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REVIEW COMMISSION

Regulatory Analysis Form

(1) Agency

Department of Environmental Protection

(2) I.D. Number (Governor's Office Use)

7-391

IRRC Number: 2412

(3) Short Title

CAFO and Other Agricultural Operations

(4) PA Code Cite

25 Pa. Code, Chapter 91.1, 91.35, 91.36, 92.1, 92.5a

(5) Agency Contacts & Telephone Numbers

Primary Contact: Cedric Karper 717-783-7576

Secondary Contact: Doug Brennan 717-787-9373

(6) Type of Rulemaking (Check One)

- Proposed Rulemaking
- Final Order Adopting Regulation
- Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
- Yes: By the Attorney General
- Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

Large animal production operations are required to obtain an NPDES permit under the CAFO program. This program regulates animal production operations that may present a threat to water quality due to the large amounts of manure produced. These regulations include the expansion of the CAFO permitting program to poultry operations, add new setback requirements for land application of manure and include new water quality management permit requirements for certain manure storage facilities.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The statutory authority for the federal rule is the Clean Water Act. The statutory authority for Pennsylvania's CAFO regulations includes Sections 5 and 402 of the Clean Streams Law (35 P.S. §§ 691.5, 691.402)

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. This regulation must be revised in response to the Federal CAFO Final Rule signed by the EPA Administrator on December 15, 2002 in order for the Department to retain delegation of the federal program. The Rule was published in the Federal Register on February 12, 2003. The EPA deadline for regulatory changes for states to adopt the new revisions was April 13, 2005, and affected farms are required to meet the requirements by December 31, 2006.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

These regulations will enhance protection of the Pennsylvania waters from nutrients produced, stored, and managed by large animal feeding operations. The rule will also protect against introduction of pathogens in drinking water, and impairment of Chesapeake Bay water quality (which Pennsylvania must address under federal law). The new regulations will allow Pennsylvania farmers to be regulated directly by the Department instead of EPA. Effective manure management practices required by these regulations will maximize the use of manure and agricultural process wastewater as a resource for agriculture while reducing adverse impacts on the environment.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Despite substantial improvements in the nation's water quality since the inception of the Clean Water Act, nearly 40 percent of the Nation's assessed waters show impairments from a wide range of sources. Improper management of manure from CAFOs is one of the major contributors to remaining water quality problems. Improperly managed manure has caused acute and chronic water quality problems throughout the United States and is a primary source of water quality impairment in Pennsylvania.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Human health and the environment will benefit by assuring that CAFOs will effectively manage the manure that they produce. EPA estimates that there are 462 CAFOs in Pennsylvania, (160+ are already within our current program) mostly in the north and south central parts of the State. The population of the Susquehanna River Basin, which makes up one third of the State, will benefit from enhanced water quality and associated economic and recreational benefits. These regulations will also complement Pennsylvania's commitment and legal requirements related to the Chesapeake Bay Program. The CAFO permitting process also helps farmers critically assess the costs and benefits of developing CAFOs before they make substantial financial commitments.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

The proposed amendments are not expected to produce any adverse impacts beyond the increased cost to CAFOs that will be required to obtain a permit and implement those practices within the permit plan. These costs are the "cost of doing business" in the new area of intensive livestock and poultry animal production. Since most of these requirements are driven by National regulations, Pennsylvania farmers should not be placed in a competitive disadvantage to other states because of environmental requirements. Farms that import manure from CAFOs and CAOs will be limited in where they can place the manure, and this will likely have some impact on CAFOs' and CAOs' ability to export their excess manure.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

An estimated 190 additional operations will be directly affected by the new CAFO regulations. Most of them will be large poultry operations, many of which already have nutrient management plans. Revisions to Chapter 91 will affect certain agricultural operations that build new or expanded manure storage facilities after the effective date of the regulations, CAOs that export manure and importers of CAFO and CAO manure.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

EPA began soliciting comments on their regulations about 3 years ago. Fact sheets, reports, and the AFO/CAFO Strategy were widely circulated too both government and industry for review and comment. Pennsylvania DEP formed a CAFO stakeholder's workgroup with representation from agricultural, agribusiness, environmental groups, the State Conservation Commission, Pa. Department of Agriculture, and U.S. Natural Resources Conservation Service to assist with our CAFO program update. The workgroup held a series of meetings beginning in March 2003. The group reviewed the new Federal CAFO regulations and had significant input into Pennsylvania's new regulations.

The proposed regulations were published in the Pennsylvania Bulletin on August 7, 2004. Public comments were accepted until November 5, 2004. Public informational meetings were held on September 13, 2004 in Mechanicsburg and September 16, 2004 in DuBois. Public hearings were held on October 13, 2004 in Mechanicsburg and October 14, 2004 in DuBois.

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(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures that may be required.

The average costs of obtaining a CAFO permit for each category is:

Existing operation, General permit - \$1,000 to 2,500

Existing operation, Individual permit - \$1,500 to 3,500

New operation - \$10,000 to 15,000

EPA estimates for total compliance costs, Pennsylvania operators will spend \$9.67 million dollars for over 300 CAFOs. However these estimates do not take into account that most of the BMP implementation costs are already required under current programs such as the Nutrient Management Program under the Nutrient Management Act, 3 P.S. §§1701 et seq., and 25 Pa. Code Chapter 102 requiring erosion and sedimentation controls for plowing and tilling. In addition, under current regulation at 25 Pa. Code §92.5a, all existing CAFOs over 1000 animal equivalent units (AEUs) are already included in the CAFO program. Further, CAFO operations with 300 to 1000 AEUs are already required to implement a nutrient management plan under the Nutrient Management program, which provides funding assistance for development of the plans. The proposed changes to the Nutrient Management program have been coordinated with the proposed changes to our CAFO program.

DEP believes that the new CAFO requirements will bring approximately 190 new operations into the program. EPA estimates are higher, however we believe this is because they are counting individual animal types and DEP is combining animal types for a given operation. This helps avoid double counting those operations that have more than one animal type. The proposed amendments will have no additional compliance costs to what is already being borne by the regulated community.

To help these livestock and poultry operations meet the rule's requirements, Congress increased funding for land and water conservation programs in the 2002 Farm Bill by \$20.9 billion, bringing total funding for these programs to \$51 billion over the next decade. The Environmental Quality Incentives Program (EQIP) was authorized at \$200 million in 2002 and will ultimately go up to \$1.3 billion in 2007; 60 percent of those funds must go to livestock operations. New technology is also being perfected to aid farmers in meeting this new rule. Several technical financial assistance programs are available to livestock and poultry producers in Pennsylvania. Federal grants such as EQIP, and CREP are available. State cost share and grant programs such as the Chesapeake Bay Program and the Nutrient Management Fund grant and low interest loans are also available. Compliance assistance efforts following the enactment of the new regulations will be in the form of education and outreach by the Conservation Districts, Penn State Extension, and Department trainings and fact sheets.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures that may be required.

The proposed amendments will affect no costs or savings to local governments.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures that may be required.

Based on the preliminary numbers the new regulations will generate approximately 190 new CAFO permit applications. The additional workload for staff that works on this and other programs simultaneously will be increased. The additional nutrient management plans required as part of the CAFO permit application may also affect the Nutrient Management Act program resources.

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(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	0	0	0	0	0
COSTS:						
Regulated Community	0	190,000.00	190,000.00	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	0	190,000.00	190,000.00	0	0	0
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

DEP estimates that 190 existing operations will be required to obtain CAFO permits under the revised regulations that Pennsylvania is proposing. EPA estimates are higher, however we believe this is because they are counting individual animal types and DEP is combining animal types for a given operation. Most of these will be general permits. The cost estimate range for "General Permit" is \$1,000 to 2,500. Individual permit costs will range from \$1,500 to \$3,500. All existing operations except for those in Special Protection watersheds will be required to obtain a "General Permit". Using \$2,000.00 as the average cost for the permitting of an existing operation, \$380,000.00 will be the amount spent by the industry to comply with the revised regulations. These operations will be staggered in a two-tiered approach for the first and second year the regulations go into effect.

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(20b) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY-3 2002-2003	FY-2 2003-2004	FY-1 2004-2005	Current FY 2005-2006
Env. Program Management (161-10382)	\$43,780,000	\$43,679,000	\$31,839,000	\$37,049,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

This program will improve impaired water quality and sustain present non-impaired water bodies. As animal production operations become larger due to economies of scale needed to compete in the market place, greater stress and threat to the environment will follow. All states are required to comply with the Federal regulations.

(22) Describe the no regulatory alternatives considered and the costs associated with those Alternatives. Provide the reasons for their dismissal.

No regulatory alternatives were considered. The CAFO regulations originated from the federal Final Rule for CAFOs.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

The regulations being proposed are the best compromise between our current program and the new requirements of the Federal program. The linkage with the Nutrient Management Act program will result in cost savings to both the industry and state government, by coordination instead of requiring two separate unrelated programs. An example of this is using AEU instead of the strict animal numbers in the federal guidelines. Pennsylvania has and hopes to continue to use the AEU concept, including all animal types and an operation, since 1993.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Pennsylvania's CAFO program has been tailored to meet Pennsylvania's nutrient management needs. Operations with mixed animal types such as dairy and poultry are common in Pennsylvania. The proposed program will continue to use the AEU concept that was used in the original Federal program. We have successfully coupled the Nutrient Management Act and CAFO programs, which have resulted in minimizing duplication of compliance efforts by the industry and efficient use of Department resources. Several of the changes to the Federal program are already included in Pennsylvania's program because of the nutrient Management Act regulations. In regards to provisions in the proposed regulations which will be more stringent in the future:

- Pennsylvania will continue to require accounting manure generated by all animal types on the operation as included in the original Federal CAFO regulations.
- The Nutrient Management Act has conclude that the higher density operations, with 2,000 pounds or more of animal weight per acre of land suitable for manure application, CAOs, presents the highest risk. We will continue to use the CAOs as defined in Act 6 instead of the new federal animal numbers for operations with 300 to 1,000 AEUs. All operations with, 1000 or more AEUs will continued to obtain a CAFO permit.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The federal CAFO Final Rule must be implemented by all of the other 49 states. Because of this, the proposed amendments will not put Pennsylvania at a competitive disadvantage with any other state.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The proposed amendments will not affect any other existing or proposed regulations under Title 25 of the Pennsylvania Code. The proposed amendments will not affect any other existing or proposed regulations of any other state agency.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The proposed regulations were published in the Pennsylvania Bulletin on August 7, 2004. Public comments were accepted until November 5, 2004. Public informational meetings were held on September 13, 2004 in Mechanicsburg and September 16, 2004 in DuBois. Public hearings were held on October 13, 2004 in Mechanicsburg and October 14, 2004 in DuBois.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports that will be required as a result of implementation, if available.

The proposed amendments will cause minor additional paperwork (e.g., reporting forms, record keeping, application forms, letters, public notices, etc.) for CAFO Program in Pennsylvania.

DEP has been actively endorsing electronic data reporting in lieu of conventional paper form reporting to water systems throughout the state. If employed, electronic data reporting would greatly reduce current paperwork requirements.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

This program is targeting large animal production operations. This program will not affect smaller farms.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The anticipated effective date of the regulations is 90 days following publication of the final regulations, expected in October 2005. Compliance will be expected over a transition period beginning on the effective date of the regulations, and this involves submittal of applications for permits.

(31) Provide the schedule for continual review of the regulation.

The amendments will be reviewed in accordance with the Sunset Review Schedule published by the Department.

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(Pursuant to Commonwealth Documents Law)

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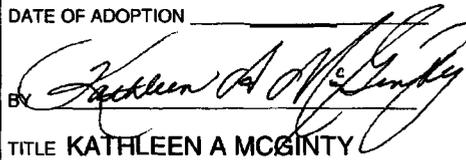
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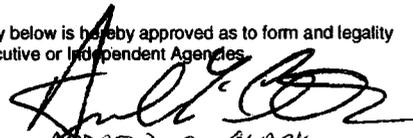
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CHAIRPERSON**

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BY 
ANDREW C. CLARK

7.22.05
DATE OF APPROVAL

(Deputy General Counsel)
(~~Chief Counsel - Independent Agency~~)
(~~Strike inapplicable title~~)

Check if applicable. No Attorney General Approval
or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

**Concentrated Animal Feeding Operations (CAFOs)
and Other Livestock Agricultural Operations**

25 Pa. Code, Chapters 91 and 92

Notice of Final Rulemaking

Department of Environmental Protection Environmental Quality Board

[25 PA. CODE CHS. 91 AND 92]

Concentrated Animal Feeding Operations and Other Agricultural Operations

Order

The Environmental Quality Board (Board) by this order amends §§ 91.1, 91.35, 91.36, 92.1 and 92.5a. These amendments conform current Department of Environmental Protection (Department) regulations to the revised Federal regulations for concentrated animal feeding operations (CAFOs). The amendments also make some substantive and organizational changes to existing regulations regarding agricultural operations in this Commonwealth.

These amendments were adopted by the Board at its meeting on June 21, 2005.

A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact Cedric Karper, Chief, Division of Conservation Districts and Nutrient Management, Bureau of Watershed Management, Rachel Carson State Office Building, P. O. Box 8465, Harrisburg, PA 17105-8465, (717) 783-7577; or Douglas Brennan, Assistant Counsel, Bureau of Regulatory Counsel, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101-2301, (717) 787-9373. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final rulemaking is available on the Department's website: www.dep.state.pa.us.

C. *Statutory Authority*

The final-form rulemaking is being made under the authority of sections 5(b)(1) and 402 of the Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

D. *Background*

1. Purpose.

The primary purpose of these revisions to Chapter 92 is to allow the Commonwealth to maintain delegation of the National Pollutant Discharge Elimination System (NPDES) CAFO program, which was revised by the Federal government in 2003. The purpose of these revisions to Chapter 91 is to strengthen existing requirements for pollution control and prevention at agricultural operations which are not subject to the NPDES permit requirements of Chapter 92 relating to CAFOs. In particular, the proposed Chapter 91 revisions clarified and strengthened the requirements related to agricultural discharges, including provisions for manure storage facilities and land application of manure. Those revisions included a provision which authorized the Department to establish "appropriate vegetated buffers and setbacks... to protect and maintain water quality." The final Chapter 91 regulation also contains a setback requirement, although it has been revised to focus on the highest risk operations.

The revisions are also intended to implement a regulatory program for livestock and poultry operations that reasonably controls the risk to the environment in a sustainable way, with due regard for the economic importance of the industry and other societal benefits, using the input from the public and important stakeholders and relying as much as possible on the existing successful CAFO program.

The most recent (2002) Pennsylvania report on the quality of surface waters listed agriculture as the second leading cause of impairment. Improper management of nutrients such as manure and fertilizers, as well as lack of stormwater runoff controls, are the primary contributing factors to these water quality problems around this Commonwealth. Livestock and poultry operations, including large-scale operations whose animals generate large amounts of manure, present risks of water pollution. In addition, many of this Commonwealth's agricultural operations are in the Chesapeake Bay watershed. This requires a special focus on best management practices to protect and restore that important resource, and to meet Pennsylvania's legal obligations under the federal Clean Water Act.

At the same time, agriculture is an important industry in this Commonwealth, providing livelihood for thousands of citizens and their families. In addition, agricultural lands provide significant aesthetic and environmental benefits to this Commonwealth. Finally, agriculture is an important part of the cultural fabric of this Commonwealth.

2. Federal CAFO Regulations.

To address the environmental risks posed by large-scale livestock and poultry operations, the United States Environmental Protection Agency (EPA) promulgated a comprehensive set of revised regulations governing CAFOs in February 2003. These regulations greatly expanded existing Federal rules put in place over 20 years ago, to strengthen the existing regulatory program for CAFOs. The regulations revised 40 CFR Parts 122 and 412.

