

PAG-12
AUTHORIZATION TO OPERATE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT FOR OPERATION OF
CONCENTRATED ANIMAL FEEDING OPERATIONS

COMMENT RESPONSE DOCUMENT
JANUARY 2024



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF CLEAN WATER

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INTRODUCTION

The Department of Environmental Protection (DEP) published notice of the availability of a draft NPDES General Permit for Operation of Concentrated Animal Feeding Operations (PAG-12 General Permit) in the *Pennsylvania Bulletin* on October 1, 2022 [52 Pa.B. 6265]. A 30-day comment period was provided, and interested parties were directed to submit comments to DEP's eComment system or by e-mail to ecomment@pa.gov. The comment period ended on October 31, 2022. DEP received comments and questions from four (4) different individuals and organizations during the comment period.

The purpose of this document is to present DEP's responses to public comments, explain how the comments were considered in final the PAG-12 General Permit, as applicable, and answer all questions posed.

LIST OF COMMENTERS

The names of individuals who submitted comments to DEP during the comment period are identified below (in no particular order). DEP will present each comment received in this document and identify the commenter(s) by number, corresponding to the list below.

- (1) Jennifer Reed Harry, PennAg, Northwood Office Center, 2215 Forest Hills Drive, Suite 39, Harrisburg, PA 17112.
- (2) Grant R. Gulibon, Pennsylvania Farm Bureau, 510 S. 31st Street, PO Box 8736, Camp Hill, PA 17001.
- (3) Kelly M. O'Neill, Chesapeake Bay Foundation, 1426 N. 3rd Street, Suite 220, Harrisburg, PA 17102.
- (4) Meg Parish, Environmental Integrity Project, 1000 Vermont Ave NW, Suite 1100, Washington, DC 20005.

COMMENTS AND RESPONSES

The number associated with each commenter is identified in parentheses following the comment. Comments have been organized by topic.

Notice of Intent (NOI) and Instructions

1. **Comment:** NOI Instructions on Page 11, instructions #2: If a stream is in the Chesapeake Bay the TMDL name is the Chesapeake Bay TMDL plus any preceding TMDL stream up the watershed? Or is the TMDL first order stream to be named or all of them? Please clarify or provide an example. **(1)**

Response: The BMP Checklist for TMDL Waters that was published as part of the draft PAG-12 General Permit package has not been finalized. In lieu of the checklist, DEP will utilize a “reasonable potential analysis” (RPA) spreadsheet to evaluate the likelihood that a CAFO’s operation may cause or contribute to an impairment. The RPA spreadsheet will be utilized by DEP staff anytime a CAFO seeking coverage under PAG-12 is in the watershed of sediment or nutrient-impaired waters, including the Chesapeake Bay watershed. If the RPA spreadsheet indicates there is a high potential for a CAFO to cause or contribute to an impairment, DEP will require the CAFO to apply for an individual permit unless the potential can be reduced through actions of the CAFO. The RPA spreadsheet evaluates the following CAFO-specific information:

- The distance from the CAFO’s production area to the nearest surface water;
- Whether or not livestock are granted unrestricted access to surface water;
- The presence of liquid or semisolid manure storage facilities on-site, whether the facilities accept direct precipitation or runoff, the date the facilities were constructed, the type of liner used, and whether there is an operation and maintenance (O&M) plan and it is being followed;
- Silage leachate management, if applicable;
- The presence and location of animal concentration areas, how roof water is managed in these areas, and how runoff is stored, treated or managed; and
- Evidence of channelized flow from the production area to a surface water and whether the potential exists for pollutants to run off the site.

2. **Comment:** NOI Instructions on Page 11, instructions #2: There is not enough information on what land uses should be included. Instruction #1 indicates that the applicant should enter the name of the surface waters closest to the production area. This does not read as an identification of land uses relevant to the checklist, rather it reads that DEP needs to narrow the focus of the checklist and will do so simply by using the watershed closest to the production area. It is recommended that clarification of which land uses qualify for this checklist be identified in the first paragraph. Additionally, clarify what is included in the “production area” definition. **(1)**

Response: See DEP’s response to Comment No. 1.

3. **Comment:** Regarding hauling and spreading of manure, the draft would require listing the number of acres owned, the number of acres rented or leased for manure application, and the total acres available for manure application. For a CAFO permittee who exports all of his manure, the number of acres to spread on will be zero, because that land is leased to the individual who has the manure. Again, reviewing the permittee’s nutrient management plan for accuracy is not a DEP or EPA function; it is a conservation district function. Conservation districts are closest to the farmer and have a much more complete understanding of the proper course of action in each individual case. **(2)**

Response: This information is required for any application or NOI for a CAFO (see 40 CFR § 122.21(i)(1)(vii)) and has been part of CAFO NPDES permit applications and Notices of Intent (NOIs) since the inception of the program.

