

**RESPONSE TO COMMENTS  
FINAL PERMITTING DECISION  
ARG590000**

The following are responses to comments received regarding the draft general permit ARG590000, Concentrated Animal Feeding Operations (hereinafter “CAFO”) and are developed in accordance with regulations promulgated at 40 C.F.R. § 124.17 and APCEC Regulation No. 8, Administrative Procedures.

**Introduction**

The CAFO general permit was submitted for public comment on February 11, 2011. The public comment period ended on March 11, 2011. The Arkansas Department of Environmental Quality (hereinafter “ADEQ”) conducted six (6) public meetings and hearings on the proposed CAFO general permit. Based on the decision of the Fifth Circuit Court decision in *National Pork Producers, et al. v. United States Environmental Protection Agency*, 635 F.3d 738 (2011), the ADEQ decided that the draft permit should be modified to remove the phrase “or proposes discharge” throughout the permit. A second draft general permit was submitted for public comment on April 18, 2011. No public comments were received on second public notice.

This document contains a summary of the comments that the ADEQ received during both public comment periods. A summary of the changes can be found on the last page of this document. There were several similar issues raised throughout the comments; those are grouped together, with one response from the ADEQ.

The following people or organizations sent comments to the ADEQ during the public notice and public hearing. A total of eighty-seven (87) comments were raised by thirteen (13) separate commenters.

Commenter	# of comments raised
1. Butterball, LLC	18
2. Beaver Water District (BWD)	11
3. The Arkansas Farm Bureau Federation	8
4. Natural Resources Conservation Service (NRCS)	5
5. Terracon Consultants, Inc.	23
6. Tyson Foods (Tyson)	29
7. Vince Chadick	6
8. Bob Shofner (Public Hearing)	1
9. Lisa Widner	2
10. Bruce T. Jackson	1
11. Merle Gross	2
12. Don Mason, Gene Pharr	1

**Comment 1** The term “facility” is confusing the family farms involved in turkey production in the state of Arkansas. Family farmers working with Butterball to raise turkeys do not consider their farms “facilities”. Terms such as “facilities” and “factories” have a negative connotation for many of our farmers and thus should be removed from permit language. Family farms that have been owned and operated by over six generations of family members find offensive the term “facilities.” Butterball, LLC recommends the term facility be replaced with the term farm. (emphasis in original) As we understand it, it is the farm that is actually considered for a permit, rather than a “facility” or “factory.”

**Response:** The Department acknowledges this comment and understands the position of the commenter; however, the term “facility” will remain in the final permit because it is a defined term within the federal regulations that govern this permit. This general permit is issued in accordance with 40 C.F.R. § 122.23, a regulation for the control of wastewater discharges from CAFOs under the National Pollutant Discharge System (hereinafter “NPDES”) permitting program. The term “facility” is used throughout the NPDES regulation and permits issued under those regulations. “Facility” is defined as, “any NPDES ‘point source’ or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.” See 40 C.F.R. § 122.2. Thus, facility applies to all types of activities that are point sources and must apply for an NPDES permit. This definition does not reflect on the nature of the agricultural activities on site.

**Comment 2** [T]he Draft is confusing with regards to terms such as “waste” and disposal.” [Draft] ARG59000 is not consistent with legal definitions found in Resource Conservation and Recovery Act (RCRA) which defines “waste” as something no longer useful while “disposal” does not apply to something recognized under federal regulation for land application and thus litter or manure management. It is well recognized that the use of litter and manure as organic fertilizer or as a soil conditioner is “useful.” The fact is, there are land application regulations that allow the use of litter and manure and thus defining it as no longer useful is not consistent. Butterball, LLC recommends that any reference to litter and manure as waste should be eliminated. (emphasis in original)

**Response:** The Department acknowledges this comment but notes that this general permit was issued solely under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Arkansas Water and Air Pollution Control Act, Ark. Code Ann., § 8-4-101 *et seq.*, not RCRA. Specifically, as stated above, this general permit is issued in accordance with 40 C.F.R. § 122.23, a regulation for the control of wastewater discharges from CAFOs under the National Pollutant Discharge System (hereinafter “NPDES”) permitting program. Any time the term “waste” is used in the permit it is

in the context of and under the authority of the Clean Water Act and the Arkansas Water and Air Pollution Control Act, not RCRA.

**Comment 3** The term “disposal” should be removed from the draft Permit. “Disposal” of litter and manure for land application is a management tool of a beneficial resource and thus is not disposal of waste. All uses of “disposal” to describe the management of manure and / or litter be deleted and the word “utilization” should be inserted.

**Response:** The Department understands that land application of litter or manure may be an effective management tool and this permit clearly provides for proper land application of litter and manure. However, this permit was drafted in accordance with 40 C.F.R. §§ 122.23 and 412 and those regulations use the term “disposal.” The term “disposal” will remain in the permit in the same context as it is used in the federal regulations.

**Comment 4** Clarification of "discharge" to exclude already exempt events is also needed. The major area of ambiguity of the draft Permit is found in the basic interpretation of exactly what farms should apply for this permit. Clearly define those that need to select coverage under the permit eliminating what has already been recognized as agricultural exempt under correct Acts. Dry litter farms do not "discharge or propose to discharge" as a normal part of operations. The Draft Permit outlines feathers, dust, and incidental amounts of litter spread through ventilation fans mixed with stormwater as "discharge or to propose to discharge." These should be considered Clean Water Act exempted agricultural storm water and NOT "discharging or proposing to discharge". The Draft Permit should follow this precedence and clarify this exemption under normal farm operations.