The Department already had in place NPDES permit regulations for CAFOs in § 92.5a (relating to CAFOs). These regulations were previously approved by the EPA as part of a delegation agreement to administer the Federal program in this Commonwealth. To maintain delegation of the Federal program, the Department must demonstrate that its regulations meet the new Federal requirements. In the case of the Commonwealth, the existing CAFO regulations, along with Chapter 83, Subchapter D (relating to nutrient

management) promulgated by the State Conservation Commission (Commission or SCC), Chapter 91 and Chapter 102 (relating to erosion and sediment control), previously contained many of the new Federal requirements. These regulations have been in place for several years and have achieved wide acceptance in the agricultural community as well as various stakeholders such as Department regional offices, the Department of Agriculture, the Commission, the Nutrient Management Advisory Board and the county conservation districts.

3. Public Comment.

These final regulations reflect public comments received after the proposed changes were published in August 2004. For instance, the preponderance of comments received on manure storage and appropriate setbacks and buffers in the proposed Chapter 91 revisions urged clear, simple and enforceable standards to apply to farm operations based upon science rather than regulatory categories or DEP discretion. Similar discussions arose in response to the administration's Agriculture, Communities and Rural Environment initiative (ACRE), during the public comment period for the proposed regulations. ACRE is the result of Governor Rendell's directive to the Secretaries of Agriculture and Environmental Protection to develop a comprehensive, progressive plan to support farmers' rights under the Right-to-Farm Law and to address the concerns over animal feeding operations that spawn ordinances restricting farming. The Governor directed the agencies to require minimum buffer areas where no manure can be applied for all CAFOs and CAOs, and that farms that import manure must meet the same buffer requirements as the farm that produces the manure. Therefore, these final regulations establish a minimum 100 foot setback or 35 foot vegetated buffer for all CAFOs, CAOs and importing farms, which correspond to minimum national criteria for nutrient reduction. In addition, these final regulations require water quality management permits for new or expanded manure storage facilities based upon volume and criteria related to potential for pollution.

The CAFO Stakeholder Group (Group) that assisted the Department in developing the proposed rulemaking also assisted with these final regulations. The Department has also sought the advice of the Agricultural Advisory Board in developing this final regulation.

E. Summary of Changes from the Proposed Rulemaking

The regulatory scheme for agricultural operations contains several levels of requirements, which increase in stringency as the risk of impacts to water resources increases. The final rule makes changes at several of those levels, and has been developed concurrently with regulation changes by the Commission under Chapter 83, Subchapter D (relating to nutrient management).

1. CAFOs.

One main focus of this final rulemaking is CAFOs, the largest livestock and poultry operations in this Commonwealth. The basic requirement for CAFOs will continue to be to obtain a permit under the Department's program implementing the NPDES Program. The NPDES permit program has several fundamental requirements, some of which are new or which contain new elements to conform to the new Federal requirements. Underlying the NPDES requirements are several other levels of requirements:

a. *Manure Management.* First, agricultural operations in this Commonwealth, including CAFOs, must meet construction and operation requirements for manure storage, and for land application. These broad-based requirements are currently described in § 91.35

(relating to wastewater impoundments) and § 91.36, which are administered by the Department. The final rule consolidates them into one section, § 91.36. CAFOs, which have large and higher risk manure storage facilities, have special permitting requirements above and beyond those of most other livestock and poultry operations, and this final rule preserves that extra protection. For swine, poultry and veal operations, these protections are increased, consistent with the revised Federal CAFO regulations.

b. *Conservation Practices.* Second, all agricultural operations that conduct plowing and tilling, including CAFOs, must develop and implement an erosion and sediment control plan to limit runoff, under Chapter 102, also administered by the Department. These plans are important to the prevention of surface water pollution by phosphorus from manure and other nutrient sources applied to the land as fertilizer. The final rule specifies that the erosion and sediment control plans must be submitted with CAFO permit applications.

c. *Nutrient Management.* Third, the approximately 840 CAOs (some of which are also CAFOs) regulated under Chapter 83 based on their concentration of animals (as opposed to their absolute numbers of animals) must meet a series of requirements related to nutrient management. These requirements currently include testing of soils and manure for nitrogen and phosphorus, determination of agronomic needs of the crops based on nitrogen (as well as phosphorus, after a decision of the Environmental Hearing Board in April 2004), land application of manure based on those tests and on crop needs, and stormwater runoff controls around the farmstead. These requirements, including the need to have a nutrient management plan ("NMP") approved by the local county conservation district, are also imposed on CAFOs under the existing and final regulations. The NMPs are subject to appeal to the Environmental Hearing Board.

Chapter 83 is promulgated by the Commission and is administered primarily through county conservation districts. Extensive revisions to Chapter 83 were proposed in a rulemaking at the same time the Board proposed changes to these regulations. (*Editor's Note:* For the document relating to those proposed revisions see 34 *Pennsylvania Bulletin* 4361 (August 7, 2004)). The Chapter 83 final regulations are expected to be approved by the State Conservation Commission later in 2005.

The amendments to Chapter 83 include new, additional requirements for addressing the impacts on water quality from phosphorus (in addition to nitrogen) and more frequent soil and manure testing for nitrogen and phosphorus. They also are expected to significantly increase the regulation of the export of manure. These amendments are relevant to CAFOs because § 92.5a requires CAFOs to have an NMP under Chapter 83.

Although it has been important to keep the Chapter 83 and the CAFO & Other Agricultural Operations regulation updates on a coordinated schedule through development, they can now proceed independently to final. These final regulations can be fully implemented and satisfy federal CAFO requirements independent of finalization of revisions to Chapter 83. This is important because of the federal deadlines of April 2005 for states to update their CAFO program requirements and various dates in 2006 for CAFOs to implement the new requirements, under the federal CAFO regulations. This is possible primarily because of an Environmental Hearing Board decision in 2004 and subsequent State Conservation Commission action that required immediate implementation of phosphorus based Nutrient Management planning. Other significant federal CAFO requirements are independently addressed in these final regulations and in the existing Chapter 83 requirements.

d. *Federal CAFO Requirements.* Finally, Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) contains the

Department's NPDES regulations and § 92.5a governs CAFOs. Section 92.5a incorporates the other requirements already applicable to agricultural operations found in Chapters 83, 91 and 102, and adds special requirements for CAFOs within the Department's NPDES permit program. These final regulations make several changes to § 92.5a, as well as the related definitions in § 92.1 (relating to definitions), to conform to the new EPA CAFO regulations:

- * A revised definition of "CAFO" expands the scope of these regulations to include all federally defined large CAFOs as well as all operations with over 1000 animal equivalent units ("AEUs") and CAOs with greater than 300 AEUs.
- * A new definition of "livestock" to include horses.
- * Definitions of "manure" and "agricultural process wastewater."
- * A timetable for poultry operations with dry manure to apply for NPDES CAFO permits.
- * Setback requirements at CAFOs from surface waters for land application of manure.
- * Recordkeeping and reporting requirements that are identified in the NPDES permit and also in the Department's implementation strategy to be published later in 2005.
- * A PPC plan for chemicals.
- * Implementation of management controls on the export of manure away from the CAFO.
- * Compliance with 3 Pa.C.S. §§ 2301--2389 when handling animal mortality.
- * Effluent limits and conditions for treated wastewater discharges from CAFOs.
- * Limits on field storage of CAFO manure and proper management of CAFO feed and supply storage areas.

e. *Definition of a "CAFO"*. This final rulemaking amends the definition of a "CAFO" to alter the way in which a discharge to surface waters from the operation would trigger the CAFO requirements. The existing regulations consider any agricultural operation, no matter how small, to be a CAFO if it has a discharge to surface waters. The final rulemaking replaces this broad CAFO designation authority with an emphasis on enforcing Clean Streams Law requirements to address unauthorized discharges. This change is based on the focus of the CAFO regulations: large animal operations. For the most part, these regulations do not allow discharges. Smaller operations that have discharges are subject to other, more basic requirements and prohibitions under the Clean Streams Law. The Board believes that the CAFO program should keep its focus on permitting (and monitoring) larger operations. The final rulemaking adds new language highlighting the Clean Streams Law general prohibitions against unpermitted discharges to surface waters including medium and small operations with discharges that would otherwise lead to a CAFO permitting process under the federal regulations.

In addition, the Board added a category of operations that will be a CAFO--operations designated as large CAFOs by the EPA. The purpose of this provision is to satisfy the

new Federal definition of a CAFO, which does not use the Pennsylvania approach of "animal equivalent units."

f. Comparison of Federal CAFO Regulations and the Pennsylvania CAFO Program.

The following table summarizes the requirements in the Federal regulations and the associated Pennsylvania regulations that are used in this final rulemaking to meet those requirements.

Issue	EPA--New Rule	Department/Commission Regulations
Definitions	§§ 122.23(b)(4), (6) and (7); 412.4(b)	§ 92.1
NMP	§§ 122.42(e)(1) and 412.4(c)(1)	§ 92.5a(f)(1) and Chapter 83
--Storage	§ 122.42(e)(1)(i)	§§ 91.36(a), 92.5a(e)(1)(ii), (3) and (6), and §§ 92.5a(f)(4), (7)
--Dead animals	§§ 122.42(e)(1)(ii) and 412.37(a)(4)	§ 92.5a(f)(3)
--Stormwater management	§ 122.42(e)(1)(iii)	§ 92.5a(f)(1) and Chapter 83
--Animal contact with waters of the United States	§ 122.42(e)(1)(iv)	§ 92.5a(f)(1) and Chapter 83
--Chemical handling	§ 122.42(e)(1)(v)	§ 92.5a(f)(1)
--Conservation practices	§ 122.42(e)(1)(vi)	§ 92.5a(f)(1) and Chapters 83 and 102
--Testing of manure and soil	§§ 122.42(e)(1)(vii) and 412.4(c)(3)	§ 92.5a(f)(1) and Chapter 83
--Land application protocols	§§ 122.42(e)(1)(viii) and 412(c)(2)	§ 92.5a(f)(1) and Chapter 83
--Recordkeeping for NMP	§§ 122.42(e)(1)(ix) and (e)(2) and 412.37(b) and (c)	§ 92.5a(f)(5)
Manure transfer (export)	§ 122.42(e)(3)	§ 92.5a(e)(1) and (f)(1) and Chapter 83
Annual report	§ 122.42(e)(4)	§ 92.5a(f)(5)
Nitrogen and Phosphorus	§ 412.4(c)(1)	§ 92.5a(f)(1) and Chapter 83 (Including 2004 EHB decision on P-Based planning)
Maintenance of land application	§ 412.4(c)(4)	§ 92.5a(f)(1) and Chapter 83

equipment		
Setback requirements	§ 412.4(c)(5)	§ 92.5a(e)(1)(i)
Discharge prohibition from production areas	§ 412	§§ 91.36(a)(1), 91.36(a)(5), 92.5a(f)(1) and 92.5a(f)(7)
Visual inspections of production area	§ 412.37(a)(1) and (3)	§ 92.5a(f)(1) and Chapter 83
Depth markers	§ 412.37(a)(2)	§§ 91.36(a) and 92.5a(f)(4)

2. Other Agricultural Operations; Setbacks and Buffers.

The Group that assisted the Department in the development and finalization of this final rulemaking identified smaller livestock and poultry operations as causing a substantial portion of pollution problems created by agriculture. To address this, the amendments to § 91.36(c) emphasize the responsibility of all agricultural operations to prevent the discharge of pollutants to waters of this Commonwealth under the Clean Streams Law. In addition, the amendments in § 91.36(a)(4) require permits for new or expanded liquid or semisolid manure storage at operations smaller than those currently required to obtain a permit, to minimize the risk of impacts to water resources. Section 91.36(a)(4) also establishes specific size, type and location criteria for permit requirements for new or expanded manure storage facilities.

In addition, the Board has narrowed the focus of § 91.36(b)(2), which now establishes minimum setback and buffer requirements for (1) CAOs and farms which import manure from CAOs, as well as for (2) CAFOs and their manure import sites. The setbacks and buffers for CAOs and importers only apply to certain key types of waterbodies. The Board recognizes that the scope of this provision includes farms that are also regulated under the Nutrient Management Act. Therefore, the Board has included a special provision in its Order that terminates the part of this subsection applicable to CAOs and their importers, if the SCC promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with the Clean Streams Law and other provisions in Chapters 91 and 92.

3. Chapter 91.

§ 91.1 – Definitions of “CAO” and “CAFO” are added to explain key terms in the setback provision in § 91.36(b)(2). A definition of “manure storage capacity” is added to clarify the meaning of § 91.36(a)(4) regarding the volume of storage that will be used in determining if a permit is required. A definition of “agricultural process wastewater” is added to identify other wastewaters such as egg wash water and milkhouse wastewater that are part of normal farming operations and regulated under § 91.36. A definition of “manure” has been added for clarity. The proposed definition of “setback” has been deleted.

§ 91.36(a)(1) – The references to the Manure Management Manual and the Pennsylvania Technical Guide here, and in § 91.36(a)(2) and § 91.36(b)(1)(i), are revised to properly describe the purpose of the practices, standards and criteria that are contained in these guidance documents. They are intended to be used as tools for

agricultural operations to meet the basic regulatory requirements, and avoid the need to obtain a permit or approval from the department.

§ 91.36(a)(2), (3) and (4) – The categories of manure storage facilities requiring permits is clarified. A new requirement for operators to maintain copies of engineer certifications has been added.

§ 91.36(a)(6)(i) – The freeboard requirements for manure storage facilities are simplified to be consistent with the Pennsylvania Technical Guide and to allow a minimum 6" freeboard for storage facilities not exposed to rainfall.

§ 91.36(a)(7) – The general statement that the Department may require any manure storage facility to obtain a permit has been deleted. This authority already exists for the types of situations where this would be applied.

§ 91.36(b)(2) – This section is revised from the general provision for requiring setbacks and buffers adequate to protect water quality at any agricultural operation, to target CAOs, CAFOs and CAFO/CAO manure import sites, for implementation of a 100' setback or 35' vegetated buffer. For CAOs and importers, the setbacks and buffers only apply to certain key types of waterbodies. The Board has included a special provision in its Order that terminates the part of this subsection applicable to CAOs and their importers, if the SCC promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with the Clean Streams Law or other provisions of Chapters 91 and 92.

§ 91.36(c)(2) – This section is added to clarify that operations that would otherwise be considered small and medium CAFOs under the federal regulations will be addressed as enforcement cases under the Clean Streams Law.

4. Chapter 92.

§ 92.1 – The definition of CAFO is revised to eliminate the designation of any operation as a CAFO and to delete operations with "authorized discharges." These changes help to simplify the definition and eliminate objectionable broad authority to designate operations as CAFOs. To address concerns over consistency with the federal definition relative to small and medium sized operations, operations with illegal discharges will be addressed as Clean Streams Law enforcement cases.

§ 92.1 – The definition of setback is revised to specify the point from which setbacks are to be measured and examples of surface water conduits are added to be consistent with the federal definition of setback. Definitions of agricultural process wastewater and manure are added to be consistent with the federal definitions. A revised definition of CAOs is included to be consistent with the § 91.1 definition.

§ 92.5a(d) – a new provision was added to ensure that all operations that are required to obtain permits have a permit application deadline which applies to them.

§ 92.5a(e)(1)(ii) – A limit of 14 days for stockpiling CAFO manure on CAFO operations without cover or protection is added. EPA has stipulated this limit, and persons representing the category of CAFO operations that are impacted have indicated that this is manageable. Given the current CAFO definition, this is an appropriate requirement for management of dry manure from these operations. There are no expectations to extend

this requirement to other operations. Manure stockpiling for other high-risk operations will be regulated through the Nutrient Management Act regulations and any discharge of pollutants from any manure stockpiles is subject to enforcement under the Clean Streams law.