4. **Comment:** The addition of a requirement for attachment of a PPC plan to the PAG-12 notice of intent (NOI), to be implemented in the event of a mass mortality event at an operation, will be costly and time-consuming for

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applicants to meet. Often, the weather and other factors affect such a response, and in the event of such an occurrence, state officials will take charge of the response, and the measures chosen may not be consistent with the permittee's plan. **(2)**

Response: A PPC Plan for pollutants related to the CAFO operation has always been a required component of the NOI under PAG-12 (see 25 Pa. Code § 92a.29(e)(4)). DEP has updated the PPC Plan requirement to include a CAFO's response to a mass animal mortality event at the operation. State officials will take charge of the response and provide guidance or direction for an appropriate mass mortality management option in the absence of a farm-specific plan. The inclusion of a predetermined option(s) for mass mortality in a specific operation's PPC Plan that will protect public and animal health and the environment will guide decision-making if such an event were to occur.

Fact Sheet

5. **Comment:** Fact Sheet, Page 3: "DEP will review the BMP Checklist when deciding whether coverage under PAG-12 can be authorized or whether the operation is more appropriately regulated under an individual permit." Operation should have an opportunity to remain as a general permit if willing to address obvious BMP related issue. Individual permit is more burdensome for operators. DEP should add language to address this issue. **(1)**

Response: See DEP's response to Comment No. 1.

Best Management Practices (BMPs)

6. **Comment:** What is the motivation for adding the TMDL topic into the permitting process? Is it to collect additional BMPs for the bay model? Is it to introduce TMDL based management? Operations with fully implemented Ag E&S plans and NMPs should be able to submit the TMDL form once and then be exempt. **(1)**

Response: The U.S. Environmental Protection Agency (EPA) expects that DEP's general and individual permits include provisions that help assure consistency with the assumptions and requirements of TMDLs (including the Chesapeake Bay TMDL). Also see DEP's response to Comment No. 1.

7. **Comment:** Please elaborate and provide specificity as it relates to the use of the word Best Management Practices. What definition of Best Management Practices does this refer to and it is consistent with current PA regulated programs such as Act 38? **(1)**

Response: The term "Best Management Practices (BMPs)" is defined in the PAG-12 General Permit as, "...schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollutant loading to surface waters of the Commonwealth. The term also includes treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. The term includes activities, facilities, measures, planning or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth before, during and after earth disturbance activities." This is the definition of "Best Management Practices" that is identified in 25 Pa. Code Chapter 92a (National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance). Regulations implementing the nutrient management provisions of Act 38 are found at 25 Pa. Code Chapter 83 (State Conservation Commission), Subchapter D (Nutrient Management) and define the term as: *BMP—Best management practice—A practice or combination of practices determined by the Commission to be effective and practicable (given technological, economic and institutional considerations) to manage nutrients to protect surface water and groundwater taking into account applicable nutrient requirements for crop utilization. (25 Pa. Code § 83.201).* Since the PAG-12 General Permit is issued under the authority of Chapter 92a and Pennsylvania's Clean Streams Law, the definition in Chapter 92a applies.

8. **Comment:** Please elaborate and provide specificity on the open-ended statement "additional BMPs may be required" – is the DEP permit reviewer properly trained to stipulate the addition of BMPs in the permit

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application? What protection does the CAFO applicant have to ensure DEP staff does not over reach their authority to request BMPs and what recourse does the CAFO applicant have to challenge said additional BMPs – as case history has demonstrated, when permits are challenged by special interest groups – all correspondence is requested and viewed as case evidence – having DEP staff make unwarranted requests which the CAFO applicant will then challenge, brings additional hurdles to obtaining a CAFO permit. **(1)**

Response: See DEP's response to Comment No. 1. In addition, DEP may require additional BMPs under PAG-12 to protect public health and to protect, maintain and restore water quality if, during the permit term, DEP finds that the CAFO is causing or threatening to cause pollution. In such cases DEP will notify the CAFO that it must take corrective action, which may include additional BMPs and an implementation schedule. DEP will generally not prescribe the type of BMPs that must be implemented as long as the problem is abated. For example, if barnyard runoff is flowing into a surface water and causing pollution, DEP will require that the source of pollution be eliminated rather than prescribe that the runoff be treated or diverted in a certain manner. The permittee could elect to move animals to an alternative location or implement other BMPs to solve the problem. This process has not changed in comparison to previous versions of PAG-12. DEP prefers to work collaboratively with CAFO operators and those that provide technical services to them. DEP's experience is that in most cases all parties are able to come to agreement on pollution problems and corrective actions. In those cases where there are disagreements, DEP management will be consulted. Ultimately if DEP finds that the CAFO is causing or threatening to cause pollution and the CAFO fails to address the problem, DEP could take escalating enforcement action and revoke coverage under the General Permit.