**Response:** The determination of “discharge of a pollutant” is determined on a site-specific basis, depending on whether or not pollutants are entering the waterbody. Pursuant to 40 C.F.R. § 122.2, “discharge” means “the ‘discharge of pollutant.’” According to that same section, “discharge of a pollutant” means “any addition of any ‘pollutant’ or combination of pollutants to ‘waters of the United States’ from any ‘point source.’” See Comment 37 for more information regarding what is a “pollutant.” To provide some clarification, the definition of discharge has been added to Part 10.14 of the permit.

Additionally, the Department creates a flow chart so the facility could easily find out if a permit is required or not. Please note that use of the chart in no way guarantees satisfactory operation of the tools and techniques proposed in the permit. The facility is responsible for reading the permit in detail and ensuring that water quality standards are not violated.

The Department disagrees that the agricultural stormwater provision would exclude all of the runoff from a CAFO. Under the final rule, any CAFO that discharges is required to seek permit coverage. This means that the evaluation of whether the CAFO discharges is based on a factual objective assessment. EPA is clarifying in the rule that discharges of manure, litter, or process wastewaters from the land application areas of a CAFO are agricultural stormwater discharges, where the manure or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater. Such practices, as specified in 122.42(e)(1)(vi)–(ix) must be included in all CAFO permits.

**Comment 5** Under Section 1.4, it is not technically defined as to whether the presence of a Concentrated Animal Feeding Operations in a watershed of a 303(d) listed stream is required to follow provisions under Sections 1.4.1-1.4.13 as related to documentation on qualifications under a discharge and “water quality impaired water” and if the discharge that is of concern is related to production area, land application or both. Farms provided templates or forms for development and submission for requirements under Sections 1.1.4.1-1.4.1.3. We encourage ADEQ to provide more detailed information on determination for:

- i. Farms that “discharge to water quality impaired water”,
- ii. Farms located within a watershed of a 303(d)
- iii. Farms with requirements related to production area, land application area or both
- iv. Farms provided templates or forms for development and submission for requirements under Sections 1.1.4.1-1.4.1.3.

**Response:** Part 1.4 lists several separate limitations on coverage under the general permit. The limitation to coverage based on a discharge to the impaired stream is distinct from the other limitations found in Parts 1.4.1-1.4.3. More than one of those limitations may apply to a particular CAFO.

Discharge to an impaired stream that is listed on the 303(d) list does not automatically exclude the facility from coverage under the general permit. The operator may show compliance with Parts 1.4.5.1-1.4.5.3., in order to obtain coverage under the general permit. The 303(d) list could be found on the ADEQ web site at the following address under Reports & Publications: [http://www.adeq.state.ar.us/water/reports\\_data.htm](http://www.adeq.state.ar.us/water/reports_data.htm)

**Comment 6** Section 1.5.1.2 outlines the need for a nutrient management plan (NMP). This is redundant considering for the past five years, farms have NMPs in place that have proven effective. These plans were developed and

implemented based on Arkansas Natural Resource Commission regulations using the Arkansas Phosphorus Index. Development of these plans required intense work and required numerous resources to ensure farms and users of litter work under a NMP. Past history of compliance with the NMP and the current economic situation re-enforce the need for the Permit to recognize these programs and not require any additional resources be used to develop new plans.

**Response:** The Department acknowledges this comment and the fact that many facilities may have submitted NMPs in past years under other regulatory programs. However, the submittal of NMPs for coverage under this general permit is required under 40 CFR §§ 122.23(h) and 122.42(e)(1). An operator may submit an existing NMP with the Notice of Intent (hereinafter “NOI”), as long as the existing NMP meets the requirements of the federal regulations.

**Comment 7** As to ADEQ Form 1, Section 1.5.1.5 should be limited specifically for new liquid manure and expressly clarify that this section is not applicable to dry litter manure.

**Response:** As stated above, and throughout these responses, this general permit is issued in accordance with 40 C.F.R. § 122.23, a regulation for the control of wastewater discharges from CAFOs under the National Pollutant Discharge System (hereinafter “NPDES”) permitting program. 40 C.F.R. § 122.23 applies to both liquid and dry litter manure. Dry litter manure is not excluded from this regulation; for example, 40 C.F.R. § 122.23(b)(4)(x) – (xii) discusses the number of animals required to meet the definition of “large CAFO” if the facility “uses other than a liquid manure handling system.”

**Comment 8** Section 2.3.1 outlining that “all discharges shall be sampled and analyzed” should be reworded. Discharge is not part of the draft Permit definitions and it is our strong belief that sampling related to waters of the state is again a waste of resources. We support clarifying the “all discharges” so that it is “all discharges to waters of the state.”

**Response:** The Department will modify Part 2.3.1 to state, “All discharges to waters of the State shall be sampled and analyzed for the following parameters....”