§ 92.5a(e)(5) and § 92.5a(f)(6) – With the change in the CAFO definition to eliminate confusion by deleting the reference to operations with an “authorized discharge,” language was added to this subsection to address the same issue -- to allow CAFO permit applicants to include design plans and specifications for manure treatment systems with a treated wastewater discharge. This is to encourage innovative technologies, including energy generation projects, by consolidating water quality permitting requirements. In these cases the permit will include effluent limits and conditions determined in the same way as they are for other NPDES discharge permits as required by § 92.2a.

§ 92.5a(e)(6) and § 92.5a(f)(7) – For consistency with federal requirements, a provision was added to account for runoff from CAFO feed and supply storage areas in CAFO permit applications. This runoff can be a source of pollution. Applicants may address this runoff as part of the nutrient management plan or as separate plans and practices submitted with the application.

F. Summary of Comments and Responses on the Proposed Rulemaking

Written comments were received from 191 commentators during the public comment period between August 7, 2004 and November 5, 2004. Oral testimony was also received at two public hearings conducted in Mechanicsburg, PA and DuBois, PA in October 2004.

Comments concerned the following general topics: the definition of a CAFO, setback and buffer requirements for land application of manure (both for CAFOs and for all other agricultural operations), manure storage facilities, economics, enforcement/accountability, CAFO permit review considerations, and CAFO permit conditions. In general, as one would expect, environmental commentators advocated stricter, more expansive regulatory requirements, while farming interests wanted to limit the requirements. The comment/response document provides detailed responses to these comments, explaining the Department’s position.

1. Definition of a CAFO

Based on the comments received, the definition of CAFO has been revised to delete language regarding (1) the general authority for the Department to designate operations as CAFOs in certain circumstances, and (2) operations with treated discharge authorized by the Department. These provisions created unnecessary confusion and concern.

In addition, EPA and others commented on the absence of “medium” and “small” CAFOs as described in the federal CAFO definition, which requires that a discharge be present at the operation. In response to these comments additional language was included in § 91.36(c) to clarify the Department’s intent to address these situations as violations with enforcement actions under the Clean Streams Law. CAFOs with authorized discharges – treated wastewater discharges – are now addressed in the provisions for CAFO permit applications and permit conditions.

2. Setbacks and Buffer Requirements for Land Application of Manure

General provisions for all agricultural operations were proposed for manure application setbacks and vegetated buffers adequate to protect water quality. Again, a wide range of comments resulted from this provision. The federal standard, 100' setback or 35' buffer for CAFO operations, remains in the final regulation, and a parallel provision was added to § 91.36(b) for consistency. For CAOs, and for CAO and CAFO manure import sites, §91.36(b) now contains a focused statewide setback/buffer requirement to prevent pollution from land application of manure, using the same distances as for CAFOs. The Board has included a special provision in its Order that terminates the part of this subsection applicable to CAOs and their importers, if the SCC promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with the Clean Streams Law or other provisions of Chapters 91 and 92. Consistent with the NPDES program, the CAFO setbacks and buffers apply to all surface waters as defined in Chapter 92, whereas the setbacks for the other operations only apply to certain key types of waterbodies.

3. Manure Storage Facilities

Similar comments were raised concerning general designation provisions for permit requirements for manure storage. Refinements to the Manure Management Manual under existing authority can be used to better define acceptable standards for manure and agricultural process wastewater storage in Special Protection and agriculture impaired watersheds. The specific requirement for manure storage permits – new and expanding, liquid and semi-solid manure storage ponds between 1 million and 2.5 million gallons in Special Protection and agriculture impaired watershed and all new and expanding liquid and semi-solid manure storage facilities over 2.5 million gallons – remains in these final regulations. Generally, comments were not critical of these requirements.

The proposed CAFO regulations did not have a provision for field stockpiling of manure because these provisions are being included in the Nutrient Management regulation revisions. CAFOs are subject to those requirements. EPA commented that the proposed revisions in the Nutrient Management regulations did not meet their limitations on field stacking. As a result a 14-day limit of stockpiling of CAFO manure on CAFO operations was added to the final CAFO regulations. Through the work group formed to assist with this regulation development and follow up discussions with those impacted by this addition it was determined that this would be an inconvenience but manageable. There is no expectation to expand this requirement to other operations. Other operations will fall under the requirements of the Nutrient Management regulations and Chapter 91. Any discharge of pollutants from any manure stockpile is subject to enforcement action under the Clean Streams Law.

4. Economics

A number in the regulated community raised the concern of cost. In general, the final regulations reduce these concerns. However, the incremental costs of meeting new requirements under the revised regulations is minimal other than the cost of obtaining a permit in some cases since most practices and standards should have already been met under existing requirements.

5. Enforcement/Accountability

Comments were provided on the level of enforcement of existing and new requirements. Non-compliance with existing requirements is a cause of agriculturally driven water quality impairment. Regulations alone will not solve this concern. Allocation and alignment of resources is important. A reorganization to give higher priority and

focus to nonpoint sources, including agriculture, and additions to compliance resources for these programs are planned by the Department.

G. *Benefits, Costs and Compliance*

1. Benefits

Human health and the environment will benefit because agricultural operations, including CAFOs, will be required to effectively manage the manure and agricultural process wastewater that they produce. The largest and most concentrated operations are targeted under the CAFO program. The Department estimates that there will be a total of 350 CAFOs in this Commonwealth, as defined under this final form rulemaking (there are approximately 160 now), mostly in the central parts of this Commonwealth. The population of the Susquehanna River Basin, in particular, will benefit from enhanced water quality and associated economic and recreational benefits. The final form rulemaking will also complement the Commonwealth's efforts to meet its commitments to the Chesapeake Bay Program and will help to address agricultural nonpoint sources of pollution that are among the most significant sources of water quality impairment in this Commonwealth. It clarifies the regulation of agricultural process wastewater on agricultural operations. The CAFO permitting process will also help farmers critically assess the costs and benefits of developing CAFOs before they make substantial financial commitments.

2. Compliance Costs

There will be compliance costs for some agricultural operations around this Commonwealth, especially existing poultry producers that will be newly regulated as CAFOs, new or expanded operations which become CAFOs, some agricultural operations with manure storage capacity greater than 1 million gallons, and operations with additional costs associated with setback/buffer requirements

The approximately 190 operations that are expected to be directly affected by the new CAFO regulations should not be surprised by the changes. The EPA began soliciting comments on the proposed Federal rule changes about four years ago. Fact sheets, reports and the Federal AFO/CAFO Strategy were widely circulated to both government and industry for review and comment. The large poultry and swine integrators have been expecting these changes. In addition, Department staff have met with the poultry and swine representatives during the development of the proposed rulemaking. The technical capacity in the private sector for preparing the permit applications exists, although the timeline established by the Department in § 92.5a(b) – (d) will dictate the burden placed on these resources.

The Department does not have detailed information on the anticipated CAFO compliance costs in this Commonwealth. Using information from the EPA on the average costs of obtaining an NPDES CAFO permit, costs are estimated to be no more than the following:

- Existing operation, general permit: \$1,000 to \$2,500.
- Existing operation, individual permit: \$1,500 to \$3,500.
- New or expanded operation: \$10,000 to \$15,000.

In addition to the costs for obtaining a CAFO permit, smaller CAFOs and some agricultural operations will incur expenses to obtain permits for large manure storage facilities. The Department estimates those costs to be up to \$1,500 to \$3,500 per storage facility.

3. Compliance Assistance Plan

To help these livestock and poultry operations meet the proposed rulemaking's requirements, Congress increased funding for land and water conservation programs in the 2002 Farm Bill by \$20.9 billion Nationwide, bringing total funding for these programs to \$51 billion over the next decade. The Environmental Quality Incentives Program (EQIP) was authorized at \$200 million in 2002 and will ultimately go up to \$1.3 billion in 2007; 60% of those funds must go to livestock operations. The Commonwealth's allocation is approximately \$8 to \$10 million annually. New technology is also being perfected to aid farmers in meeting the proposed rulemaking.

Several financial assistance programs are available to livestock producers in this Commonwealth. Federal grants, such as EQIP and the Conservation Reserve Enhancement Program are available. State cost share and grant programs such as the Chesapeake Bay Program, Growing Greener and the Nutrient Management Program grants and low interest loans through Agrilink are also available.

Additionally, compliance assistance efforts following the enactment of the new regulations will be in the form of education and outreach by the conservation districts, Penn State Extension and Department trainings and fact sheets.

4. Paperwork Requirements

The final rulemaking will cause no additional paperwork (for example, reporting forms, recordkeeping, application forms, letters, public notices, and the like) for existing CAFOs in this Commonwealth.

It should be noted that the Department has been actively endorsing electronic data reporting instead of conventional paper form reporting to water systems throughout this Commonwealth. If employed, electronic data reporting would greatly reduce a CAFO's current paperwork requirements.

H. Pollution Prevention

Management of agricultural manure under these regulations is based on the premise of recycling the nutrients for crop production. Properly managing and applying manure for crop growth prevents pollution and reduces the need for commercial fertilizers.

I. Sunset Review

The final rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on July 28, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34

Pa.B. 4353, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on (blank) , these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on (blank) and approved the final-form regulations.

K. Findings of the Board

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 *Pennsylvania Code* §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 34 *Pennsylvania Bulletin* 4353 (August 7, 2004).

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapter(s) 91 and 92, are amended to read as set forth in Annex A.

(b) § 91.36(b)(2)(i) and (ii) shall remain in effect until the effective date of regulations promulgated by the State Conservation Commission that establish requirements which provide, at a minimum, the same setback and buffer requirements for concentrated animal operations, and for agricultural operations that import manure from those operations, established in § 91.36(b)(2). The Department will publish notice in the *Pennsylvania Bulletin* if such regulations are promulgated. Nothing in this Order is intended to affect the duty of any agricultural operation to comply with the Clean Streams Law or any other provision of Chapters 91 and 92.

(c) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(d) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(e) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(f) This order shall take effect immediately.

BY:

**KATHLEEN A. MCGINTY
Chairperson
Environmental Quality Board**

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 91. GENERAL PROVISIONS

GENERAL

§ 91.1. Definitions.

The definitions in section 1 of **[the act of June 22, 1937 (P. L. 187, No. 394)]** the Clean Streams Law (35 P. S. § 691.1) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

AEU—Animal equivalent unit—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in section 3 of the Nutrient Management Act (3 P. S. § 1703).

* * * * *

[*Animal equivalent unit*—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in section 3 of the Nutrient Management Act.]

* * * * *

AGRICULTURAL PROCESS WASTEWATER—WASTEWATER FROM AGRICULTURAL OPERATIONS, INCLUDING FROM SPILLAGE OR OVERFLOW FROM LIVESTOCK OR POULTRY WATERING SYSTEMS; WASHING, CLEANING OR FLUSHING PENS, MILKHOUSES, BARNs, MANURE PITS; DIRECT CONTACT SWIMMING, WASHING OR SPRAY COOLING OF LIVESTOCK OR POULTRY; EGG WASHING; OR DUST CONTROL.

* * * * *

CAFO – CONCENTRATED ANIMAL FEEDING OPERATION – AN AGRICULTURAL OPERATION THAT MEETS THE CRITERIA ESTABLISHED BY THE DEPARTMENT IN § 92.1.

* * * * *

CAO -- CONCENTRATED ANIMAL OPERATION -- AN AGRICULTURAL OPERATION THAT MEETS THE CRITERIA ESTABLISHED BY THE STATE CONSERVATION COMMISSION IN REGULATIONS UNDER THE AUTHORITY OF THE ACT OF MAY 20, 1993 (P.L. 12, NO. 6), KNOWN AS "THE NUTRIENT MANAGEMENT ACT," AT CHAPTER 83, SUBCHAPTER D (RELATING TO NUTRIENT MANAGEMENT).

* * * * *

~~Earthen waste storage pond--A manure storage facility with an earthen structure lined with clay, plastic, concrete or other material acceptable to the Department.~~

* * * * *

MANURE--ANIMAL EXCREMENT, INCLUDING POULTRY LITTER, WHICH IS PRODUCED AT AN AGRICULTURAL OPERATION. THE TERM INCLUDES MATERIALS SUCH AS BEDDING AND RAW MATERIALS WHICH ARE COMMINGLED WITH THAT EXCREMENT.

* * * * *

Manure Management Manual--The guidance manual published by the Department that is entitled "Manure Management Manual for Environmental Protection," including its supplements and amendments. The manual describes approved manure management practices for all agricultural operations as required by § 91.36. (relating to pollution control and prevention at agricultural operations).

Manure storage facility--A permanent structure or ~~facility~~ POND [or], a portion of a structure or ~~facility~~ POND, or a group of structures or ~~facilities~~ PONDS at one agricultural operation, utilized for the purpose of containing manure ~~OR~~ AGRICULTURAL PROCESS WASTEWATER [as defined in § 83.201 (relating to definitions)]. THIS SHALL INCLUDE CONCRETE, METAL OR OTHER FABRICATED TANKS AND UNDERBUILDING STRUCTURES, AS WELL AS EARTHEN AND SYNTHETICALLY-LINED MANURE STORAGE PONDS.

* * * * *

MANURE STORAGE CAPACITY--THE TOTAL VOLUME IN GALLONS OF A MANURE STORAGE FACILITY, LESS ANY REQUIRED FREEBOARD, SUFFICIENT AND AVAILABLE TO CONTAIN ALL OF THE FOLLOWING: ACCUMULATED MANURE AND AGRICULTURAL PROCESS WASTEWATER DURING THE STORAGE PERIOD; NORMAL PRECIPITATION LESS EVAPORATION ON THE SURFACE OF THE FACILITY; NORMAL RUNOFF DURING THE STORAGE PERIOD; THE DESIGN STORM PRECIPITATION AND RUNOFF (25 YEAR OR 100 YEAR, AS APPROPRIATE PURSUANT TO §91.36(a)); AND SOLIDS REMAINING AFTER LIQUIDS HAVE BEEN REMOVED.

* * * * *

Pennsylvania Technical Guide—

(i) The Pennsylvania Soil and Water Conservation Technical Guide, including supplements and amendments, which is the primary technical guide published by the Pennsylvania office of the Natural Resources Conservation Service of the U.S. Department of Agriculture.

(ii) The Guide contains technical information, including design criteria, about conservation of soil, water, air, plant and animal resources specific to Pennsylvania.

(iii) The Guide is also referred to as the Field Office Technical Guide in Federal regulations and other documents.

* * * * *

~~**[Setback—A specified distance from surface waters or potential conduits to surface waters where manure, litter, and process wastewater may not be land applied.]**~~

* * * * *

Vegetated buffer—A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

~~**[Waste storage structure—A manure storage facility that is a fabricated structure for storage of animal wastes or other organic agricultural wastes that is not an earthen waste storage pond.]**~~

* * * * *

MANAGEMENT OF OTHER WASTES

§ 91.35. Wastewater impoundments.

(a) Except as otherwise provided under subsections (c)--~~(e)~~**(d)**, a person may not operate, maintain or use or permit the operation, maintenance or use of a wastewater impoundment for the production, processing, storage, treatment or disposal of pollutants unless the wastewater impoundment is structurally sound, impermeable, protected from unauthorized acts of third parties, and is maintained so that a freeboard of at least 2 feet remains at all times. The person owning, operating or possessing a wastewater impoundment has the burden of satisfying the Department that the wastewater impoundment complies with these requirements.