BMP Checklist for TMDL Waters

9. **Comment:** This checklist may not be necessary, and it may not provide the water quality improvements that the agency seeks. **(1)**

Response: See DEP's response to Comment No. 1.

10. **Comment:** The checklist has the potential to be viewed as less than desirable: Farms will work with their trusted plan writer, and have the plan approved through local conservation districts where they have a trusted relationship. Then DEP states that the plans developed & approved through trusted channels are inadequate. Does this break the farmers trust in the current plan development & approval process? Does this undermine Conservation Districts as the point organization for local conservation efforts and place DEP as the lead agency for conservation planning? **(1)**

Response: See DEP's response to Comment No. 1.

11. **Comment:** The BMP Checklist: Determining the TMDL name is very difficult using eMapPA application and DEP's TMDL search website. Provide more detailed instructions on how to determine the TMDL name. **(1)**

Response: See DEP's response to Comment No. 1.

12. **Comment:** The BMP Checklist: Who determines if the proposed BMP alternative is adequate? How does DEP or the CD have enough staff to conduct additional site visits to verify BMPs? **(?)**

Response: See DEP's response to Comment No. 1.

13. **Comment:** The BMP Checklist: What about stormwater management – will all the large retention basins need to be included on the list? **(1)**

Response: See DEP's response to Comment No. 1.

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14. **Comment:** What justification and protocol will DEP adhere to for this determination? Is there a guidance document on this or is it open to the DEP reviewer's interpretation? **(1)**

Response: DEP staff will utilize an RPA spreadsheet and will provide training to staff on the use of the spreadsheet. The spreadsheet will be part of the file DEP will maintain for the NOI and will be available upon request.

15. **Comment:** Production Area Definition: CFR 122.23 provides the following definition of a production area – “Production area means that part of an AFO that includes the animal confinement areas, the manure storage area, the raw materials storage areas, and the waste confinement areas. The animal confinement area includes, but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways and stables.”

Understanding that the “not limited to” phrase allows expansion of this definition, pastures as a whole are an over-reach. Certainly, DEP wants to regulate earthen or unmodified Animal Concentration Areas (ACAs) and Animal Heavy Use Areas (AHUAs), as well as any pasture that is mis-managed. These areas fall into the “open lots, feedlots, cowyards and barnyards” categories. However, not all pastures have an overgrazing/mis-use resource concern, and not all pastures fit this definition.

The BMP Quick Reference Guide, in Sheet A-8: Pasture and Grazing Management Practices, calls a few things that can be used to determine what CAFO operations need to include pastures in the production area. Any operation implementing a prescribed grazing plan to maintain at least 60% vegetative cover should not be required to include pastures in the production area, as these areas would not be resource concerns or deemed mis-used pasture.

These types of prescribed grazing plans would be outlined in the operation's Ag E&S Plan or Soil Conservation Plan following guidance presented in NRCS Practice Standard 528 Prescribed Grazing. These plans outline the number of animals supported in the system, as well as the number of days on pasture – both numbers are verifiable by DEP staff and Conservation District partners. Training, by NRCS or comparable staff, on developing grazing plans and interpreting grazing plans would be necessary for plan writers and DEP/Conservation District agency reviewers to successfully address this resource concern. **(1)**

Response: See DEP's response to Comment No. 1. Also, the RPA spreadsheet does not consider pasture management practices.

16. **Comment:** “Infeasible” – This term will open DEP staff to subjective interpretations and arguments, leading to conflict & mistrust with farms. Successful regulation should be based on trust. Synonyms for infeasible include “absurd”, “futile”, “hopeless”, “useless”, as well as “impractical” and “unworkable”. Understanding that this column is included to provide applicants with a way to convey to DEP that, while a practice could be implemented on the farm, it is not necessary to address a resource concern. Even softer synonyms like “unworkable” or “impractical” may not be fitting substitutes for “infeasible”. Is there also a legal concern with this terminology? If subject to a right-to-know request, would the farm or agency have difficulty explaining “infeasible”? **(1)**

Response: See DEP's response to Comment No. 1.

17. **Comment:** Buffer BMP options – There are no areas in the BMP Quick Reference Guide that provides information on buffers within the production area, unless pastures are included in that definition. The BMP Quick Reference Guide, section A-13, presents pasture buffer options. According to the first paragraph in section A-13, all buffer options for pastures require fencing to exclude animals. The following buffer options could be removed – “grass buffers”, “grass buffers – narrow”, “riparian forest buffers”, and “riparian forest buffers – narrow”.

Additionally, section A-13 of the Quick Reference Guide seems only eligible for “converted pasture”, as stated in the first sentence of “Specifications or Key Qualifying Conditions”. Does that affect the use of these practices on existing or established pastures? **(1)**

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Response: See DEP's response to Comment No. 1.