**Comment 9** Another area that could be considered burdensome, but can be easily addressed through a simple wording change is in Section 3.2.4 “manure, litter and process wastewater” Turkey litter found on farms is dry litter with manure and bedding making up the litter. It would be difficult and time consuming for farmers to determine the amount of bedding versus manure. This distinction is really not necessary and this section can be

reworded with a simple “or” instead of “and” when stating manure, litter and process wastewater.”

**Response:** The Department cannot agree to this change because it may have unintended consequences beyond turkey production facilities. As is stated throughout these responses, this general permit applies to both dry and liquid manure systems. There may be other facilities where some combination of manure, litter, and process wastewater is present. Inserting the term “or” would require the facility to report only one and this might not be protective of the waters of the State. However, note that the requirements of Parts 3.2.4.2 and 3.2.4.3 only require an “estimate” of the amount of total manure, litter and process wastewater.

**Comment 10** The draft Permit’s reporting requirements are not clear. For example, in Section 3.2.4, there is reference to “previous 12 months.” Is this to be interpreted as a calendar year, the past 365 days, or another designated 12 month period? Likewise, under Section 3.2.4.1, it is unclear as to when and how to determine maximum number of animal units. In this regard, we encourage the Department to consider being more specific in relationship to poultry with dry litter, the timeframe of reporting and to follow the CAFU [CAFO] federal definition, 55,000 AU. Also as part of the reporting under Section 3.2.4.2, a CAFO is to “estimate the amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months.” This requirement should not apply to dry litter turkey farms as it would be wasteful.

**Response:** The following statement was added to Part 3.2.4 for clarification of “previous 12 months:”

All reports are due by the 31st day of January each year for the previous January – December reporting period (i.e. January 31, 2012 for Year 2011). The first report may include less than 12 months of information.

In Part 3.2.4.1, the total number and type of animals fed or maintained on the lot or facility for a total of 45 days or more out of any 12-month period must be reported for the previous January - December reporting period (i.e. January 31, 2012 for Year 2011). Additionally, term of “animal units” no longer uses the to define size classes in the federal regulations. In the 2003 CAFO Rule, EPA set thresholds by specifying the actual number of animals. See 68 FR 7176 (Feb. 12, 2003) and 40 CFR 122.23(b)(4) and (6).

As stated above, this general permit is issued in accordance with federal CAFO regulations and applies to all types of facilities, including dry litter turkey production.

**Comment 11** We respectfully submit that the provisions of Sections 3.2.4.2 and 3.2.4.4 dealing estimating “total manure, litter and process wastewater generated by the CAFO in the previous 12 months” provides no benefit to the intent of the draft Permit. The amount generated is not relevant in connection with a permit, it is the amount actually applied to the land. Litter storage, litter still in use in turkey barns is not land applied litter and such amounts should be reported.

**Response:** The amount generated is relevant to the intent of the general permit because litter or manure generated, but not stored properly, could result in a discharge of pollutants to waters of the State.

**Comment 12** We also support clarifying, Section 3.2.4.4 to add the word available “total available for land application.” This eliminates concerns and confusion when not all acres are available for land application or if acres used over the past 12 months are to be reported. Confusion can also be avoided in reporting “actual crop(s) planted and actual yields(s) for each field” as found in Section 3.2.4.8. Commenter believes that the intent of the draft Permit is to consider crop types to which manure or litter is land applied. Pasture land that is already established is not defined as planting a crop. Removal of “crop(s) planted and inserting “crop(s) applied to” would be useful for clarifying this section.

**Response:** Part 3.2.4.4 is changed to add “available.” However, Part 3.2.4.8 will remain in the permit as drafted due to the fact that “crop(s) planted” means crop types that was planted in each field for land application of manure or litter and it is more precise than crop(s) applied. Pasture land already established is not required to be reported.

**Comment 13** The commenter believes that Arkansas family farmers should be not placed under tighter nutrient regulations for applying litter to land than for other land applied fertilizer. We support ADEQ development of a regulation that is equal for all, including the requirement that all nutrient sources be applied to be land according to a Nutrient Management Plan. It is not just poultry litter application, but commercial fertilizer as well that plays a part in environmental protection efforts.

**Response:** The Department acknowledges this comment.

**Comment 14** The commenter is concerned about Section 4.1 of the draft Permit regarding “multi-year phosphorus application.” Under the current Arkansas Phosphorus Index, multi-year phosphorus application is not permitted. The commenter supports research on the use of “banking” to see if in fact the Arkansas Phosphorus Index multi-year limitation should be reconsidered and the draft Permit use this science for defining terms.

ADEQ should consult with Dr. Andrew Sharpley at the University of Arkansas to develop a science based definition for “multi-year”.

**Response:** The Department acknowledges this comment. The Arkansas Phosphorus Index (PI) is applicable to nutrient surplus watersheds. Since this general permit is applicable to all CAFOs that discharge and are located in the State of Arkansas, the “multi-year phosphorus application” definition in Part 4.1 will not be changed, in accordance with 40 CFR 412.4(c)(2)(ii). Multi-year phosphorus application is a practice that may be appropriate for certain fields that do not have a high potential for runoff to surface waters. Additionally, CAFOs are responsible for compliance with all applicable terms and conditions of this permit. Receipt of this permit does not relieve any operator of CAFO of the responsibility to comply with any other applicable federal, state, or local statute, ordinance, policy, or regulation such as Arkansas PI.