* * * * *

(c) Except when a wastewater impoundment is already approved under an existing permit from the Department, a permit from the Department is required approving the location, construction, use, operation and maintenance of a wastewater impoundment subject to subsection (a) in the following cases:

* * * * *

(4) **[If the impoundment is a new or expanded manure storage facility at an agricultural operation with more than 1,000 animal equivalent units, regardless of the capacity of the impoundment.**

(5) **If the Department determines that a permit is necessary for effective regulation to insure that pollution will not result from the use, operation or maintenance of the wastewater impoundment.**

(d) **[The following types of agricultural operations are not subject to subsections (b) and (c) or the freeboard requirements of subsection (a), but shall provide a 12-inch freeboard for all waste storage ponds as defined in the "Pennsylvania Technical Guide" and a 6-inch freeboard for all waste storage structures at all times:**

(1) **An agricultural operation, which contains less than 1,001 animal equivalent units.**

(2) **An agricultural operation in existence prior to January 29, 2000, and designed in accordance with the "Pennsylvania Technical Guide" and addenda or amendments thereto.**

(e) **This section does not apply to [residual]:**

(1) Manure storage facilities at agricultural operations, which are governed by § 91.36 (relating to pollution control and prevention at agricultural operations).

(2) Residual waste processing, disposal, treatment, collection, storage or transportation.

§ 91.36. Pollution control and prevention at agricultural operations.

(a) ***Animal manure storage facilities.* [Except as provided in paragraphs (1) and (2), animal manure storage facilities do not require a water quality management permit from the Department if the design and operation of the storage facilities are in accordance with the Department approved manure management practices as described in the publication entitled "Manure Management for Environmental Protection" and addenda or amendments thereto prepared by the Department, "The Pennsylvania Technical Guide" and addenda and amendments thereto, and when applicable, § 83.351 (relating to minimum standards for the design, construction, location, operation, maintenance and removal from service of manure storage facilities) and each animal manure storage facility is designed to prevent discharges to surface waters during a storm event of less than a 25-**

year/24-hour storm. In addition, in the case of animal manure storage facilities located at animal operations with over 1,000 animal equivalent units on or before January 29, 2000, a water quality management permit is not required if a registered professional engineer certifies that the design and construction of each manure storage facility is consistent with the "Pennsylvania Technical Guide."

(1) A permit is required under § 91.35 (relating to wastewater impoundments) for the design, construction and operation of any new or expanded animal manure storage facility at an agricultural operation with more than 1,000 animal equivalent units. In addition to the requirements of § 91.35, the permit shall incorporate the requirements of this section.

(2) If a person chooses to design or construct manure storage facilities using criteria other than those described in "Manure Management for Environmental Protection" prepared by the Department and the "Pennsylvania Technical Guide" and addenda or amendments to those publications, approval of the Department or a permit under § 91.35 will be required. Operations which are required to or volunteer to submit nutrient management plans shall comply with the nutrient management regulations in Chapter 83 (relating to State Conservation Commission).]

(1) ~~Except as provided~~ WHERE MORE STRINGENT REQUIREMENTS ARE CONTAINED in paragraphs ~~(2) and (3)~~ (2) - (5), a manure storage facility shall be designed, constructed, operated and maintained in accordance with CURRENT ENGINEERING AND AGRONOMIC PRACTICES TO ENSURE THAT THE FACILITY IS STRUCTURALLY SOUND, WATER-TIGHT, AND LOCATED AND SIZED PROPERLY, TO PREVENT POLLUTION OF SURFACE WATER AND GROUNDWATER, INCLUDING DESIGN TO PREVENT DISCHARGES TO SURFACE WATERS DURING A STORM UP TO AND INCLUDING A 25-YEAR/24-HOUR STORM.

(i) ~~the~~ THE Manure Management Manual and the Pennsylvania Technical Guide CONTAIN CURRENT ENGINEERING AND AGRONOMIC PRACTICES WHICH CAN BE USED TO COMPLY WITH THE REQUIREMENTS IN (1).

(ii) IF THE CRITERIA IN THE MANURE MANAGEMENT MANUAL AND THE PENNSYLVANIA TECHNICAL GUIDE ARE NOT FOLLOWED, THE OWNER OR OPERATOR SHALL OBTAIN A WATER QUALITY MANAGEMENT PERMIT OR OTHER APPROVAL FROM THE DEPARTMENT FOR THE MANURE STORAGE FACILITY.

(2) For liquid or semi-solid manure storage facilities constructed after January 29, 2000, the owner or operator shall ~~meet one of the following~~:

~~(i) The~~ OBTAIN A WATER QUALITY MANAGEMENT PERMIT FROM THE DEPARTMENT FOR THE MANURE STORAGE FACILITY UNLESS THE design and construction of the facility ~~shall be~~ ARE certified to meet the "Manure Management Manual" and "Pennsylvania Technical Guide" by a registered professional engineer. THE OWNER OR OPERATOR SHALL RETAIN A COPY OF THE CERTIFICATION AT THE OPERATION AND SHALL PROVIDE A COPY TO THE DEPARTMENT UPON REQUEST.

~~(ii) The owner or operator shall obtain a water quality management permit from the Department for the manure storage facility.~~

~~[(2)]~~ (3) In the case of a NEW OR EXPANDED liquid or semisolid manure storage facility located at an animal operation with over 1,000 AEUs for the first time after January 29, 2000, a water quality management permit is required.

~~[(3)]~~ (4) For a new or expanded LIQUID OR SEMI-SOLID MANURE STORAGE FACILITY [agricultural operation] after _____ (Editor's Note: The blank refers to the effective date of adoption of this [proposal] REGULATION.) [the following requirements apply to a liquid or semi-solid manure storage facility]:

(i) Where the manure storage capacity is between 1 million and 2.5 million gallons, a water quality management permit is required for any manure storage facility that [meets one of the following]:

~~(A) It is a clay-lined earthen waste storage pond] IS A POND AND ONE OF THE FOLLOWING APPLIES:~~

~~[(B)] (A) The nearest downgradient stream is classified as a High Quality or Exceptional Value water under Chapter 93 (relating to water quality standards).~~

~~[(C)] (B) The nearest downgradient stream that has been assessed has been determined by the Department to be impaired from nutrients from agricultural activities [and the manure storage facility is on an agricultural operation that is not implementing a Nutrient Management Plan approved by the State Conservation Commission under Chapter 93, Subchapter D (relating to nutrient management)].~~

(ii) Where the manure storage capacity is 2.5 million gallons or more, a water quality management permit is required.

~~[(4)] (5) [A manure storage facility at a CAFO] FOR NEW OR EXPANDED CAFOS as defined in Chapter 92 (relating to NPDES permitting, monitoring and compliance) shall be designed, constructed, operated and maintained to prevent discharges to surface waters during a storm event up to and including a 25-year/24-hour storm, except for new or expanded agricultural operations that are CAFOs,] that commenced operations after April 13, 2003, and that include swine, poultry or veal calves, [The facilities for those swine, poultry or veal calves] THE CAFO shall prevent discharges to surface waters during a storm event up to and including a 100-year/24-hour storm FROM MANURE STORAGE FACILITIES THAT CONTAIN MANURE FROM THOSE SWINE, POULTRY OR VEAL CALVES.~~

~~[(5)] (6) For a liquid or semi-solid manure storage facility, the following minimum freeboard requirements apply and shall be maintained:~~

(i) For an agricultural operation with over 1,000 AEUs that was a new or expanded operation after January 29, 2000, a minimum 24-inch freeboard, EXCEPT FOR ENCLOSED FACILITIES THAT ARE NOT EXPOSED TO RAINFALL, WHICH MUST HAVE A MINIMUM FREEBOARD OF SIX INCHES.

(ii) For all other facilities [as follows]:

~~(A) Earthen waste storage ponds, a minimum 12-inch freeboard, as described in], A MINIMUM 12-INCH FREEBOARD FOR MANURE STORAGE FACILITIES THAT ARE PONDS, AND A MINIMUM SIX-INCH FREEBOARD FOR ALL OTHER MANURE STORAGE FACILITIES.~~

~~[(6) For all waste storage structures containing animal wastes, a minimum 6-inch freeboard, as described in the Pennsylvania Technical Guide.]~~

~~[(6)] (7) The requirements in this section are in addition to and do not replace these] **ANY MORE STRINGENT REQUIREMENTS in Chapter 83, Subchapter D.**~~

~~[(7) The Department may require a water quality management permit for any manure storage facility, based on relevant criteria such as proximity to special protection waters or impaired waters under Chapter 93, or the risk of pollution.]~~

*(b) Land application of animal manure ~~[, litter]~~ and **AGRICULTURAL process wastewater; setbacks and buffers.***

(1) The land application of animal manures **[does not require] ~~[, litter]~~ and AGRICULTURAL process ~~[wastewaters]~~ WASTEWATER** requires a permit or approval from the Department **[if] unless the operator can demonstrate that the** land application **[of manure] ~~[is in accordance with]~~ [the] ~~[requirements of paragraph (2) and]~~ **MEETS one of the following ~~[is satisfied]~~ :****

(i) The land application FOLLOWS CURRENT STANDARDS FOR DEVELOPMENT AND IMPLEMENTATION OF A PLAN TO MANAGE NUTRIENTS FOR WATER QUALITY PROTECTION, INCLUDING SOIL AND MANURE TESTING AND CALCULATION OF PROPER LEVELS AND METHODS OF NITROGEN AND PHOSPHORUS APPLICATION. ~~[is in accordance with]~~ THE [Department approved manure management] ~~[practices as described in the]~~ [publication entitled "Manure Management Manual CONTAINS CURRENT STANDARDS FOR DEVELOPMENT AND IMPLEMENTATION OF A PLAN TO MANAGE NUTRIENTS FOR WATER QUALITY PROTECTION WHICH CAN BE USED TO COMPLY WITH THE REQUIREMENTS IN (1) [for Environmental Protection" and addenda or amendments thereto prepared by the Department. If a person chooses to apply animal manure using the criteria other than those described in "Manure Management Manual for Environmental Protection" and addenda or amendments thereto prepared by the Department, approval of the Department or a permit will be required. Operations which are required to or volunteer to submit nutrient management plans shall comply with Chapter 83].

(ii) For CAOs, the land application is in accordance with an approved nutrient management plan under Chapter 83, Subchapter D.

(iii) For CAFOs, the land application is in accordance with a CAFO permit as described in § 92.5a (relating to CAFOs).

~~[(2) Appropriate vegetated buffers and setbacks established by the Department shall be followed to protect and maintain water quality.]~~

(2) UNLESS MORE STRINGENT REQUIREMENTS ARE ESTABLISHED BY STATUTE OR REGULATION, THE FOLLOWING AGRICULTURAL OPERATIONS SHALL NOT MECHANICALLY LAND APPLY MANURE WITHIN 100 FEET OF SURFACE WATER, UNLESS A VEGETATED BUFFER NO LESS THAN 35 FEET IN WIDTH IS USED, TO PREVENT MANURE RUNOFF INTO SURFACE WATER:

(i) A CAO.

(ii) AN AGRICULTURAL OPERATION RECEIVING MANURE FROM A CAO DIRECTLY, OR INDIRECTLY THROUGH A BROKER OR OTHER PERSON.

(iii) AN AGRICULTURAL OPERATION RECEIVING MANURE FROM A CAFO DIRECTLY, OR INDIRECTLY THROUGH A BROKER OR OTHER PERSON.

(3) CAFOS SHALL MEET THE SETBACK REQUIREMENTS IN § 92.5a(e)(1)(i).

(4) FOR PURPOSES OF SUBSECTION (2) ONLY, "SURFACE WATER" SHALL MEAN A PERENNIAL OR INTERMITTENT STREAM WITH A DEFINED BED AND BANK, A LAKE OR A POND.

(c) Discharge of pollutants.

(1) It is unlawful for agricultural operations to discharge pollutants to waters of this Commonwealth except as allowed by regulations or a permit administered by the Department. The Department is authorized to take an enforcement action against any agricultural operation in violation of this requirement. [In addition, when]

(2) AN OPERATION THAT HAS A DISCHARGE THAT IS NOT AUTHORIZED UNDER THE CLEAN STREAMS LAW AND THAT MEETS THE DEFINITION OF EITHER A MEDIUM OR SMALL CAFO UNDER 40 CFR 122.23 IS CONSIDERED TO HAVE AN ILLEGAL DISCHARGE AND IS SUBJECT TO ENFORCEMENT ACTION UNDER THE CLEAN STREAMS LAW.

(3) When an agricultural operation is found to be in violation of the Clean Streams Law (35 P. S. §§ 691.1–691.1001), the Department may require the agricultural operation to develop and implement a nutrient management plan under Chapter 83, Subchapter D, for abatement or prevention of the pollution.

**CHAPTER 92. NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMITTING, MONITORING AND
COMPLIANCE**

GENERAL PROVISIONS

§ 92.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context indicates otherwise:

* * * * *

AGRICULTURAL PROCESS WASTEWATER—WASTEWATER FROM AGRICULTURAL OPERATIONS, INCLUDING FROM SPILLAGE OR OVERFLOW FROM LIVESTOCK OR POULTRY WATERING SYSTEMS; WASHING, CLEANING OR FLUSHING PENS, MILKHOUSES, BARNs, MANURE PITS; DIRECT CONTACT SWIMMING, WASHING OR SPRAY COOLING OF LIVESTOCK OR POULTRY; EGG WASHING; OR DUST CONTROL.

* * * * *

CAO – concentrated animal operation—An agricultural operation ~~[where the animal density exceeds 2 AEUs per acre, as defined in section 3 of the Nutrient Management Act]~~ THAT MEETS THE CRITERIA ESTABLISHED BY THE STATE CONSERVATION COMMISSION IN REGULATIONS UNDER THE AUTHORITY OF THE ACT OF MAY 20, 1993 (P.L. 12, NO. 6), KNOWN AS “THE NUTRIENT MANAGEMENT ACT,” AT CHAPTER 83, SUBCHAPTER D (RELATING TO NUTRIENT MANAGEMENT).

* * * * *

CAFO--Concentrated animal feeding operation--A CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs [or an agricultural operation with a discharge to surface waters during a storm event of less than a 25-year/24-hour storm] ~~[any agricultural operation with a discharge to surface waters that is authorized by Department permit limits and conditions]~~, OR any agricultural operation defined as a large CAFO under 40 CFR [122.23(b)(4)] 122.23 (relating to concentrated animal feeding operations) [or any other agricultural operation designated as a CAFO by the Department based on risk of pollution of surface waters using relevant criteria such as the size, location and management plan of the operation].

* * * * *

Livestock--

(i) Animals raised, stabled, fed or maintained on an agricultural operation with the purpose of generating income or providing work, recreation or transportation. Examples include: dairy cows, beef cattle, goats, sheep, swine and horses.

(ii) The term does not include aquatic species.

* * * * *

MANURE—ANIMAL EXCREMENT, INCLUDING POULTRY LITTER, WHICH IS PRODUCED AT AN AGRICULTURAL OPERATION. THE TERM INCLUDES MATERIALS SUCH AS BEDDING AND RAW MATERIALS WHICH ARE COMMINGLED WITH THAT EXCREMENT.

* * * * *

Setback--A specified distance from THE TOP OF THE BANK OF surface waters, or potential conduits to surface waters, where manure [~~litter,~~] and AGRICULTURAL process wastewater may not be land applied. EXAMPLES OF CONDUITS TO SURFACE WATERS INCLUDE BUT ARE NOT LIMITED TO: OPEN TILE LINE INTAKE STRUCTURES, SINKHOLES, AND AGRICULTURAL WELLHEADS.

* * * * *

Vegetated buffer--A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

* * * * *

PERMITS

§ 92.5a. CAFOs.