18. **Comment:** Dairy Precision Feeding – While the benefits of this practice are widely accepted, there is a lot of liability for an operation checking “current implementation” on this practice. Yes, they may work with a nutritionist, but does that nutritionist provide a report, at the needed frequency (monthly, quarterly, annually), and with enough information to allow DEP to verify the practice? Who within DEP will become certified to verify this practice based on the information provided? How long is a Precision Feeding Plan good for? Feedstocks change annually, and variability within the feedstock changes almost daily.

Is DEP requiring precision feeding plans for operations checking “currently implemented” to be provided in an annual report so annual verification of the practice can be done? If DEP issues a permit without verifying the Dairy Precision Feeding BMP is met, and does not annually review the feeding plan, does the agency hold liability it cannot defend itself on? What template for precision feeding should be used? **(1)**

Response: See DEP's response to Comment No. 1.

19. **Comment:** The addition of the “TMDL Checklist” is duplicative, needlessly isolates operations in the Chesapeake Bay watershed by creating a separate checkoff for those entities, and raises questions about its workability. The checklist is to be completed by applicants that “are or will be located in a within a watershed covered by an EPA-approved TMDL” where “one or more sources of that water’s impairment is considered to be agriculture.”

Farm Bureau has several concerns regarding the TMDL Checklist. First, how would an applicant determine if his operation “will be located” in a TMDL watershed? It would seem impossible to make that determination with any certainty unless a TMDL is already in the process of being imposed, because it is unlikely that an applicant would be able to expend the time and other resources necessary to assess the potential need for a future TMDL not contemplated at the time of the applicant’s seeking a new or reissued PAG-12 permit. Likewise, we are concerned that a requirement to list BMPs that may be added in the future could result in an applicant being forced to install BMPs that are no longer feasible or even necessary, given changing future conditions.

Furthermore, the draft PAG-12 includes language stating that “No condition of this general permit releases the permittee from responsibilities or requirements under any other federal or Pennsylvania state or local statute, regulation, or ordinance”—implying that permittees in TMDL watersheds are already expected to comply with the provisions of any EPA-approved TMDL. **(2)**

Response: See DEP's response to Comment No. 1.

20. **Comment:** It is our understanding Pennsylvania is the first bay state to renew the PAG-12 in accordance with the EPA stipulation to address TMDL’s. It is also our understanding the other bay states will also address TMDL’s when their state’s PAG-12 is up for renewal. With that in mind, we respectfully ask DEP to document the methodology, the internal collaboration with permit holders and interested individuals as well as the justification of levying the TMDL expectations onto the permit holder. **(1)**

Response: This documentation is contained in DEP’s PAG-12 Fact Sheet (3800-PM-BCW0032e).

21. **Comment:** Will a detailed, in-depth training be provided to DEP Regional Staff as well as Conservation Districts to ensure interpretation of the permit is consistent across the Commonwealth? When will this training occur? It has been our experience individual interpretation of the permit and the implied meaning is often construed based on that individuals experience. **(1)**

Response: Yes, DEP’s Central Office will provide training for staff on the PAG-12 General Permit prior to the effective date of the General Permit.

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22. **Comment:** We ask for DEP to outline the guidance and training which will be provided to all DEP permit reviewers and inspectors as it relates to the TMDL expectations. What standard operating procedures has/will DEP adhere to therefore, ensuring all PAG -12 permit implementation are held to the same standard and paper reviews as well as onsite reviews will be interpreted in the same manner regardless of the county and/or DEP regional office and will not be subject to individual DEP staff bias. **(1)**

Response: The training referred to in the response to Comment No. 21 will also include training on the Standard Operating Procedure (SOP) for PAG-12 NOI Reviews, available on DEP's [Office of Program Integration website](#).

23. **Comment:** Has DEP approached the State Conservation Commission about modifying the Act 38 template to include more CAFO pertinent information, or requiring more pasture management information in Ag E&S Plan requirements? The Act 38 template already includes an "Additional CAFO Requirements" to address specific DEP CAFO concerns. Many items in this checklist can be included in Appendix 6 & 7, or in the "Additional CAFO requirements" in the Act 38 plan. A modification to the pasture section of the Ag E&S template would also accomplish the need to address mis-managed pastures on all PA Farms, not just CAFO operations. **(1)**

Response: Thank you for the suggestion. DEP will be discussing this possibility with the State Conservation Commission.