**Comment 15** Clarification of Section 4.4.2 is needed. Once our farmers (permittee) have sold or given away the litter, they are no longer responsible for the litter, and have no obligation for a current nutrient analysis to be provided to the end use.

**Response:** The CAFO owner or operator that obtains a permit will be required to keep a record of the date, approximate amount, and the recipient’s name and address for each manure transfer. The records must be kept for five (5) years. The owner or operator also must give the recipient a copy of the most current manure test results. 40 C.F.R. § 122.42(e)(3). Part 3.2.3 states the requirements relating to transfer of manure, litter, or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 C.F.R. § 412. The CAFO rule does not cover brokers that buy and sell dry poultry manure. Therefore, the permittee is exempt from Part 3.2.3, if the permittee sells dry poultry manure to brokers.

**Comment 16** Terms in sections 4.4.1.1.b do not account for the fact that cooling systems are not in operation at all times under our Best Management Practices and thus inspections are only needed when our cooling systems such as fans or misters are in operation. The same comment would apply to Section 4.4.2.6 “estimated volume of overflow.” Overflow is not associated with our farmers’ dry litter and wording clarification is needed to define overflow to that of liquid manure.

**Response:** The Department acknowledges this comment but believes that the plain language of the permit addresses the concerns of the commenter.



Because Part 4.4.1.1.b applies "... when the facility is in normal operation," ADEQ believes that the issue raised by the commenter is addressed in the language of the permit. Part 4.4.2.6 requires the permittee to record information regarding "any overflow." "Overflow" is defined in Section 10.24 of the permit and is based on the regulatory definition found in 40 C.F.R. § 412.2(g). If no overflow occurs, those records are not necessary under the language of the permit. Therefore, the permit will remain as drafted.

**Comment 17** There is also a need to understand the ability of farmers to complete tests to lower risks. Our Butterball farmers do not perform their own analysis on litter and there is no explanation in the draft Permit as to what test methods ADEQ would expect farmers use if in fact they did test. Nutrient Management Plans follow University guidance under FSA1029. Records provided from the University do not state analytical techniques used in the analysis. Butterball suggests ADEQ consider a simple statement as to sampling follow current Arkansas guidelines such as FSA1029.

**Response:** In accordance with Part 2.3.2, all discharges shall be sampled and analyzed in accordance with EPA approved methods for water analysis listed in 40 C.F.R. § 136. All CAFOs covered under this general permit must identify protocols for the appropriate testing of manure, litter, process wastewater, and soil in their NMP. For the land application area, any test methods consistent with University of Arkansas Extension recommendations used to sample and analyze manure, litter, process wastewater, and soil are allowed and may be included in the NMP. ADEQ cannot specify a particular sampling method to be used but will allow sampling methods that are consistent with the federal regulations.

**Comment 18** In general, BWD supports this Draft Permit and would oppose any changes that would make the final permit any less stringent or less protective of the waters of the State.

**Response:** The Department acknowledges this comment.

**Comment 19** BWD encourages ADEQ to begin the process to revise Arkansas Pollution Control and Ecology Commission (APC&EC) Regulation Nos. 5 and 6 as soon as the Draft Permit is finalized in order to minimize confusion as to what requirements apply to CAFOs and other Animal Feeding Operations (AFOs).

**Response:** The Department acknowledges this comment.

**Comment 20** A Table of Contents for this very detailed permit would be very helpful to permittees, regulators, and all interested persons.

**Response:** The Department acknowledges this comment. A table of contents has been added to the final permit.

**Comment 21** Regarding Draft Permit Part 1.7.3: Should the words “or denial” be deleted from this provision? If a permittee under an expired General Permit applies for and is denied an Individual Permit, then the permittee would be without permit coverage the way Part 1.7.3 currently is written. Is that what ADEQ intends?

**Response:** ADEQ does not intend for a permittee be without permit coverage.. Part 1.7.3 should be read in conjunction with Part 1.6.2 of the permit. In accordance with Part 1.6, any operator covered by the ARG590000 may request to be excluded from General Permit coverage. If an individual NPDES Permit is denied to an operator subject to the general permit, the applicability of ARG590000 remains in full force and effect. If ADEQ issues a final individual permit to an operator subject to the ARG590000, then the general permit applicability is terminated as of the effective date of the individual NPDES Permit. Thus, the phrase “or denial” will remain in part 1.7.3.

**Comment 22** Regarding Draft Permit Part 1.8: Should the word “disclosed” in the last sentence of Part 1.8 be “disclosure”?

**Response:** The word “disclosed” has been changed to “disclosure.”

**Comment 23** Regarding draft Permit Part 4.2.1.3: BWD questions whether the soil of land application sites should be analyzed more frequently than every 3 years.

**Response:** 40 C.F.R. § 412.4(c)(3) requires soil to be analyzed for phosphorus content a minimum of once every five (5) years. ADEQ believes that soil sampling every three (3) years is protective of the environment without creating a regulatory burden for the permittee.

**Comment 24** Regarding Draft Permit Part 4.2.1.5.c: The word “waster” should be “waste”.

**Response:** The word “waster” has been changed to “waste.”

**Comment 25** Regarding Draft Permit Part 4.2.1.6: BWD strongly supports the prohibition of land application of wastes to slopes with a gradient greater than 15%. Should this provision, however, be in a separate subsection rather than in one with the heading “Precipitation Event”?