(a) [Each] Except as provided in subsections (b) [~~and (c)] – (d), each~~ CAFO shall [apply] have applied for an NPDES permit on the following schedule, AND SHALL HAVE OBTAINED A PERMIT:

* * * * *

(3) Prior to beginning operation, for any new or expanded CAFO that [begins] began operation after November 18, 2000, and before _____ (Editor's Note: The blank refers to the effective date of adoption of this [~~proposal~~] REGULATION.)

(b) A poultry operation that is a CAFO, which is in existence on _____ (Editor's Note: The blank refers to the effective date of adoption of this [~~proposal~~]

REGULATION.) and that is not using liquid manure handling systems, shall apply for an NPDES permit no later than the following, AND SHALL OBTAIN A PERMIT:

(1) _____ (Editor's Note: The blank refers to a date 6 months after the effective date of adoption of this ~~{proposal}~~ REGULATION.) for operations with 500 or more AEUs.

(2) _____ (Editor's Note: The blank refers to a date 15 months after the effective date of adoption of this ~~{proposal}~~ REGULATION.) for ALL OTHER operations ~~{with 300-499 AEUs}~~.

(c) After _____ (Editor's Note: The blank refers to the effective date of adoption of this ~~{proposal}~~ REGULATION), a new operation, and an existing operation that will become a CAFO due to changes in operations such as additional animals or loss of land suitable for manure application, shall do the following:

(1) Apply for an NPDES permit no later than 180 days before the operation commences or changes.

(2) Obtain an NPDES permit prior to commencing operations OR MAKING CHANGES, AS APPLICABLE.

(d) ANY OTHER OPERATION NOT DESCRIBED IN (a) – (c) THAT WILL BECOME NEWLY REGULATED AS A CAFO FOR THE FIRST TIME DUE TO THE CHANGES IN THE DEFINITION OF A CAFO IN § 92.1 SHALL APPLY FOR A PERMIT NO LATER THAN _____ (EDITOR'S NOTE: THE BLANK REFERS TO SIX MONTHS FROM THE EFFECTIVE DATE OF THE ADOPTION OF THIS REGULATION), AND SHALL OBTAIN A PERMIT.

[(b)] ~~{(d)}~~ (e) The NPDES permit [for each CAFO shall include conditions requiring] application requirements shall include, but not be limited to, the following:

(1) A nutrient management plan meeting the requirements of Chapter 83 [(relating to State Conservation Commission)], Subchapter D (relating to nutrient management) and approved by the county conservation district or the State Conservation Commission. The plan must include: ~~{written agreements with importers or brokers related to the land application of manure, and nutrient balance sheets or a nutrient management plan for the importing farms. The plan must also include one of the following, whichever is more stringent:}~~

(i) ~~{Buffers and}~~ manure application setbacks for the CAFO of no less than 100 feet ~~{from downgradient surface water}~~, or vegetated ~~{buffer}~~ BUFFERS no less than 35 feet in width.

(ii) ~~{Buffers and setbacks as required by § 91.36(b)(2) (relating to pollution control and prevention at agricultural operations).}~~ A STATEMENT THAT MANURE THAT IS STOCKPILED FOR 15 CONSECUTIVE DAYS OR LONGER SHALL BE UNDER COVER OR OTHERWISE STORED TO PREVENT DISCHARGE TO SURFACE WATER DURING A STORM EVENT UP TO AND INCLUDING THE APPROPRIATE DESIGN STORM FOR THAT TYPE OF OPERATION PURSUANT TO §91.36(a)(1) AND (5).

(2) An erosion and sediment control plan **for plowing and tilling operations** meeting the requirements of **Chapter 102 (relating to erosion and sediment control)**.

(3) **[For earth disturbances of 5 acres or more, an NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102.] When required under § 91.36(a), a water quality management permit, permit application, APPROVAL or engineer's certification, as required.**

(4) A preparedness, prevention and contingency plan for pollutants related to the CAFO operation.

(5) A WATER QUALITY MANAGEMENT PERMIT APPLICATION AS REQUIRED BY CHAPTERS 91 AND 92, WHEN TREATMENT FACILITIES THAT WOULD INCLUDE A TREATED WASTEWATER DISCHARGE ARE PROPOSED.

(6) MEASURES TO BE TAKEN TO PREVENT DISCHARGE TO SURFACE WATER FROM STORAGE OF RAW MATERIALS SUCH AS FEED AND SUPPLIES. THESE MEASURES MAY BE INCLUDED IN THE NUTRIENT MANAGEMENT PLAN.

[(c)] [(e)] (f) [In addition to the requirements of subsection (b), the] NPDES [permit] permits for each CAFO [with greater than 1,000 AEUs] shall include, but not be limited to, conditions requiring the following:

(1) A water quality management permit under § 91.36(a) (relating to pollution control and prevention at agricultural operations).

(2) A preparedness, prevention and contingency plan for chemicals related to the CAFO operation.

(3) Written agreements with importers or brokers related to the land application of manure and nutrient balance sheets for all exported manure.]

(1) Compliance with the Nutrient Management Plan, the Preparedness, Prevention and Contingency Plan and the Erosion and Sediment Control Plan FOR PLOWING AND TILLING OPERATIONS.

(2) A separate NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102 WHERE APPLICABLE [for any earth disturbance of 1 acre or more with a point source discharge to surface waters, or 5 acres or more regardless of the planned runoff].

(3) Compliance with 3 Pa.C.S. §§ 2301–2389 (relating to the Domestic Animal Law).

(4) Compliance with § 91.36.

(5) Recordkeeping and reporting requirements as described in the permit.

(6) WHEN APPLICABLE, EFFLUENT LIMITATIONS AND OTHER CONDITIONS AS REQUIRED UNDER §92.2a TO MEET WATER QUALITY STANDARDS, FOR TREATED WASTEWATER DISCHARGES.

(7) MEASURES NEEDED TO BE TAKEN TO PREVENT DISCHARGE TO SURFACE WATER FROM STORAGE OF RAW MATERIALS SUCH AS FEED AND SUPPLIES, WHICH ARE NOT OTHERWISE INCLUDED IN THE NUTRIENT MANAGEMENT PLAN.

**Concentrated Animal Feeding Operations
And
Other Agricultural Operations**

[25 PA. CODE Chapters 91 and 92]

Comment and Response Document

June 21, 2005

CAFO definition

1. Comment: The regulations fail to require a NPDES permit for “medium” and “small” CAFOs as required by federal regulations, and the definition fails to meet federal Clean Water Act requirements (4-69, 72, 74, 79, 81-97, 109, 114, 119, 120, 160, 162, 166, 168-172, 183-184, 186, 191). Combination of animal types is a good idea. (109) The definition of a CAFO should be less confusing – it should either follow the current Pennsylvania definition, or adopt the Federal definition. (70) Several commentators favored using Pennsylvania’s existing definition. (70, 168-172) Other commentators favored using the Federal definition. (102,177, 181-182)

Response: Pennsylvania’s CAFO program has been successfully implemented for five years. That program is based on integration of three levels of requirements from two agencies—the Department and the State Conservation Commission.

First, *all farms*, including CAFOs, must meet certain manure storage and land application requirements, now described in DEP regulations at 25 Pa. Code §91.36. In addition, plowing and tilling requirements in §102.4 apply statewide.

Second, about 840 farms across the state which are designated as “*concentrated animal operations*” under the Nutrient Management Act, must meet an additional level of requirements under State Conservation Commission regulations at 25 Pa. Code Chapter 83. These Chapter 83 requirements are extensive, and are aimed at farms with a high risk of causing water pollution—those with a high concentration of animals relative to the land available for application of the manure. CAFOs must also meet these requirements, and they are a key component of the Pennsylvania CAFO program.

Finally, a third level of requirements is imposed on *CAFOs* in Pennsylvania under 25 Pa. Code §92.5a, which are now being revised to meet the federal CAFO requirements under the Clean Water Act.

These three levels of requirements make up the Pennsylvania CAFO program. The Department and its partner agencies, including the State Conservation Commission, the county conservation districts, NRCS, the Department of Agriculture, Penn State Extension and others have all worked cooperatively for more than five years to gain industry understanding and acceptance of this CAFO program. It is important to build on that success in adjusting the CAFO program to meet the new Clean Water Act requirements.

The federal CAFO regulations under the Clean Water Act establish three possible categories of CAFOs - large, medium and small. However, in the Preamble to the EPA CAFO regulations EPA clearly indicates that the priority category is the “large” CAFOs, from a permit program perspective. These are the highest risk operations. This is underscored by the federal CAFO regulatory scheme, which defines large CAFOs based only on the numbers of animals, whereas the medium and small CAFOs must meet certain risk-based criteria in

addition to the animal number criteria. Those criteria center on the existence of an actual discharge to surface waters.

Moreover, only the large CAFOs must meet the detailed Effluent Limitation Guidelines in 40 CFR Part 412. Finally, state programs are accorded flexibility in implementing federal NPDES requirements under 40 CFR 123.25(a). Therefore, “large” CAFOs are clearly the primary focus of the federal regulations, and Pennsylvania has flexibility in implementing the federal program.

Further, the Pennsylvania CAFO program is already very similar to the new federal CAFO regulations. Those federal regulations were developed in part using the Pennsylvania program as a model.

The stakeholder group formed by DEP in 2003 extensively discussed the issue of “medium” and “small” CAFOs. The Department has considered those discussions, and comments from the public, and has decided to retain the current Pennsylvania program, which is similar in many ways to the federal regulations. The Department believes that it would be counter-productive to alter the current Pennsylvania CAFO program which has been in place for five years, is well understood by industry, partner agencies and the public, and addresses at least all of the elements of the federal program.

As noted above, the federal CAFO regulations focus on “large CAFOs” due to their risk. These final regulations take a very similar approach. They apply a Pennsylvania-specific, risk-based approach by focusing on animal density and combinations of animal groups, as used in the Nutrient Management Act. The regulations also specifically refer to the federal definition of “large CAFOs” to ensure inclusiveness of that category.

This approach necessarily means that these final regulations have a broader scope than the federal regulations insofar as identifying what EPA calls “large” CAFOs, because EPA’s regulations simply rely on animal numbers by type of animal (e.g. mature dairy cow). In Pennsylvania, because of the frequent mixture of animal types on each farm, the CAFO regulations consider animal density (AEUs per acre) of the operation and all sources of manure in determining risks to the environment and hence the farms that are regulated as CAFOs. These are “concentrated animal operations (CAOs)” with greater than 300 animal equivalent units (AEUs). No distinction is made based on the types of animals when calculating the AEUs. Therefore, many farms, which would not be CAFOs under the federal regulations, are indeed CAFOs under these final regulations, due to the density of animals on these operations and hence the risks they present to the environment.

In addition, the NMA regulatory program under Chapter 83 regulates hundreds more farms than the CAFO program. This NMA regulatory program already contains many of the federal CAFO requirements. These include nutrient management planning (including consideration of both nitrogen and phosphorus), stormwater management, restricting animal access to surface waters, conservation practices, soil and manure testing, land application protocols, manure transfer (export), maintenance of land application equipment, setbacks, manure storage, and visual inspections of production areas.

Finally, Pennsylvania already has stricter manure export requirements than those in the EPA regulations, and the State Conservation Commission has proposed even more stringent requirements in its revisions to 25 Pa. Code Chapter 83. For instance, DEP's NPDES regulations at 25 Pa. Code §92.5a(c)(3) currently require written agreements between CAFOs and importers.

For these reasons, the approach in these final regulations is consistent with the federal regulations and creates at least an equivalent state program.

On February 28, 2005, the United States Court of Appeals for the Second Circuit issued an opinion to vacate a portion of the federal CAFO regulations that are related to this issue (*Waterkeeper Alliance, Inc. v. EPA*). That decision held that EPA cannot require "large" CAFOs to submit a permit application unless they actually have a discharge. This decision did not affect EPA's definition of a CAFO. Instead, it affects the duty of CAFOs to apply for a permit.

This opinion does not affect these Pennsylvania regulations because they are based upon Section 402 of the Clean Stream Law, 35 P.S. § 691.402, which authorizes the department to require a permit if there is a threat of pollution. The federal Clean Water Act does not give EPA this authority over CAFOs, according to the court. Moreover, the court decision did not vacate the federal CAFO regulations, just certain aspects, and even then still left standing the requirement for "large" CAFOs to obtain a permit if they do have a discharge, including land application of manure without a nutrient management plan. In addition, the court recognized the threats posed by "large" CAFOs and left open the possibility that EPA could justify the permit requirement based on data about the industry, so this limitation may very well be removed in the future. Finally, at this time the opinion is still subject to appeal and further review in the courts.

The Department is particularly cognizant of the Preamble to the EPA regulations, which encourages states to implement programs to eliminate the discharges in lieu of requiring permits for "medium" and "small" CAFOs. 68 *Federal Register* 71-99 – 7200, 7232 – 7233 (February 12, 2003). These final regulations address that flexibility by using the broad authority in the Clean Streams Law and declares agricultural operations which meet the EPA definitions of "medium" and "small" CAFOs to be illegal discharges under that law.

This approach to EPA's "medium" and "small" CAFOs allows DEP to target its limited CAFO permitting staff resources on the largest and most dense operations, as opposed to issuing permits to operations with illegal/unauthorized discharges. The ultimate goal is to identify and eliminate discharges at these operations, and the Department believes that that can be more efficiently accomplished through enforcement of existing law, rather than through a permit process, which, if effective, will result in an operation that is not a CAFO. The Department believes that this approach satisfies the Clean Water Act requirements for a delegated NPDES program for CAFOs.

2. Comment: The definition of a CAFO in 92.1 is vague and ambiguous. The definition should use factors such as cumulative impacts, issuance of a TMDL and type of

watershed classification. Operations that have caused a pollution incident, are located in sensitive geologic areas, or are within one mile of a public or private drinking water supply should be required to obtain a CAFO permit. (69, 72, 114, 162, 185). DEP's designation process should be required to examine whether an agricultural operation impairs a high quality or exceptional value stream, if it is located in an impaired watershed, or in areas with limestone geology. (4-70, 72, 81-96, 102, 109-110, 120, 162, 165, 168-171, 183, 189).

Response: These comments address the following provision contained in the definition of a CAFO in the proposed regulations, which is not included in these final regulations:

or any other agricultural operation designated as a CAFO by the Department based on risk of pollution of surface waters using relevant criteria such as the size, location and management plan of the operation.

This provision created a great deal of concern by many commenters, including the Independent Regulatory Review Commission, and so it has been deleted in these final regulations. However, the Department offers these responses on suggestions by the commenters to revise that provision:

First, pollution "incidents" can vary greatly in significance; so one standard is not always appropriate. The Department intends to address them primarily through enforcement of the Clean Streams Law.

Second, the Department does not feel that all operations located in sensitive geologic areas or in close proximity to drinking water supplies necessarily present a threat to surface or ground water. Where they do, the Department believes that the threat can be addressed by following the Manure Management Manual or permit conditions, under 25 Pa. Code §91.36. These final regulations, in fact, impose stricter requirements on large storage facilities in those sensitive watersheds, at § 91.36(a)(4).

Third, Special Protection streams and impaired stream segments are taken into consideration during the CAFO permitting process, as described in the responses to Comments 56 and 57.

3. Comment: The number of operations included in the definition should be expanded to include more livestock operations. The regulations should have lower threshold numbers to require a NPDES permit. (2, 97, 167)

Response: Please see the response to Comment 1 which describes Pennsylvania's comprehensive system of regulating agriculture. The proposed CAFO regulation is estimated to triple the number of regulated facilities from 150 to 450. In addition, operations covered under the Nutrient Management Act currently number approximately 840. That number will increase substantially under the proposed revisions by the State Conservation Commission. Finally, all animal operations in Pennsylvania are subject to requirements under the Clean Streams Law and Section 91.36 of the regulations. This multi-tiered framework provides authority to protect water quality from agricultural nutrient and sediment

pollution in the Commonwealth based on the relative risk posed to the environment.