24. **Comment:** In our view, in its review and revision of the PAG-12 permit, the Department should be guided by the recognition that a CAFO permit is not intended to function as a nutrient management plan. Conservation districts review nutrient management plans to ensure that they are correct; this is not properly a DEP or EPA function. The permit should be focused on covering the CAFO facility itself, not on how nutrients are managed or manure is delivered, as other mechanisms already exist to govern those activities. **(2)**

Response: An NMP is a requirement of an application or NOI for NPDES permit coverage for a CAFO, and when DEP authorizes coverage for the CAFO owner or operator under the PAG-12 General Permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO (see 40 CFR §§ 122.21(i)(1)(x) and 122.23(h)). DEP relies on conservation districts and the State Conservation Commission to review and approve NMPs, but when DEP approves permit coverage for a CAFO, DEP is also approving the CAFO's NMP.

25. **Comment:** Farm Bureau urges the Department to be mindful of increasing the time and cost burden on applicants to complete the PAG-12 permitting process. Additional requirements, whether they be direct obligations or actions required by reference, make the PAG-12 less and less of a "farmer-obtainable" permit, given the technical expertise necessary to complete many of its requirements. The number and type of supporting documents that DEP is expecting current CAFO operators to file with their completed NOI forms would also be expanding at a time during which Pennsylvania farmers—in all sectors of the agricultural economy—are expending growing amounts of ever-scarcer resources just to remain in business. **(2)**

Response: DEP acknowledges the comment.

26. **Comment:** It is also important to note in closing that the economic, environmental, and other benefits of agriculture, including those provided by CAFOs, are realized by every Pennsylvanian, not just the PAG-12 permittee. Therefore, we also respectfully suggest that the bulk of the costs associated with issuing and administering the PAG-12 permit should not be borne by the permittee through fees, but funded instead as part of the Department's annual operating budget. **(2)**

Response: The collection of fees from CAFOs provides less than half of DEP's costs to administer the NPDES CAFO program (permitting, compliance monitoring, surface water assessments, etc.). The remainder is paid for utilizing EPA grants and DEP's general operating fund.

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27. **Comment:** Has DEP given any consideration, within their authority, to requesting EPA consider an extension of the current PAG-12 (slated to expire in March 2023) to ensure Pennsylvania can draft a proper PAG-12 to address the TMDL inclusion which could then serve as template for the other bay states to use. If yes, what specifically has been discussed. If not, why? An action of this nature, would ensure continuity of business across the bay states as it relates to permit conditions. In addition, if Pennsylvania DEP took the lead to ensure the permit meets the statutory obligations as well as has support from the majority of the permit holders – this would elevate Pennsylvania as a problem solver and would truly be an action of ‘good government’. **(1)**

Response: DEP extended the PAG-12 General Permit for one year, until March 31, 2024, as announced in the *Pennsylvania Bulletin* on December 17, 2022 [52 Pa.B. 7786].

28. **Comment:** Pennsylvania, as other stakeholders have noted, will be the first Chesapeake Bay state to renew its PAG-12 in the context of EPA’s direction that a “connection” be demonstrated between the permit and any applicable TMDL. Given this direction, as well as the expectation that the other Bay jurisdictions will need to do the same in renewing their CAFO permits and the potential for Pennsylvania’s efforts to serve as a model for the rest of the watershed, we would ask whether or not the Department has considered, within its authority, requesting that EPA consider granting an extension of the current PAG-12 so as to ensure that the best possible product result from this process? Doing so would help to ensure continuity of business across the Bay states in terms of permit conditions and expedite the updates that will be necessary in the other jurisdictions. **(2)**

Response: See DEP’s response to Comment No. 27.

29. **Comment:** CBF commends the Department of Environmental Protection (Department) for working to improve its NPDES CAFO program. In addition, we applaud the agricultural producers who have adopted conservation practices to improve water quality, while enhancing the profitability of agriculture. CBF has made a strong commitment to finding solutions to water quality problems and simultaneously assisting farmers to attain well-managed farmland through implementation of riparian buffers, improved soil health, and other conservation practices. **(3)**

Response: DEP acknowledges the comment.

30. **Comment:** Greater focus on meeting Total Maximum Daily Load – CBF welcomes the greater focus on CAFOs operating in watersheds with a Total Maximum Daily Load (TMDL) with an agricultural source of impairment. The Clean Water Act has required that permits be consistent with TMDLs for many years, so we are pleased to see this finally incorporated into the PAG-12 NPDES General Permit. This will help ensure that Pennsylvania achieves water quality improvements throughout Pennsylvania and meets the Commonwealth’s Chesapeake Bay goals. **(3)**

Response: DEP will not require completion of the BMP Checklist for TMDL Waters with PAG-12 NOIs, but will consider the potential for CAFOs to cause or contribute to impairments through the use of its RPA spreadsheet.

31. **Comment:** DEP should examine the conservation measures documented in CAFOs’ BMP Checklist for TMDL Waters, Nutrient Management Plans, and Erosion and Sediment Control plans, and determine if the PAG-12 NPDES General Permitting process needs revisions to meet the necessary reductions to the Waste Load Allocations under the Chesapeake Bay Watershed Improvement Plan. **(3)**

Response: See DEP’s response to Comment No. 1.