**Response:** A new subpart, Part 4.2.1.7, Slope Requirement, has been added.

**Comment 26** Regarding Draft Permit Part 5.1: BWD asks that the public notification provided by this provision include an option for notification via email to all persons who request to be on an ADEQ listserv regarding NOIs etcetera under the CAFO General Permit.

**Response:** At this time, ADEQ is not going to create a separate listserv specifically for CAFO permits. However, interested individuals that have signed up for the “Water Permits – Public Notice” listserv will receive weekly emails that include notice of Notices of Intent (hereinafter “NOIs”) and NMPs submitted pursuant to this general permit. The following web site may be checked daily for the list of NOIs, NMPs, and other submitted information concerning proposed permit coverage under the CAFO general permit:

[http://www.adeg.state.ar.us/water/branch\\_permits/general\\_permits/default.htm](http://www.adeg.state.ar.us/water/branch_permits/general_permits/default.htm).

**Comment 27** How are separate facilities distinguished? For example, are two adjoining AFOs considered to be one facility or two? If two operations owned by the same person are separated by several miles of land not owned by this person, is the mere fact that the person spreads waste from both operations on the same ground enough for these facilities to be considered one operation?

**Response:** Pursuant to 40 C.F.R. 122.23(b)(2), “two or more AFOs under common ownership are considered one operation for permitting purposes if they adjoin each other or use a common area or system for waste disposal.” In the first example from the comment, the two adjoining AFOs would be considered to be a single operation if they are under common ownership. In the second example, the two operations also would be considered to be a single operation because they are under common ownership and use a common area for waste disposal.

**Comment 28** The Farm Bureau requested that [APCEC] Regulation 5 and ANRC Title 22 remain intact and the necessary changes be made to these existing state programs to provide protection for those growers who believe they are not discharging or proposing to discharge and choose not to seek coverage under a state general CAFO permit. Liquid animal waste facilities regardless of size, as they are now, should continue to be required to seek coverage under [APCEC] Regulation 5. Language should be included in the state general CAFO permit that compliance with [APCEC] Regulation 5 and ANRC Title 22 suffices as a “certification of no discharge”, especially for small and medium AFOs.

**Response:** The Department acknowledges this comment. After finalization of this general permit, revisions to APCEC Regulation No. 5 as well as APCEC Regulation No. 6 will be considered. Additionally, the first draft permit has been modified to remove “or proposes to discharge” from the permit. Therefore, “certification of no discharge” is obsolete at this time. Please be advised that APCEC Regulation No. 5 only is applicable to liquid waste; however, the NPDES CAFO permit requirements covers wet and dry litter operations.

**Comment 29** The Farm Bureau also encourages ADEQ to work directly with the Arkansas NRCS to determine specific [best management practices (hereinafter “BMPs”)] that will address nutrient transport from the production area, particularly as it relates to poultry, such that if these BMPs are implemented and maintained these operations will not discharge or propose to discharge. These BMPs should be incorporated directly or by reference in the update of [APCEC] Regulation 5 and ANRC Title 22.

**Response:** The Department acknowledges this comment. If any type of BMPs are implemented and maintained so that there is no discharge, then no NPDES permit is required. This permit is based on 40 C.F.R. §§ 122 and 420, not APCEC Regulation No. 5.

**Comment 30** The appropriate revisions should be made to [APCEC] Regulation 5 and ANRC Title 22 such that producers are not required to apply for multiple permits.

**Response:** The Department acknowledges this comment.

**Comment 31** Sections 2.3 – Differentiation should be made between liquid manure storage lagoons designed specifically for that purpose and sedimentation ponds that capture pasture and production area runoff, especially in the case of dry litter. These do not serve the same purpose and do not pose the same potential environmental impact. The Arkansas P-Index recognizes farm ponds as a BMP for the removal of nutrients; therefore, an “overflow” event from a farm pond would constitute a discharge and, therefore, would not require sampling.

**Response:** The NPDES regulations for CAFO operations do not distinguish between liquid manure storage lagoons and sedimentation ponds. Under 40 C.F.R. § 122.23(b)(8), both are considered part of the “production area” of the facility. Discharges from the production area must be permitted under the federal regulations.

**Comment 32** Section 3.2.1 – 40 CFR 412.46(a)(1) allows the Director to establish NPDES permit BMP effluent limitations designed to ensure no discharge

based on site specific evaluation of open manure storage (liquid manures) and must include the production area. The same concept should be applied for poultry (dry litter) production areas, i.e. preapproved BMPs, such that a CAFO would not discharge or propose to discharge. Some specific suggestions:

- maintain areas adjacent to ventilation fans or between houses such that they meet the requirements of a grassed waterway, filter strip or equivalent,
- collection of litter dust on a routine basis or prior to storm events that has been deposited by ventilation fans using preapproved measures (BMPs),
- diversion of stormwater runoff from production areas onto grassy areas that would serve as filter strip or equivalent,
- diversion of stormwater runoff from production areas into a retention pond whose overflow discharges into a grassed waterway, filter strip, etc., or other grassy or vegetated areas that would serve as filter strip or equivalent,
- or others as recommended by the University of Arkansas Division of Agriculture, the Arkansas NRCS, the Arkansas Natural Resources Commission, or as identified by the ADEQ Director/Staff

**Response:** The commenter seems to misinterpret the provisions of 40 C.F.R. § 412.46(a)(1). That section allows the Director to establish BMP effluent limitations as new source performance standards. As the commenter states above, these BMPs are based on a site-specific evaluation of the facility. This does not establish “pre-approved BMPs” for certain types of operations but, rather, allows a new source to utilize BMPs to meet effluent limitations. The regulation would not be applicable in the context of general permit coverage.