4. Comment: The definition should describe and fully cover, not imply exemption for, discharges of industrial wastewater. The federal regulations do not allow discharges from CAFOs. The definition is internally inconsistent. The definition should include agricultural operations with a discharge regardless of whether they are authorized by any Department permits (69, 114, 172, 176, 183, 184)

Response: In the stakeholder discussions held at 6 meetings in 2003, there were agricultural representatives who questioned what provision would be made in the regulation for emerging technologies including generation of energy. Generation of energy from manure and other biomass is part of the Governor's statewide priority of using indigenous energy resources within Pennsylvania. The clause "operations with discharge authorized by Department permit limits" was added to the CAFO definition to allow operations the flexibility to treat their discharge and release it to a surface water body, provided it meets effluent limits and guidelines established by DEP, as part of an energy development activity or otherwise. Unfortunately, this language was confusing to the public, the industry, and EPA.

The Department believes that it is important to encourage creative solutions to our water quality problems, and to facilitate the generation of energy from manure at animal operations where feasible. Therefore, the Department deleted this clause from the definition of a CAFO, and inserted the following provisions into the regulations to allow energy generation and other activities which beneficially use manure and which utilize wastewater treatment facilities to be considered in the CAFO permitting process:

§92.5a(e)(5) A WATER QUALITY MANAGEMENT PERMIT APPLICATION AS REQUIRED BY CHAPTERS 91 AND 92, WHEN TREATMENT FACILITIES THAT WOULD INCLUDE A TREATED WASTEWATER DISCHARGE ARE PROPOSED.

§92.5a(f)(6) WHEN APPLICABLE, EFFLUENT LIMITATIONS AND OTHER CONDITIONS AS REQUIRED UNDER §92.2a TO MEET WATER QUALITY STANDARDS, FOR TREATED WASTEWATER DISCHARGES.

While these regulations allow agricultural operations to discharge treated wastewater under a CAFO NPDES permit, the effluent limits and conditions will be the same as they would be under an industrial wastewater permit under Chapter 92. The permit would not change the land application and production area requirements under these regulations, but would include effluent limitations such as those required by 25 Pa. Code §§92.31-41 solely for those activities which are part of energy generation, or wastewater treatment to address the nutrients produced at the CAFO.

The provisions in the federal regulations regarding discharges are aimed at land application of manure and traditional farming operations in the production area, and even then they are not absolute prohibitions. The provisions in the final

regulation quoted above will allow the Department to encourage beneficial uses of manure and treatment technologies that will have a positive impact on the environment, by streamlining the permit process yet still requiring the types of effluent limitations required for any point source discharge from a treatment facility.

5. Comment: The definition of livestock should include “poultry, ducks or geese”. (164)

Response: The definition of Animal Equivalent Unit (AEU) includes livestock and poultry, as two separate groups. The federal rule lists specific groups of animals that are regulated, with no classification distinctions. The Department concluded that developing a new definition or revising the existing proposal would be confusing. Any poultry operation, regardless of type, that meets the animal number or AEU thresholds under the CAFO definition is required to obtain a CAFO permit under these regulations.

Setback and Buffers for Land Application of Manure

- Definitions

6. Comment: The definition of setbacks must be amended to prohibit manure spreading near sinkholes, drainage tiles, agricultural wellheads and other features that convey water, as required under federal regulations. (69, 71, 107, 108, 112, 162, 165, 176, 191) Setbacks should include “conduits to surface water or groundwater”. (99, 162, 165) Setbacks should be applied to wetlands. (110, 112)

Response: For CAFOs, the proposed definition for a setback was taken directly from the federal rule and included the language “other potential conduits to surface waters”. The Department agrees that the definition used by EPA is the proper approach. As a result of these comments, these final regulations retain the proposed language and add the examples given in the federal definition for clarity purposes. The definition in §92.1 has been revised as follows:

Setback—A specified distance from THE TOP OF THE BANK OF surface waters, or potential conduits to surface waters, where manure [litter] and AGRICULTURAL process wastewater may not be land applied. EXAMPLES OF CONDUITS TO SURFACE WATERS INCLUDE BUT ARE NOT LIMITED TO: OPEN TILE LINE INTAKE STRUCTURES, SINKHOLES, AND AGRICULTURAL WELLHEADS.

- Setback and buffer requirements for CAFOs

7. Comment: Setbacks should be determined based on the slope and contour of the land, the season, and cultivation practices used on the land. The setbacks should also be regulated as sparingly as possible since they cost farmers money. The 100 foot setback or 35 foot vegetated buffers should be considered maximums. (73)

The wording for setbacks and buffers should be modified to reference the NRCS technical guide and its contents. Buffers should be 50 foot wide because 35' buffers are too narrow, especially on steep slopes. Why are the distances chosen appropriate? (4-70, 81-95, 107-113, 116-117, 120, 165, 168-171, 176, 191)

Response: For CAFOs, the federal rule requires a minimum 100-foot setback or 35-foot buffer for land application of manure at certain "large" CAFOs. EPA decided on this standard after consideration of scientific data along with implementation and maintenance costs. The stakeholder group concurred in applying this requirement to all Pennsylvania CAFOs, because setbacks are an effective BMP to address runoff after land application under most conditions. Landowner costs in establishing and maintaining buffers are also a consideration. Farmers have the ultimate responsibility to protect water quality. These setbacks and buffers are minimums. Wider distances may be necessary to prevent pollution and avoid violations of the Clean Streams Law.

The Department also retains the proposed requirement that any more stringent setbacks in the Chapter 83 regulations will apply to CAFOs. Therefore, these final regulations require either the 100' setback or 35' buffer, or any more stringent setback required in Chapter 83, whichever is greater. For instance, in some cases the Chapter 83 regulations require a 200-foot setback when there is a high slope.

With regard to all other agricultural operations, the stakeholders consistently expressed concern about pollution associated with smaller operations. This led to the Department's proposal to add language in §91.36(b)(2) for a requirement for "appropriate vegetated buffers and setbacks for all agricultural operations." This proposal, public comments and the Department's response are contained in Comment 18.

The NRCS standard for a filter strip establishes 50 feet as the minimum width required to remove sediment and dissolved contaminants in runoff (Filter Strip Practice Standard No. 393). It emphasizes that several variables including slope and contour of the land should be considered in designing the filter. These final regulations use the 35 foot buffer specified by EPA in the federal CAFO rule requirement described above because it balances the need for protection and the cost of regulation and one simple standard will minimize confusion. In practice, the Department encourages operations to design a buffer in accordance with the more stringent NRCS standard.

8. Comment: Is the setback definition consistent with what is in the Clean Streams Law? (70)

Response: The Clean Streams Law authorizes the Department to establish requirements which prevent pollution or a threat of pollution. The setback requirement applies to mechanical application of manure, and is consistent with the law.

9. Comment: Vegetated buffers must not be allowed to be harvestable crops. (69, 112, 176)

Response: The Department agrees with the philosophy in the NRCS standard for filter strips that recommends harvesting to remove nutrients and other contaminants in the plant tissue and to maintain the effectiveness of the filter.

10. Comment: The areas requiring a setback may be hard to define given the generality of the definition. Do surface waters and potential conduits to surface waters include roadside ditches, waterways, diversions, intermittent streams, wetland, natural swales, etc? (79, 100, 104, 105, 106, 112,113, 177, 181, 189)

Response: The proposed definition of a setback in §92.1 has been amended in this final regulation, as described in the response to Comment 6 above, to provide added clarity. Additional guidance for various circumstances will be provided in the Department's Manure Management Manual.

"Surface waters" are currently defined in §92.1 to include intermittent streams and wetlands, and this is not changed in this final regulation. In addition, these regulations apply to CAFOs because they are defined as "point sources" in the existing §92.1. Any ditches, swales, waterways and diversions on the land application or production areas are part of the CAFO. The Department has added "top of the bank" in the definition of setback in § 92.1 for clarity, for waterbodies such as intermittent streams, as described in the responses to Comments Number 6 and 11.

The technology-based BMP requirements in CAFO permits, such as setbacks and buffers, are aimed at preventing the discharge of pollutants to the surface waters. The main focus for these BMPs is discharges which reach perennial streams, lakes and ponds and may cause local or downstream water quality impacts.

The Department will provide guidance in the Manure Management Manual on applying these setback and buffer requirements to wetlands.

11. Comment: The point where the setback is measured from should be clearly defined. Is it the bank, edge, or center of the water body? (70, 73, 112, 113, 116, 191)

Response: The setback is to be measured from the top of the bank. See the revised definition in the response to Comment 6 above.

12. Comment: Support was expressed for setbacks/buffers for CAFOs (76, 115, 119)

Response: No response necessary.

13. Comment: The setback and buffer requirement should be eliminated for CAFOs. (177, 179-182)

Response: The requirement for CAFOs is mandated by the federal rule. In addition, the Department believes that setbacks and buffers are effective measures to protect water quality.

14. **Comment:** Buffers and setbacks should apply to new CAFO operations only. (177, 181)

Response: The Department believes that setbacks and buffers are effective measures to protect water quality. In addition, the federal regulation requires all CAFOs to meet this requirement by December 2006. Finally, the federal regulation was published in early 2003, so the existing CAFOs in Pennsylvania have had substantial advance notice of this new requirement.

15. **Comment:** Setbacks/buffers should apply only to EPA's large CAFOs and the alternative practices compliance alternative should be included. (102)

Response: The requirement for setbacks and buffers at non-CAFOs is described in the response to Comment number 18. Research and other efforts to define appropriate alternative practices for setbacks and buffers indicate that EPA's criteria for these alternatives for CAFOs would be very difficult to meet.

16. **Comment:** The Chapter 83 nutrient management plan requirements must be at least as stringent as the federal rule, including manure application or storage near sinkholes or wells. (183)

Response: The Department includes the Federal requirements for setbacks/buffers in § 92.5a(e)(1)(i), and the more stringent of the two would apply. These setback/buffer requirements in § 92.5a(e)(1)(i) are the same as EPA's. These final regulations also use the definition for setback and vegetated buffer contained in the Federal CAFO regulations.

17. **Comment:** Doesn't the P index already address manure application near streams? Why is there a need for the 100-foot setback? (99)

Response: CAFOs present the highest environmental risk based on the number of animals or their concentration on the farm, as described in the response to Comment 1. Therefore, the Department believes that the most stringent requirements should apply to address that risk. In addition, the federal rule requires, at a minimum, either a 100-foot setback or a 35 foot wide vegetated buffer at all CAFOs. This is in addition to a phosphorus based nutrient management plan, which is also required by the federal regulations and the Pennsylvania CAFO program. This approach recognizes the unique environmental risks posed by CAFOs, which require an NPDES permit.

- Setbacks and buffers at all other agricultural operations

18. Comment: Buffer/setback requirements should be uniform across programs. The setback and buffer requirement should be applied to all farms, not just CAFOs. (71, 79, 103, 104, 105, 111, 167, 177-182) Setbacks and buffers should not be required for small farms. (75, 76) Buffers and setbacks in Section 91.36 should be less stringent than those for CAOs (Section 83.294(f)). (161) There should be a requirement for wider setbacks/buffers along HQ/EV streams. (108) The regulations are vague - specifically "appropriate vegetated buffers and setbacks" in Section 91.36(b)(2). (4-69, 71, 75-78, 81-96, 99, 103, 109, 112, 116, 120, 164, 168-171, 173, 180, 189)

Response: In the Preamble to the proposed regulations, the Department specifically requested comments on what would be an "appropriate vegetated buffer and setback" for agricultural operations, and which operations should be required to establish setbacks or buffers, to address the problem of agricultural nutrient pollution around the state. As noted above, several differing opinions were offered.

Setbacks and buffers can be very effective tools for reducing any non-point source runoff, including runoff from farms. They have proven to be efficient at preventing contaminants from entering surface waters, and are easy to understand for those who must apply them.

CAFOs and CAOs generate a significant amount of manure and poultry litter in Pennsylvania. They frequently export the manure and litter to other farms. The application of this large amount of manure and poultry litter on these farms creates a heightened risk of water pollution. In fact, runoff containing nutrients and sediment from farms is the second leading cause of surface water pollution in Pennsylvania and contributes to water quality impairment in the Chesapeake Bay.

Based on the above, the Department has included in the final regulation a setback and buffer requirement for concentrated animal operations (CAOs), and farms that import manure from CAFOs and CAOs, as follows:

(2) UNLESS MORE STRINGENT REQUIREMENTS ARE ESTABLISHED BY STATUTE OR REGULATION, THE FOLLOWING AGRICULTURAL OPERATIONS SHALL NOT MECHANICALLY LAND APPLY MANURE WITHIN 100 FEET OF SURFACE WATER, UNLESS A VEGETATED BUFFER NO LESS THAN 35 FEET IN WIDTH IS USED, TO PREVENT MANURE RUNOFF INTO SURFACE WATER:

(i) A CAO.

(ii) AN AGRICULTURAL OPERATION RECEIVING MANURE FROM A CAO DIRECTLY, OR INDIRECTLY THROUGH A BROKER OR OTHER PERSON.

(iii) AN AGRICULTURAL OPERATION RECEIVING MANURE FROM A CAFO DIRECTLY, OR INDIRECTLY THROUGH A BROKER OR OTHER PERSON.

(3) CAFOS SHALL MEET THE SETBACK REQUIREMENTS IN § 92.5a(e)(1)(i).

(4) FOR PURPOSES OF SUBSECTION (2) ONLY, "SURFACE WATER" SHALL MEAN A PERENNIAL OR INTERMITTENT STREAM WITH A DEFINED BED AND BANK, A LAKE OR A POND.

Because the department recognizes that the scope of this provision includes farms that are also regulated by the State Conservation Commission under the Nutrient Management Act, the Order of the Board includes a special provision that terminates the part of this subsection applicable to CAOs and their importers, if the SCC promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with the Clean Streams Law and other provisions in Chapters 91 and 92.

19. Comment: If setbacks allow the use of commercial fertilizers, what are we gaining? (71, 99)

Response: Use of commercial fertilizers presents less risk to water pollution than manure. First, fertilizer can be applied with much more precision than manure. Due to the expense, commercial fertilizer nutrients are more likely to be applied by the farmer at the optimum rates and times to support crop growth. Also, fertilizer tends to result in lower rates of nitrogen application on the land.

20. Comment: The setback requirement should be waived if manure is incorporated within 24 hours or if it is injected. (100, 160, 177, 181) Buffers and setbacks should be reduced based on no-till, cover crop and other conservation practices. (178)

Response: The general setback /buffer contained in the proposed regulations has been deleted.

For CAFOs, however, the federal rule requires either a 100 foot setback or a 35 foot wide vegetated buffer, regardless of other factors. This approach recognizes the unique environmental risks posed by CAFOs, by requiring an NPDES permit.

21. Comment: These setback and buffer proposals amount to land takings! (80)

Response: Farmers can still grow crops and graze animals in the setback area. Use of their land for farming has not been denied.

Manure Storage Facilities

- **Definition**

22. Comment: Having multiple definitions for different kinds of storage facilities is confusing. One definition should encompass all types of storage facilities. (70, 115)

Response: The final regulations define “manure storage facilities” as a subset of wastewater impoundments. The terms “waste storage structure” and “earthen waste storage pond” have been deleted.

23. Comment: The words “liquid or semisolid” do not appear in the definition of a manure storage facility. (99) Do manure storage requirements apply to constructed stacking areas for semi-solid, dry or bedded pack short-term storage of manure? (71)

Response: The term “manure storage facility” encompasses all types of manure, solid, liquid and semi-solid. Under §91.36(a)(2), new facilities storing semi-solid or liquid manure are required by these regulations to be designed, with construction overseen and certified, by a professional engineer. Water quality management permits are required for certain semi-solid or liquid manure storage facilities, as identified in the regulations.