32. **Comment:** The BMP Checklist for TMDL Waters in the Notice of Intent (NOI) must encompass all areas covered under Nutrient Management Plans and Erosion and Sediment Control Plans, not just the barns, manure storages, milking parlors, or other components of the headquarters. Pastures, crop fields, and other areas must not be excluded as they are integral to livestock production, especially because these areas receive manure,

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whether through mechanical application or direct deposit by livestock. Thus, the entire area included in these plans must be considered part of the CAFO “production area.” (3)

Response: See DEP’s response to Comment No. 1.

33. **Comment:** The BMP checklist should include practices that will improve soil health (such as cover crops, conservation tillage, prescribed grazing), as they are priorities under the Chesapeake Bay Phase 3 Watershed Implementation Plan. If operations don’t use prescribed grazing but have pastured livestock, there must be careful verification that the NMP and E&S Plan requirements, especially for vegetative cover, are met for the pastures, and they do not include Animal Concentration Areas. (3)

Response: See DEP’s response to Comment No. 1.

34. **Comment:** The process for determining whether the status of a BMP in the TMDL checklist is “current implementation,” “future implementation,” or “infeasible” is vague. Will someone assess the BMPs and ensure that they are meeting any standards? For example, while most CAFOs with dairy cattle are likely utilizing a form of “dairy precision feeding,” it is difficult to understand how that will be verified beyond checking a box on the BMP Checklist for TMDL Waters. CAFO operators and Conservation District and Department staff will need more guidance on whether this is being implemented. It is unclear whether Milk Urea Nitrogen, feed, forage, and/or manure testing are required and at what frequency, and whether a nutritionist’s plan for rations for each livestock group is needed. (3)

Response: See DEP’s response to Comment No. 1.

35. **Comment:** The Department should clarify how and when it will determine whether a BMP is “infeasible,” since this interpretation could be very subjective. This determination should also be made before a permit is granted, rather than at some unspecified time in the future. Our concern is that this process needs to be transparent and workable for operations, rather than creating antagonism and frustration with the CAFO program if additional BMPs could be required at any future date. We also request that DEP provide guidance and training to all DEP and Conservation District permit reviewers and inspectors for these expectations of meeting the TMDL goals, so all PAG -12 permit holders meet water quality goals without bias. (3)

Response: See DEP’s response to Comment No. 1.

36. **Comment:** The Department should verify that all BMPs listed on the checklist or as alternatives on the back of the checklist, as well as those in the Nutrient Management Plans and Erosion and Sediment Control plans, are entered into the Bay Program Model to ensure that Pennsylvania’s CAFO nutrient and sediment reductions are tracked as accurately as possible. (3)

Response: See DEP’s response to Comment No. 1.

37. **Comment:** Review of Cumulative Impacts – CBF applauds the Department’s requirement of individual permits from “operations that, individually or in combination with other similar operations, are or have the potential to be a contributor of pollution, as defined in the Pennsylvania Clean Streams Law.” Pursuant to 25 Pa. Code § 92a.54(7) a general permit can only be issued if the point sources “individually and cumulatively do not have the potential to cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) or cause significant adverse environmental impact.”

Additional nutrient loads need to be considered carefully, especially in watersheds already impaired by excessive nutrients. Simply requiring that each new or expanding operation meet permit requirements is inadequate for preventing additional nutrient loads in areas where there already is an excess.

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However, we cannot find details on how the Department determines which operations' impacts, in conjunction with other discharges into the same waterbody segment, meet this threshold. The Department should define a clear process to review each new or expanding CAFO to determine if the cumulative impacts of that operation with others could contribute to pollution. **(3)**

Response: DEP acknowledges the comment and will plan to include considerations for new and expanding CAFOs into its SOP for the review of PAG-12 NOIs.

38. **Comment:** Require Individual Permit Coverage in Impaired Watersheds – Operations with discharges to Exceptional Value and High Quality watersheds are ineligible for a General Permit and must obtain an Individual Permit to provide an increased level of oversight. In addition, CBF recommends that Individual Permits also be required in watersheds with documented water quality impairments or risks caused by excessive nutrients where the General Permit may not address specific environmental concerns. Correction of these impairments requires a higher level of scrutiny that an Individual Permit could provide. Thus, the eligibility criteria for the PAG-12 must be revised to exclude CAFOs in watersheds designated as impaired by nutrients on the Section 303(d) list of impaired waters under the federal Clean Water Act. **(3)**

Response: Exclusion of dischargers from a general permit where discharges are to impaired waters is not a state or federal requirement. However, DEP is taking an additional step for CAFOs in impaired watersheds by evaluating a CAFO's potential for causing or contributing to the impairment.