**Comment 33** Section 4.2.1.5 – Delete “. . . 300 feet for Extraordinary Resources Waters (ERW) . . .” This setback requirement is much more restrictive than that required by 40 CFR, and appears to be based on the “precautionary principle”, i.e. if 100 feet is good, then 300 must be better. Furthermore, the Arkansas P-Index contains provisions that regulate manure and litter application rates based on BMP implementation such as vegetated filter strips, setbacks and buffers. We believe the Arkansas P-Index should be allowed to dictate application rates based on site specific conditions.

**Response:** The Department acknowledges this comment. ADEQ believes that 300 feet is necessary to protect water quality in ERWs, our highest designated use for waterbodies in Arkansas. This same setback requirement is found in APCEC Regulation No. 5 for liquid animal waste facilities. However, Part 4.2.1.5.d of the general permit does provide for a compliance alternative where “the CAFO may demonstrate that a setback

or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by [required] setbacks.”

**Comment 34** Section 4.2.1.6 – Delete ““Wastes shall not be land applied to slopes with a gradient greater than 15%, . . .” 40 CFR 122.23, 122.42, 412, or NRCS 590 Standard do not prohibit applications of manures on slopes of 15% or more. Please reference The Arkansas Phosphorus Index (2010 Revision) on pp. 6-7. Table 4: Runoff Curve accounts for risks of nutrient transport due to slope. Higher slopes in combination with higher Runoff Curve Numbers yield a “high” or “very high” risk designation. This results in reduced or no manure and litter applications. At the same time it acknowledges that there are soil types and conditions with high slopes for which manure and litter applications would be acceptable. This is a science based approach. For these reasons, we believe the requirements of the Arkansas P-Index are adequate to address application of ALL manures and litter, liquid or dry, on slopes.

Furthermore, while we acknowledge that this prohibition has been present in Regulation 5 and ADEQ may not be willing to remove this prohibition for wet manures, the risk of runoff generated by the act of applying dry litter is nonexistent. At a minimum, differentiation should be made between wet manures and dry litter as it relates to applications on slopes. This prohibition should be removed as it applies to dry litter and, again, the Arkansas P-Index should be allowed to dictate application rates based on site specific conditions

**Response:** The Department acknowledges the comment. The following statement will be included in Part 4.2.1.7, “The CAFO may demonstrate that a higher slope is appropriate because implementation of alternative conservation practices or field-specific conditions will provide pollutant reduction equivalent or better than the reductions that would be achieved by a set slope of 15%.”

**Comment 35** Section 1.4.5.3 states that the operator must provide data to support a showing that his discharge is not expected to exceed the water quality standard. Does this require site specific documentation or can general research showing a certain best management practice prevents or treats a pollutant to the required level suffice?

**Response:** The operator of the facility must provide data and other technical information to ADEQ that is sufficient to demonstrate that a certain best management practice prevents or treats a pollutant to a level where the discharge will not contribute to the existing impairment. These determinations would be done on a case-by-case basis and what kind of

information that would be required could vary depending on the specific waterbody and the specific parameter for which the waterbody is impaired.

**Comment 36** There is no threshold on what constitutes a discharge of pollutants. In many cases in the nutrient surplus areas of Arkansas, the concentration of phosphorous in fields is high enough that there will always be some amount of phosphorous in the runoff from storm events even if there is no application of manure or litter. In other cases, new CAFOs have been built in pastures where there were high concentrations of phosphorous. Now, even if there is no discharge from the CAFO, the existing soils will produce some phosphorous in the runoff. How will this be differentiated by ADEQ?

**Response:** Technical standards for nutrient management should appropriately account for the nutrient needs of crops and potential adverse water quality impacts in establishing methods and criteria for determining appropriate application rates. The current NRCS Nutrient Management technical standard describes three field-specific risk assessment methods to determine whether the land application rate is based on nitrogen or phosphorus, or if land application should be avoided. These methods are

1. Phosphorus Index;
2. Soil Phosphorus Threshold Level; and
3. Soil Test Phosphorus level.

In nutrient surplus areas and other situations where background levels of phosphorus are high in some fields, nutrient management plans would be developed using that information just as they are currently prepared for designated nutrient surplus areas.

**Comment 37** Is fan dust from poultry houses considered applied manure or litter? If this is the case, then the vegetative buffer compliance alternative will give the operators in most cases a viable treatment option. If this is not the case, how does the ADEQ anticipate the operator meeting the no discharge requirements of Section 2.2.1.1 in regards to fan dust?

**Response:** Fan dust from poultry houses may be considered a “pollutant” as defined by 40 C.F.R. § 122.2. (“Pollutant means dredged soil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”) The Nutrient Management Plan developed under this general permit could include a vegetative buffer compliance alternative to prevent discharge of the pollutant into water.