Under §91.36(a)(1), solid manure storage facilities must meet the basic requirements of any manure storage facility, including sizing for the appropriate design storm. Under §91.36(a)(1)(i), this requirement can be met for many facilities by conforming to the Manure Management Manual and the PA Technical Guide.

24. Comment: The definition of “earthen waste storage pond” should be revised to include “with a geosynthetic liner”. Also, the definition of “waste storage structure” should include the phrase “other than an earthen waste storage pond”. (164)

Response: These suggestions become moot, since the previously proposed definitions are not included in the final regulation because their use created confusion. (See Comment 22.)

25. Comment: Storage capacity should be clearly defined to mean the entire volume below the freeboard depth to be consistent with the PA. Technical Guide.

Response: The Department agrees with this comment. A new definition was added to §91.1 in the final regulations as follows:

MANURE STORAGE CAPACITY—THE TOTAL VOLUME IN GALLONS OF A MANURE STORAGE FACILITY, LESS ANY REQUIRED FREEBOARD, SUFFICIENT AND AVAILABLE TO CONTAIN ALL OF THE FOLLOWING: ACCUMULATED MANURE AND AGRICULTURAL PROCESS WASTEWATER

DURING THE STORAGE PERIOD; NORMAL PRECIPITATION LESS EVAPORATION ON THE SURFACE OF THE FACILITY; NORMAL RUNOFF DURING THE STORAGE PERIOD; THE DESIGN STORM PRECIPITATION AND RUNOFF (25 YEAR OR 100 YEAR, AS APPROPRIATE PURSUANT TO §91.36(a)); AND SOLIDS REMAINING AFTER LIQUIDS HAVE BEEN REMOVED.

- **Operations requiring water quality management permits**
26. Comment: DEP should consider a structure's potential to pollute when determining if an operation needs a WQM permit. (69, 102, 162, 185)

Response: In these final regulations, §91.36(a) has been revised to state the current practice that any new or expanded liquid or semi-solid manure storage facility in Pennsylvania must be designed, with construction overseen and certified, by a professional engineer, (§91.36(a)(1)(i)), unless the Department issues a water quality management permit §91.36(a)(1)(ii). The Department believes that either one of these options will ensure the protection needed from these storage facilities.

In addition, a new storage capacity threshold has been established that will require other facilities to obtain water quality management permits when they present an elevated threat of pollution due to their size. (§91.36(a)(4)) All of these changes demonstrate the Commonwealth's level of concern with all of these facilities and their potential to pollute, if not properly operated and maintained.

27. Comment: WQM permits should only be required of EPA's large CAFOs. (102)

Response: The current regulations require water quality management permits for new or expanded manure storages for operations that have greater than 1,000 animal equivalent units. In some cases operations were proposed with less than 1,000 AEUs and an oversized manure storage then expanded to greater than 1,000 AEUs to avoid the permit requirement. The CAFO Stakeholder Group recommended that a volume measurement would be more practical and a consensus was reached on the use of a 2.5 million gallon threshold as the mandatory requirement for permitting. The stakeholders also supported the 1,000,000-gallon threshold for storage ponds in special protection watersheds and agricultural impaired waterbodies. Absent a permit for these large manure storage facilities the Department would not be informed of their location to verify construction or oversee operation.

28. Comment: The regulation is vague in identifying relevant criteria to determine who needs a permit for any manure storage facility (70, 75,77-78, 108, 116, 173, 180, 189, 191) Smaller manure storage facilities should not be required to obtain a water quality management permit. (75, 76, 102)

Response: The Department has deleted the proposed §91.36(a)(7) in this final regulation. This authority already exists for the types of situations where this would be applied.

29. Comment: WQM permits should be required for manure storage structures near an impaired watershed regardless of whether or not it is implementing an approved nutrient management plan. (69, 162, 176, 185)

Response: The Department agrees with this comment and has revised the final regulation to read:

§91.36(a)(4)(i)(B) The nearest downgradient stream that has been assessed has been determined by the Department to be impaired from nutrients from agricultural activities [and the manure storage facility is on an agricultural operation that is not implementing a Nutrient Management Plan approved by the State Conservation Commission under Chapter 83, Subchapter D (relating to nutrient management)].

30. Comment: All storages with capacity of 1 million gallons or more should be required to get a water quality management permit. (69, 107, 114, 116, 162, 176, 185, 186)

Response: The 2.5 million gallon threshold was established after discussion among the various stakeholders and consideration of relevant technical information. It was also considered to be a good and reasonable balance given the requirements applicable to all manure storage systems.

31. Comment: Only CAFOs that exceed the threshold volumes should be required to obtain a water quality management permit. (179)

Response: The CAFO stakeholder group felt that volume was a reasonable criteria for measuring the environmental threat of a manure storage facility, and the Department agrees. A one million gallon storage at a non-CAFO presents just as much potential for degradation of water quality as does the same volume storage at a CAFO.

32. Comment: A large number of facilities will be required to get water quality management permits, creating a demand for technical assistance, as well as permitting and compliance. Recommendations include: limiting the permits to operations with just earthen storage in Special Protection or impaired watersheds; focusing on all storages that are not structures; or developing a general permit for the one million gallon threshold. (164)

Response: Requiring permits for larger storage facilities in special protection waters and in waters that are impaired from agricultural activity will help to ensure adequate care in planning, designing, installing and operating these facilities in those high-risk locations. The recommendation by the commentator would broaden the original proposal to include lined storage ponds in these

watersheds, while excluding clay-lined ponds in other watersheds from the permitting requirement. The requirement for design, construction oversight and certification of these ponds by a professional engineer remains in these final regulations. The Department agrees with the recommendation and has revised the final language as follows:

§ 91.36(a)(4) For a new or expanded LIQUID OR SEMI-SOLID MANURE STORAGE FACILITY [agricultural operation] after _____ (Editor's Note: The blank refers to the effective date of adoption of this [proposal] REGULATION.) [the following requirements apply to a liquid or semi-solid manure storage facility]:

(i) Where the manure storage capacity is between 1 million and 2.5 million gallons, a water quality management permit is required for any manure storage facility that [meets one of the following]:

~~(A) It is a clay-lined [earthen waste storage pond] IS A POND AND ONE OF THE FOLLOWING APPLIES:~~

~~[(B)] (A) The nearest downgradient stream is classified as a High Quality or Exceptional Value water under Chapter 93 (relating to water quality standards).~~

~~[(C)] (B) The nearest downgradient stream that has been assessed has been determined by the Department to be impaired from nutrients from agricultural activities [and the manure storage facility is on an agricultural operation that is not implementing a Nutrient Management Plan approved by the State Conservation Commission under Chapter 83, Subchapter D (relating to nutrient management)].~~

33. Comment: Location should be considered in the water quality management permit review process.

Response: The final regulation has been revised to establish basic criteria which include location. In addition, the Manure Management Manual and the Pennsylvania Technical Guide contain detailed guidance which can be followed to meet the minimum requirements for any manure storage facility constructed in Pennsylvania. These documents address location criteria, including consideration of prevailing winds, floodplains, and karst topography.

- Dry manure, freeboard, and miscellaneous comments

34. Comment: The proposed Chapter 83 regulation, which allows manure stacking until the next growing season, is reasonable. (76) Dry manure should not be allowed to be stockpiled uncovered in fields for more than two weeks. (69, 107, 108, 114, 116, 183)

Response: For CAFOs, the final Chapter 92 regulations include the two-week requirement for dry operations used in the federal NPDES permit program. EPA has insisted that this requirement be a part of the Pennsylvania CAFO program, and the Department believes that it is an appropriate protective measure to meet the requirements of the Clean Streams Law. The final regulation reads as follows:

§92.5a(e)(1)(ii) A STATEMENT THAT MANURE THAT IS STOCKPILED FOR 15 CONSECUTIVE DAYS OR LONGER SHALL BE UNDER COVER OR OTHERWISE STORED TO PREVENT DISCHARGE TO SURFACE WATER DURING A STORM EVENT UP TO AND INCLUDING THE APPROPRIATE DESIGN STORM FOR THAT TYPE OF OPERATION PURSUANT TO §91.36(a)(1) AND (5).

Requirements for concentrated animal operations that are not CAFOs, and for volunteer animal operations, are identified in the Chapter 83 regulations.

35. Comment: There needs to be higher freeboard requirements. (107)

Response: The freeboard requirement is above and beyond the 25-year or 100-year storm event. When properly operated and maintained, two feet of freeboard for permitted storage facilities provides an adequate safety factor against overtopping. Smaller facilities have a lower freeboard, but these, too are adequate safety factors, given the lesser environmental risk associated with these facilities.

36. Comment: The regulations should establish a difference in freeboard requirements between indoor and outdoor storage facilities. (70, 114, 115, 191)

Response: The final regulations incorporate this suggestion by establishing a 2-foot freeboard requirement for "outside" storage facilities, and 6-inch freeboard requirement for "inside" storage facilities that have limited exposure to rainfall events. Section 91.36(a)(6)(i) and (ii) were revised as follows:

(i) For an agricultural operation with over 1,000 AEUs that was a new or expanded operation after January 29, 2000, a minimum 24-inch freeboard, EXCEPT FOR ENCLOSED FACILITIES THAT ARE NOT EXPOSED TO RAINFALL, WHICH MUST HAVE A MINIMUM FREEBOARD OF SIX INCHES.

(ii) For all other facilities [as follows:

(A) ~~Earthen waste storage ponds, a minimum 12-inch freeboard, as described in~~, A MINIMUM 12-INCH FREEBOARD FOR MANURE STORAGE FACILITIES THAT ARE PONDS, AND A MINIMUM SIX-INCH FREEBOARD FOR ALL OTHER MANURE STORAGE FACILITIES.

37. Comment: It is right to require more stringent design and operation criteria for swine, poultry and veal operations. (160)

Response: The Department agrees. In addition, the more stringent criteria are consistent with the federal rule.

38. Comment: Clay liners may not provide satisfactory protection. (185)

Response: Storage ponds (both lined and unlined) over 1 million gallons that are located in special protection watersheds and watersheds impaired by agricultural sources must obtain permits under the final regulation. With the permit comes closer oversight of the design, construction, operation and maintenance of these facilities. Newly-constructed smaller ponds, as with any liquid or semi-solid manure storage facility, must be designed, construction overseen and certified by a professional engineer.

Storage is an important part of proper management of manure on many farm operations. Allowing this option provides many farmers with an economical means of storage. The Department's regulations, as noted above, are intended to insure that clay-lined facilities function properly.

39. Comment: Only engineers should review applications for permits prepared by engineers. (70, 114, 116)

Response: Under current DEP policy, the review of CAFO and WQM permit applications must be done by or under the responsible charge of a professional engineer.

40. Comment: There should be additional protections or practices for proposed facilities next to existing residential areas or uphill from a community water supply. (161)

Response: All new manure storage facilities in the Commonwealth must be designed, construction overseen, and certified by a professional engineer. The larger facilities, which must have a water quality management permit, are carefully reviewed by DEP regional staff. Local conditions are taken into account during this review.

Setbacks for private wells are being addressed under the nutrient management planning requirements in 25 Pa. Code Chapter 83, which are also a requirement for CAFOs.

41. Comment: Guidance should be provided on "protection against unauthorized acts by third parties." (71, 99)

Response: Guidance on this is included in the NRCS Technical Standards and will be considered in the new CAFO strategy or the revised Manure Management Manual.

Economics

42. Comment: The permit costs are excessive. (173, 180) Proposed permit fees must be reasonable. (100)

Response: Currently, there are about 160 CAFOs in Pennsylvania, out of a total of over 40,000 animal operations. With the new regulations, there will be in the neighborhood of 400-500 CAFOs. These facilities represent the largest and most densely populated farms. Although the engineering and technical services to complete the application may be expensive, they help to insure that applicable requirements are met and that facilities are designed for safe operation. Much of the application information must be developed for the operation whether or not a permit is required. There is no permit fee for CAFOs that qualify for General Permit coverage.

43. Comment: Pennsylvania's regs are more stringent than neighboring states, putting our producers at an economic disadvantage. (70)

Response: All of the states are undergoing regulatory changes right now as the result of the federal rule change. This is not necessarily affected by the recent court decision described in the response to Comment number 1. These rules define a baseline for all state programs. It is not known how the various states will ultimately compare, but it is certain that all states will be adding to their requirements and there will continue to be differences in these programs to address unique concerns.

44. Comment: The setback requirements will increase the cost of operating to middle sized farmers by forcing the farmer to purchase additional commercial fertilizers instead of land applying manure. (75, 77, 100, 104, 105)

Response:

All farms have a legal obligation to prevent discharges of pollutants to surface waters under the Clean Streams Law. Runoff from farms is the second leading cause of surface water pollution in Pennsylvania. Setbacks or buffers can be part of an effective plan to meet that legal requirement and address that pollution problem.

The department has narrowed the focus of the proposed setback/buffer provision to the farms involved with the highest concentration and numbers of livestock. The final setback provision also is narrowly focused on the key waterbodies (except for CAFOs which are subject to broader requirements under the NPDES program).

Public funds are available to assist farmers in meeting these setback/buffer requirements, as explained in the response to comment number 46.

45. Comment: Any new requirements should minimize the amount of paperwork and recording for the small farmer. (73)

Response: New requirements under the Chapter 91 regulations are not expected to create any new paperwork requirements for “small” farmers. The Manure Management Manual already requires farms to have a plan to address nutrients on the farm. The new requirement in §91.36(a)(4) for water quality management permits for manure storage ponds with at least 1,000,000-gallon capacity would not affect most small farms. Finally, small farmers that import manure from CAFOs will see no paperwork changes as the result of the revisions to Chapter 92.

46. Comment: Small and medium sized farmers should be offered incentives to come voluntarily into compliance with environmental standards. Government should provide education and funding to assist farmers in meeting these new requirements. (75)

Response: Farmers have a variety of technical and financial assistance programs at their disposal to help them with conservation. DEP aids in this effort through the Growing Greener program. Other sources include the Act 6 program, the Chesapeake Bay program, Section 319, and USDA’s Farm Bill programs. DEP will prepare fact sheets and publications as well as developing an outreach program to inform the regulated community about these revised regulations.

47. Comment: Take economics into consideration. Pennsylvania made no effort to quantify costs associated with these regulations. (80, 102)

Response: The Preamble to the Proposed Regulations included a section on Compliance Costs. Our estimate is based on the incremental additional costs resulting from these regulation revisions. There are few requirements, beyond farm operation management changes and obtaining permit coverage, being added to what already existed in Pennsylvania.

48. Comment: DEP should be taking soil samples if they want to tell farmers what soil amendments the soil will tolerate. (106)

Response: It is the farmer’s responsibility to insure that he does not over apply nutrients on his land. To this end, he/she also bears the onus of establishing what is the right amount to insure crop growth without generating water pollution.

Enforcement / Accountability

49. Comment: There should be a “bad actor” provision in the regs. 114, 119, 120, 176

Response: DEP’s permit bars apply to CAFO permit applications. The permit application review includes a review of the compliance history of the applicant. Compliance history is one of the considerations during the Department’s review of permit applications (see 25 Pa. Code §92.21(c)). The Department is authorized to deny a permit based on compliance history, including pollution incidents.

50. Comment: “Financial assurance” provisions need to be added to insure the taxpayers will not have to pay for clean up (bonding?). (97, 119, 120, 123, 160, 174, 176, 185) Cleanup of environmental damage should be at the operator’s expense and liability. (160, 164, 174)

Response: The Department expects the regulated community to bear the costs of any pollution attributable to them. However, bonding is not required as a condition of other NPDES permits such as sewage or industrial wastewater permits. It is not appropriate to impose this condition on CAFO permits.