39. **Comment:** Permits on operations with discharges – CBF appreciates the requirement of a permit from “any agricultural operation defined as a Medium CAFO under 40 CFR § 122.23(b)(6)(i) or as a Small CAFO under 40 CFR § 122.23(b)(9) that discharges pollutants to surface waters as described in 40 CFR § 122.23(b)(6)(ii),” and we hope that DEP will develop a process to identify these smaller operations with discharges, regardless of whether they meet the number or density thresholds for CAFO permit coverage. CBF recommends that livestock operations of any size with discharges should be covered by an Individual Permit rather than a General Permit.

CBF is concerned that there may be significant variation among Department and Conservation District staff in determining whether a farm has a discharge. CBF proposes that guidance be provided to staff that a discharge include, at a minimum, any source of pollution, including but not limited to the following:

(1) Manure, or water contaminated with manure, nutrients, silage leachate or waste water or wash water leaving the animal production area (animal confinement facility, manure storage and animal concentration areas) and discharging into surface water or groundwater.

(2) The uncontrolled flow of stormwater from manure storage facilities, temporary manure stacking areas and animal concentration areas unless the storm exceeds the 25-year/24-hour storm level.

(3) Overflowing, leaking manure storage facilities.

(4) Permanent or intermittent stream within an Animal Concentration Area without practices to control nutrient loss, such as a fenced vegetated barrier.

(5) Concentrated water flow areas in animal production areas (pipes, ditches, waterways, gullies and swales) that transport waste water, wash water, or water contaminated with manure, silage leachate or other nutrients to a permanent or intermittent stream.

The Pennsylvania Clean Streams Law prohibits a broader range of discharges resulting in pollution than the federal definition. See 35 P.S. §§ 691.1, .401 and .402 and 40 CFR § 122.23(b)(6)(ii). All operations with a discharge resulting in the broad definition of pollution are in violation of the Clean Streams Law and should be required to obtain an Individual Permit, to provide a higher level of assurance that these discharges will be eliminated. See 35 P.S. §§ 691.1, .401 and .402. Thus, requiring an Individual Permit in all cases of discharge would better serve as an incentive to these farms to quickly correct the problems leading to the discharge, to avoid needing an Individual Permit later.

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Ideally, the requirement for permit coverage would serve as a tool to encourage these operations to resolve problems and remediate these discharges to avoid the permitting process. However, clarity will be needed to ensure that the Department will actually identify these operations and require them to correct the discharge, with greater surveillance provided by the CAFO program. **(3)**

Response: DEP conducts non-CAFO farm inspections within the Chesapeake Bay watershed, and when discharges are identified they are corrected through an enforcement mechanism rather than through a permit. Issuance of a permit to such operations implies that discharges are acceptable, which they are not. For CAFOs operating under PAG-12, if discharges are identified the operator is provided an opportunity to make corrections; failure to do so would result in the requirement to apply for and obtain an individual permit.

40. **Comment:** Prohibit Winter Application Except in Emergencies – The draft General Permit provides inadequate water quality protections during the winter, when land application of manure has serious pollution risks without a growing crop to utilize these nutrients. While CBF recognizes that prohibiting winter manure application on all livestock operations would be extremely difficult without massive public investment in manure storage, CAFOs should have adequate manure storage capacity to preclude the need for land application in winter.

Winter application by CAFOs should only be permitted during an emergency and with Department approval. Many other states, also in cold climates, have proven that tighter restrictions on winter manure application are feasible, for CAFOs and other livestock operations. For example:

- Vermont has restricted winter application of manure by all farms between December 15 and April 1 unless the Secretary grants an exemption because of an emergency situation, such as structural failure of a waste storage facility, since 1995.
- Maine bans manure spreading by all farms from December 1 through March 15, unless there is a variance from the Commissioner for the Department of Agriculture, Food, and Rural Resources.
- Maryland prohibits field application of manure and other organic nutrient sources from December 16 through March 1 or when fields are no longer saturated, frozen or snow-covered. CAFOs were first prohibited from winter manure application, while smaller operations had several additional years to adapt their management to eliminate winter application.
- Delaware prohibits manure application between December 7 and February 15, and on snow-covered or frozen ground.
- Michigan CAFOs are banned from manure application in January, February and March, unless there are less than two inches of frost or four inches of snow, low tested levels of soil phosphorus, and immediate injection or incorporation into the soil.

CBF agrees that Nutrient Management Plans should define in advance which fields would receive manure in case of such emergency. **(3)**

Response: DEP is relying upon the winter manure application restrictions contained in 25 Pa. Code Chapter 83.

41. **Comment:** Manure Application in Adverse Weather – CAFOs need to avoid manure application in times of heavy rain, saturated soils, and other adverse weather conditions, not simply document the weather 24 hours prior to and following application, as required in the draft General Permit. The permit should be clarified to express this more clearly to prevent manure application on saturated soils or under adverse weather conditions, or when adverse weather is predicted by the National Weather Service. For example, New York does not allow manure application within 48 hours of a predicted rainfall, snowmelt, or other runoff conditions. **(3)**

Response: DEP believes that it would be necessary to promulgate a regulation to implement restrictions similar to those referenced in the comment.