**Comment 38** As the primary provider of engineering assistance to the livestock producers in Arkansas, the Natural Resources Conservation Service will be asked by producers to complete their nutrient management plans and provide documentation for their general permit application. The general permit leaves several areas open to broad interpretations. The main issue is what will constitute a discharge? At what point does fan dust become a discharge? If a 35 foot wide vegetative buffer is adequate then we can design to that standard. If it is not, what is adequate to prevent a discharge? Our designers can work these issues into the plan if they know what the criteria are.

**Response:** The determination of “discharge of a pollutant” is determined on a site-specific basis, depending on whether or not pollutants are entering the waterbody. Pursuant to 40 C.F.R. § 122.2, “discharge” means “the ‘discharge of pollutant.’” According to that same section, “discharge of a pollutant” means “any addition of any ‘pollutant’ or combination of pollutants to ‘waters of the United States’ from any ‘point source.’” See Comment 37 above for more information regarding what is a “pollutant.” To provide some clarification, the definition of discharge has been added to Part 10.14 of the permit.

**Comment 39** There may be huge numbers of operators desiring a general permit. A conservative estimate is that there may be over 2,000 operators who desire a general permit. The NRCS does not have the staff to provide technical assistance to this many operators. Does ADEQ have a specific timetable for operators to obtain a general permit or is it up to the operators to pursue the permit at their discretion? Which entities besides NRCS does ADEQ anticipate providing this technical assistance?

**Response:** The final federal rule became effective on December 20, 2008, and all CAFOs that discharge have a duty to apply for a NPDES permit. Existing CAFOs must were required to have their discharges permitted on or before February 27, 2009. Each facility must determine if there is a discharge from their operation and apply for either an individual NPDES permit or coverage under this general permit. Any person or entity may provide technical assistance to the operators, as long as the nutrient management plans provided to the operators meet the requirements of the permit and 40 C.F.R. §§ 122.23 and 412.

**Comment 40** The NRCS requests a meeting with ADEQ to discuss what conservation practices will be considered Best Management Practices (BMPs). There are addition conservation practices besides vegetative buffers which will remove most of the pollutants from the runoff. Some examples include grassed waterways, diversions, constructed wetlands, and vegetated



treatment areas. A meeting to discuss design criteria is needed so that I can instruct our engineers on how these systems should be designed.

**Response:** The Department acknowledges this comment and will be happy to attend a meeting regarding alternative conservation practices. Also, please be aware that more information regarding BMPs can be found at the EPA's website.

**Comment 41** Font size should be verified throughout the permit. Justification should be verified throughout the permit is consistent. The heading in Part I is not right aligned. In Part 1.2, the "w" in waters should be capitalized as should the "s" in State. Should Nutrient Management Plan (NMP) be capitalized? This is inconsistent throughout the permit. Ex 1.4.5.1 and 1.5.1.2-one is capitalized and the other is not.

**Response:** The Department acknowledges these comments..

**Comment 42** Why are CAFOs housing ducks excluded from coverage under this general permit?

**Response:** The Department made a decision due to small numbers of this type of operation in Arkansas; an individual permit is more applicable than a general permit.

**Comment 43** Part 1.4.5 requires that dischargers verify if they are discharging to a water quality impaired waterbody. Which Arkansas 303(d) list should applicants review in determining if they meet the requirements for eligibility? This could be made clear by inserting a statement that indicates that the most recent Arkansas 303(d) list available on the Department's website should be reviewed.

**Response:** The facility must review the most recent EPA-approved 303(d) list that is in place when the NOI is submitted. Part 1.4.5 will be revised to clarify this requirement..

**Comment 44** In Part 1.5.1.5 it requires a "New Facility" to submit plans and specifications for ponds. What about existing facilities not currently covered by a permit? Will they be required to submit an engineering certification of the pond capacity at the facility?

**Response:** Part 1.5.1.5 will be revised to state, "Submit an ADEQ Form 1 and plans and specifications that stamped by Professional Engineer in Arkansas for construction of pond(s).

**Comment 45** In Part 1.8, 2nd paragraph, the word "is" should be replaced with "are"

**Response:** Part 1.8 will be revised to replace “is” with “are.”

**Comment 46** In Part 2.3.1, the Department is requesting that the facilities monitor for Total Nitrogen as well as Ammonia Nitrogen and Nitrate Nitrogen. If the Department is looking for the nitrogen being introduced to the waters/soils, why also request Ammonia Nitrogen and Nitrate Nitrogen. If the Department is looking for a specific form of Nitrogen, then the Total Nitrogen monitoring should be removed and the specific nitrogen monitoring should be included. It seems a bit redundant to monitor for all three items.

**Response:** In this case, total nitrogen as well as ammonia nitrogen and nitrate nitrogen sampling Requirements of Part 2.3.1 are based on 40 C.F.R. § 412.

**Comment 47** Part 2.3.3, indicates that the Department would like a sample from the actual pond, if a discharge occurred during unsafe conditions. This seems as though a sample would not adequately reflect the discharge conditions if a discharge was to occur.

**Response:** If sample is collected immediately after the dangerous conditions have passed, the sample will adequately reflect the discharge.

**Comment 48** Part 2.3.4 requires that monitoring results be submitted within 30 days to the Department. Are there set forms that must be used or will lab results be sufficient?