51. Comment: Contracting agri-business corporations and livestock management companies should be required to co-sign CAFO permits. (69, 107, 162, 165, 174, 176)

Response: The permit application and permit documents identify the owners and operators who are primarily responsible for the facilities compliance. This is consistent with other permitting programs. The Department has been operating the CAFO Program for several years and has found this approach to be effective in addressing compliance concerns.

52. Comment: Section 91.36 should be rewritten to make sure the Clean Streams Law is enforced. The rewording should require enforcement action against agricultural operations in violation of the CSL. (4-69, 81-96, 110, 114, 161-162, 165, 168-171, 176) DEP, SCC, and PDA must substantially increase oversight and enforcement of all provisions of CAFO permits, NMA, and Manure Hauler Certification Act. (69, 162)

Response: Regulatory agencies apply enforcement discretion to maximize compliance results with available resources. This is particularly applicable in this program given the large number and diversity of farms in Pennsylvania. Requiring enforcement actions in all cases of violation is not practical. There must be some discretion to allow available resources to be directed at enforcement actions that yield the greatest water quality returns. Secretary McGinty has proposed \$1,000,000 toward increased compliance efforts. This initiative requires action by the Legislature.

53. Comment: Residential developments should be required to have setbacks from agricultural operations. (105)

Response: The science on off-farm airborne health impacts from agricultural operations is under development, although this is an area of active study by universities and others at the current time. Therefore, the Department does not have sufficient information to determine appropriate setbacks.

This is also an issue which is appropriately addressed by local zoning.

CAFO permit review considerations

54. Comment: The regulations fail to consider cumulative negative impacts on water quality of a proposed CAFO, in combination with other discharges into the same waterbody. (109, 114, 119, 185)

Response: Under 25 Pa. Code §92.2a, the Department is precluded from issuing a permit unless the operation complies with the treatment requirements and effluent limits under the Clean Streams Law and the federal Clean Water Act, including any requirements related to cumulative impacts. This applies to CAFO permit issued under these regulations.

55. Comment: The regulations cannot lawfully authorize permits for new or expanded CAFOs in 303(d) listed streams or lakes. (109)

Response: There is no prohibition in Pennsylvania's federally-approved NPDES regulations which precludes the issuance of a CAFO permit in a watershed with stream segments listed as impaired under Section 303(d) of the Clean Water Act, 33 U.S.C. §1313(d).

56. Comment: DEP should take allowable stream pollution loading restrictions or TMDLs into account when issuing CAFO permits in impaired watersheds. (69, 162, 176, 185)

Response: Where appropriate, the Department considers TMDLs when reviewing CAFO permit applications.

57. Comment: The regulations fail to comply with antidegradation requirements in special protection water bodies. (69, 109, 162, 185)

Response: The anti-degradation requirements of 25 Pa. Code §§93.4a and 93.4c are applicable to all NPDES permit decisions, including those made under the CAFO regulations.

58. Comment: In Section 92.5a.(c)(1) and (2), what does the word “commence” mean? (70, 112, 113)

Response: “Commencing operations” refers to actually populating the facility with enough animals to be defined as a CAFO.

59. Comment: The Department should consider whether a facility or proposed facility is in compliance with existing zoning ordinances. (161) Locals should have control – no pre-emption. (108, 133, 172)

Response: Land use is considered when individual CAFO permit applications are reviewed, provided local ordinances are in place and are consistent with a county comprehensive plan.

60. Comment: Applications should be deemed approved if they are not reviewed in a reasonable timeframe. If denied, application reviews should make recommendations on correcting problems. (73, 191)

Response: The Department encourages prospective permit applicants to confer with DEP regional office staff when planning for a CAFO operation. This can significantly reduce permit review times. In addition, the Department understands that for farming and other businesses, time is money and it must do its best to insure prompt review of applications. All must also understand that legitimate concerns can be raised during the permitting process. These can result in permitting delays.

When individual permit applications are denied the Department routinely describes the basis for the denial. The applicant would be responsible for determining how to correct any deficiencies in their application.

61. Comment: DEP should have a co-approval role for nutrient management plans for CAFOs. (185)

Response: The Nutrient Management Act is administered by the State Conservation Commission (which is part of DEP) and County Conservation Districts. While the Act does not envision DEP’s direct involvement in reviews of Nutrient Management Plans submitted under the Act, DEP works closely with the Commission and Conservation Districts in the establishment and maintenance of that program. That program involves extensive training, and certification, of plan writers and reviewers of Nutrient Management Plans. Enforcement actions have been taken by the State Conservation Commission, when necessary, to ensure compliance. The Commission is assisted by DEP staff in taking enforcement actions resulting in violations of the Clean Streams Law. Consequently, DEP has a great deal of confidence in the Commission’s management of the Nutrient Management Act program and its requirements, which is why these regulations incorporate those requirements into the CAFO permit program. The Nutrient Management Act is intended to be protective of water quality in the Commonwealth.

Based on the above, therefore, this comment's recommendation is unnecessary. In addition, DEP independently considers these same types of issues during the permit application review and public participation processes, and can always deny a permit application, or establish appropriate permit conditions, for legitimate water quality concerns.

62. Comment: Do CAFOs that are not CAOs have the option of not being under Act 6 program oversight? (71,103)

Response: No. Section 92.5a(e)(1) of the regulations specifies that the plan must meet the requirements of Chapter 83 and be approved by the county conservation district or the State Conservation Commission. The nutrient management program administered by the SCC and county conservation districts is done in close coordination with the Department. That program has the trained staff and resources to ensure appropriate plans are prepared and implemented.

63. Comment: Proposed operations should be listed in the PA Bulletin. (107, 120)

Response: All proposed CAFO operations are published in the PA Bulletin by DEP once the permit application or Notice of Intent are received. Operations that are required to get an individual CAFO permit also must notify their municipality and do 4 weekly newspaper notices.

64. Comment: Groundwater supply should be considered for proposed facilities. (120, 161)

Response See response to #2 above.

65. Comment: Pennsylvania should not be any stricter than the Federal standard. (102)

Response: Pennsylvania has and will continue to require CAFOs to meet the requirements of the Nutrient Management Act regulations. If those regulations are more stringent than the federal rule, agricultural operations will be expected to follow them.

66. Comment: There are no requirements for surface or groundwater monitoring. (109, 176)

Response: The federal CAFO rule is limited to surface water quality under the NPDES program, so groundwater monitoring would be beyond the scope of that rule. Further, CAFO permits typically have narrative effluent limits, not numerical effluent limits. Therefore, under most circumstances, standard permit conditions requiring operators to conduct routine surface water monitoring for compliance assurance purposes would be unnecessary. However, the Department may require measures to insure adequate protection of water resources under the

Clean Streams Law in a CAFO permit where site conditions warrant it. In addition, monitoring may always be required if needed based on specific compliance concerns at the operation.

In instances where alternative technologies are proposed as a means to treat the wastewater from a CAFO operation, effluent limits will be established, and monitoring of the discharge will be required, under the new §92.5a(f)(6). An example might be the use of treatment technology to remove nutrients from manure to produce compost and discharge treated wastewater meeting prescribed effluent limits and conditions as required under a typical industrial wastewater discharge permit.

In DEP's Water Quality Management permitting program for manure storage facilities, under 25 Pa. Code Chapter 91, there are requirements for leak detection and monitoring of storage facilities.

67. Comment: The regulations do not require a "mortality disposal plan". (120) Animal mortality handling must not adversely affect water quality. (120, 183)

Response: Pennsylvania has a Domestic Animals Act that regulates the handling of dead animals to protect water quality. Therefore, these regulations do not contain a requirement for an animal mortality disposal plan. However, Section 92.5a(f)(3) requires compliance with this law as a condition of the CAFO permit. The Domestic Animals Act can be found at: <http://www.agriculture.state.pa.us/agriculture/cwp/view.asp?a=3&q=127501> (select "Domestic Animals Act").

68. Comment: Additional production areas such as animal buildings and raw material storage areas need to be included. (183)

Response: These CAFO regulations rely to a large extent on the operating requirements contained in the regulations issued under the Nutrient Management Act, 3 P.S. §§1701 et seq., at 25 Pa. Code §§ 83.201 et seq. Subsection 83.311(a) of the Nutrient Management regulations provides that manure management practices at all animal concentration areas must be adequate to prevent surface or groundwater pollution from storm events up to and including a 25-year, 24-hour storm intensity. Animal concentration areas are defined in the Section 83.201 as "barnyards, feedlots, loafing areas, exercise lots, or other similar animal confinement areas that will not maintain a growing crop, or where deposited manure nutrients are in excess of crop needs." This requirement applies to all CAFOs.

In addition, these final regulations contain the following provisions to address this issue:

§92.5(e)(6) MEASURES TO BE TAKEN TO PREVENT DISCHARGE TO SURFACE WATER FROM STORAGE OF RAW MATERIALS SUCH AS FEED AND SUPPLIES. THESE MEASURES MAY BE INCLUDED IN THE NUTRIENT MANAGEMENT PLAN

§92.5a(f)(7) MEASURES NEEDED TO BE TAKEN TO PREVENT DISCHARGE TO SURFACE WATER FROM STORAGE OF RAW MATERIALS SUCH AS FEED AND SUPPLIES, WHICH ARE NOT OTHERWISE INCLUDED IN THE NUTRIENT MANAGEMENT PLAN

69. Comment: Some standards in Pennsylvania's Technical Guide do not meet the federal rule requirements. (183)

Response: NRCS standards are not intended to supersede laws or regulations, and nothing in the regulations creates a legal argument otherwise. The commenter presented three instances where the standards were deficient, and the Department has addressed each of these cases. The limit on field stacking CAFO manure is addressed in § 92.5a(e)(1)(ii). The P-Index process will have additional explanation in the final Nutrient Management regulations. And, the levels of storm protection for manure storage are specified in § 91.36(a)(1) and (5).

70. Comment: The regulations will discourage importers from accepting CAFO manure, because of all the requirements. (105) Support was expressed for the provision that CAFOs should have written agreements with importers. (69, 115, 161, 176)

Response: Pennsylvania has and will continue to require CAFOs to meet the requirements of the Nutrient Management regulations. If those regulations are more stringent than the federal rule, CAFOs will be expected to follow them.

71. Comment: Phosphorus balancing should only be used on existing CAOs or CAFOs. (181,182) P-index should apply only to new CAFOs – all others should use p-balancing. The phosphorus index is not adequate. A balancing approach should be used, so that CAFOs and importers apply no more P than can be absorbed by crops. (162, 176) Verify that phosphorus application rates are consistent with the federal rule requirements. (183)

Response: These CAFO regulations rely to a large extent on the operating requirements contained in the regulations issued under the Nutrient Management Act, which now contain requirements to address phosphorus runoff. All CAFOs will be expected to meet those requirements.

The federal rule requires large CAFOs to determine and implement site-specific nutrient application rates that are consistent with the technical standards for nutrient management established by the permitting authority. The Preamble goes on to discuss three methods of analysis: Phosphorus Index; Soil Phosphorus Threshold Level; and Soil Test Phosphorus Level. The Preamble then states: "The permitting authority has the discretion to determine which of these methods, or other State-approved method, is to be used." Phosphorus based plans are already required in Pennsylvania under the Nutrient Management program. Therefore, Pennsylvania has the flexibility to adopt an

appropriate approach to addressing phosphorus, in order to meet the Clean Water Act requirements.

72. Comment: Preparedness, Prevention and Contingency (PPC) plans should only be required of EPA's large CAFOs. (102)

Response: These plans are important management tools for any CAFO operation because of the risk to human health and the environment. It is an appropriate requirement for these operations. In addition, the federal rule requires all CAFOs to have a nutrient management plan that "ensures that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system" Pennsylvania is addressing these considerations by requiring all CAFOs to develop a PPC plan for their operation.

73. Comment: Are pesticides included in the PPC plan? (71, 99, 102)

Response: The Department believes that it is important to ensure that on-farm chemicals do not enter the manure wastewater stream. This is also consistent with the intent of the federal rule. Therefore, the PPC plan requirement applies to pesticides.

74. Comment: Annual manure testing is excessive. Should only have to test when changes are made to the operation. (71)

Response: The Nutrient Management Act's Chapter 83 regulations have a program for manure testing that is applicable to CAFOs.

75 Comment: Definitions of manure and agricultural process wastewater are not included. (183)

Response: Definitions for both terms were added.

AGRICULTURAL PROCESS WASTEWATER—WASTEWATER FROM AGRICULTURAL OPERATIONS, INCLUDING FROM SPILLAGE OR OVERFLOW FROM LIVESTOCK OR POULTRY WATERING SYSTEMS; WASHING, CLEANING OR FLUSHING PENS, MILKHOUSES, BARNs, MANURE PITS; DIRECT CONTACT SWIMMING, WASHING OR SPRAY COOLING OF LIVESTOCK OR POULTRY; EGG WASHING; OR DUST CONTROL.

MANURE—ANIMAL EXCREMENT, INCLUDING POULTRY LITTER, PRODUCED AT AN AGRICULTURAL OPERATION. THE TERM INLCUDES MATERIALS SUCH AS BEDDING AND RAW MATERIALS WHICH ARE COMMINGLED WITH THAT EXCREMENT.

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7.	Heather Sage, 454 44 th St., Pittsburgh PA 15201-1142			
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9.	Stephe McManus, 9 Regency Ct., Exton, PA 19341-2796			
10.	Wayne Laubscher, 749 E Croak Hollow Rd., Lock Haven PA 17745-8153			
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69.	Kimberly Snell-Zarcone, Citizens for Pennsylvania's Future, 610 N. Third Street, Harrisburg, PA 17101-1113 (This commentator testified at the hearing and submitted comments.)		10-13-04	Yes
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July 26, 2005

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333 Market Street
Harrisburg, PA 17120

Re: Final Rulemaking – Concentrated Animal Feeding Operations and Other Livestock Agricultural Operations Program Amendments (#7-391)

Dear Mr. Kaufman:

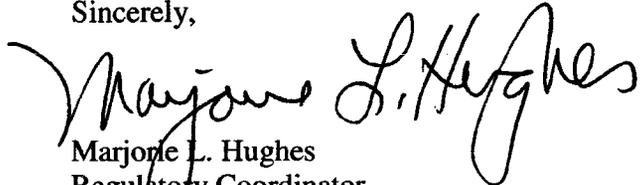
Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Committee. The Environmental Quality Board (EQB) approved this final-form rulemaking on June 21, 2005.

This final regulation package includes revisions to Chapter 92 of the Department's regulations related to water pollution on agricultural operations made primarily in response to the latest Federal CAFO Final Rule that went into effect on April 14, 2003 and to Chapter 91 regulations, which apply to all agricultural operations. In order to retain primacy under the NPDES CAFO permitting program, the Commonwealth must adopt a program that meets or exceeds the new Federal requirements.

EQB adopted the proposed regulations on April 20, 2004. In order to facilitate public review and comment, the Department held two public informational meetings (9/13/04 in Mechanicsburg and 9/16/04 in DuBois) and two hearings (10/13/04 in Mechanicsburg and 10/14/04 in DuBois) in conjunction with the State Conservation Commission's (SCC) revised Nutrient Management regulations. Comments were received from 191 commentators during the 90-day comment period, including comments from IRRC and the Standing Committees.

The Department will provide assistance as necessary to facilitate the Commission's review of this final-form regulation under Section 5.1(e) of the Regulatory Review Act. This review is tentatively scheduled for August 25, 2005. Please contact me if you would like additional information.

Sincerely,



Marjorie L. Hughes
Regulatory Coordinator

Enclosures