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42. **Comment:** Inadequate Effluent Limits – CBF is concerned about the inconsistent and inadequate effluent limits. All new and expanding operations, not limited to those with swine, poultry or veal, should be designed, constructed, operated, and maintained to contain all manure and wastewater in a 100-year/24-hour storm. The weaker 25-year/24-hour storm criteria should not apply to operations with other species, such as horses, sheep, cattle, and ducks.

Climate change will likely lead to more frequent and more intense storm events, exceeding the predictions used to determine current standards for effluent limits. Therefore, all new and expanding farms should be designed to contain all discharges and prevent runoff in a 100-year/24-hour storm at a minimum. **(3)**

Response: DEP's regulations at 25 Pa. Code § 91.36(a) only require new or expanded CAFOs that commenced operations after April 13, 2003 and include swine, poultry or veal calves to prevent discharges from manure storage facilities to surface waters during a storm event up to and including the 100-year/24-hour storm.

43. **Comment:** Increase Staff – CBF is especially concerned about the limited staff and resources for permit review and enforcement, necessary to ensure that farms are adequately following permit requirements, and to verify that farms in TMDL watersheds are using the appropriate BMPs to meet water quality goals. More importantly, sufficient, qualified staff is needed to ensure that all farms requiring permits, especially those that discharge pollutants to surface waters, are brought under the oversight of the CAFO program in a timely manner. **(3)**

Response: DEP acknowledges the comment.

44. **Comment:** The Pennsylvania Department of Environmental Protection (DEP) is authorized to administer the federal National Pollutant Discharge Elimination System permitting program for CAFOs. In doing so, it must comply with federal law. See 40 C.F.R. § 123.25 (applying a list of federal permitting regulations to state programs). Under 40 C.F.R. § 122.42(e), any permit a state issues to a CAFO, like the PAG-12, "must include a requirement to implement a nutrient management plan [NMP] that, at a minimum, contains best management practices necessary" to ensure that the NMP does nine specific things. 40 C.F.R. § 122.42(e)(1)(i-ix) (emphasis added). These nine things include that "[t]he nutrient management plan must, to the extent applicable: ... [p]revent direct contact of confined animals with waters of the United States." 40 C.F.R. § 122.42(e)(1)(iv).

Under 40 C.F.R. § 122.42(e)(1), it is not enough, as the draft PAG-12 does, to simply state that "[t]he permittee shall implement a site-specific [NMP] for the land application of manure that is approved by the State Conservation Commission or delegated county conservation district and meets the requirements of 25 Pa. Code Chapter 83, Subchapter D and 40 C.F.R. 122.42(e)(1)(i-ix)." Draft PAG-12 at 20. Rather, any CAFO permit must require that NMPs include specific BMPs to ensure that the NMP actually does prevent direct contact of confined animals with waters of the United States. This would include BMPs to ensure that the farm is preventing confined animals from standing in, crossing, or drinking waters of the United States. EPA notes this in its CAFO Permit Writers Manual:

BMPs must be in place to prevent the direct contact of animals confined or stabled at the facility with waters of the U.S. in the production area. The NMP must describe how the operator will prevent animals in the production area from coming into direct contact with waters of the U.S., including standing in, crossing, or drinking from such waters.

EPA, *CAFO Permit Writers Manual*, at 5.6 (emphasis added).

A broad permit term stating that animals confined in the CAFO must not come into direct contact with waters of the United States combined with site-specific BMPs could satisfy 40 C.F.R. § 122.42(e)(1). For example, if fencing is the BMP, the practice, its location and any necessary operation and maintenance for the fencing could be included as a permit term. *CAFO Permit Writers Manual* at 5.6.1; see also Natural Resources Conservation Service Practices 382 (standard fence) and 472 (standard access control). We request that Pennsylvania modify the PAG-12 to include such a broad permit term and require specific BMPs to ensure that NMPs do in fact prevent direct contact of confined animals with waters of the United States. As written, the draft PAG-12 fails to require the BMPs needed to ensure that NMPs will in fact prevent direct contact of confined animals with waters

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of the United States - and thus fails to comply with 40 C.F.R. § 122.42(e)(1). DEP must amend the draft permit to comply with federal permitting regulations. **(4)**

Response: NMPs must satisfy 25 Pa. Code § 83.311(c), relating to animal concentration areas (ACAs). This regulation requires, among other things, that access to surface water in ACAs be limited to properly installed stream crossings. DEP believes that the implementation of this regulation satisfies the federal regulation at 40 CFR § 122.42(e)(1)(iv).