**Response:** All lab results must be submitted on an approved form by ADEQ, such as Discharge Monitoring Reports (hereinafter “DMRs”), which will be provided to the permittee upon issuance of the tracking permit number.

**Comment 49** Who will be establishing the Best Management Practice effluent limitations for facilities requesting that the Department establish them as stated in Part 2.4.1? Has Department staff been adequately trained in the areas that must be addressed at the facility’s request per Part 2.4.1?

**Response:** The permittee or his/her representative must establish best Management Practice based on a best available technology and all elements of this Part 2.4.1. Staff will review BMP based on requirements of 40 CFR 412.

**Comment 50** Will training be available to the public so that they can verify that the decisions made in regard to Best Management Practices (BMPs), which are decided by the Department, are adequate to protect the Waters of the State?

**Response:** No specific training will be made available at this time. However, the permittee may review more BMP resources on the EPA website.

**Comment 51** If a facility requests that the Department set BMPs upon a site-specific evaluation, how is this applicable under the general permit? If the Department is making a decision based upon site-specific information, the permit should be covered as an individual NPDES discharge permit. Based on the information provided in Fact Sheet, a general permit requires the same effluent limitations or operating conditions for the point sources. If the Department is setting site-specific BMPs effluent limitations, how are the operating conditions different from a point source facility?

**Response:** The permitting program established in the federal regulations allows general permit coverage and general effluent limitations for CAFOs, while also allowing the individual facilities the options to establish how they will meet those permit limits through specialized NMPs. This is similar to Stormwater Pollution Prevention Plans developed to meet effluent limitation guidelines for construction and industrial stormwater general permits.

**Comment 52** In Part 3.2.1.6, it mentions that “appropriate setbacks, buffers or equivalent practices” be developed. Further in the permit, Part 4.1 discusses what a setback is and 4.2.1.5 actually lists the setback requirements. Part 3.2.1.6 should reference where in the permit, the applicant can determine the “appropriate” setbacks.

**Response:** Part 4.1 of the permit sets a minimum setback. However, Part 4.2.1.5.d of the general permit does provide for a compliance alternative where “the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by [required] setbacks.”

**Comment 53** In Part 3.2.1.9, it is indicated that the permittee may determine what records should be maintained. Should it not be the responsibility of the Department to inform the facility of what records must be maintained?

**Response:** Due to the specific characteristics of each site, i.e. dealing exclusively with liquid manure, dry litter, a mixture of both, etc., the Department has outlined in Parts 3.2.1.1 to 3.2.1.8 the necessary elements of a nutrient management plan that might apply to each type of operation. Part 3.2.1.9 is necessary to require the operator to describe what type of records will show they are meeting the necessary elements for their type of operation.

**Comment 54** Several areas in the permit are listed as “reserved”. If these areas are being held for future inclusion, they should be located at the end of that section/part. For example 4.3 should not be reserved when there is a 4.4 and 4.5. 4.4 should become 4.3, 4.5 should become 4.4 and 4.5 could then be “reserved”.

**Response:** The Department acknowledges the comment but chooses not to change the numbering at this time. The Department does not believe that the reserved sections make the permit confusing to the public or covered entities.

**Comment 55** Part 5 seems as though it would be better suited in an earlier portion of the permit, perhaps included in Part 1 after Part 1.5. This would allow for the individuals reading the permit to fully understand the timeframe required in the issuance of facility permit coverage.

**Response:** Part 1.5 is related to submittal of applications (NOI and all related forms); however, Part 5 outlines the process of administrative and technical NOI review and the public notice of all submitted NOIs and NMPs. The technical review and public notice occur after the all the information required in Parts 2 through 4 are submitted to ADEQ and it is logical to include that information after the technical requirements.

**Comment 56** Part 7.4.1.2 references Part 9.4 (24-hour notice). A review of Part 9.4 indicates that this part is for “Other Non-Compliance”. The reference should be changed to Part 9.3.

**Response:** The reference in Part. 7.4.1.2 will be changed from “Part 9.4” to “Part 9.3.”

**Comment 57** Part 7.4.2.2 references Part 7.4.2.1.1, a review of Part 7.4.2.1 shows that after 7.4.2.1, the letters a, b and c as outline indicators. The reference in Part 7.4.2.2 should be changed to Part 7.4.2.1.a

**Response:** The reference in Part 7.4.2.2 will be changed from “Part 7.4.2.1.1” to “Part 7.4.2.1.a.”

**Comment 58** Part 8.4 indicates that certain information shall be included on the DMR. However, the acronym DMR is not defined at any previous point in the permit. Is the DMR a set form or may the facilities use their own forms?

**Response:** The permittee is required to use forms approved by ADEQ, such as DMRs.

**Comment 59** The permit is not clear about ADEQ’s interpretation of what type of farms should apply for this permit. It is Tyson’s belief that dry litter poultry farms do not “discharge or propose to discharge” under normal operating conditions. Tyson would agree that there are clear instances where a discharge may occur from a poultry farm. For example, a water line breaking causing manure mixed with water to run out of the barn and into waters of the state or where litter is piled next to a stream and rainfall causes runoff into waters of the State. However, incidental amounts of litter, dust and feathers from poultry house ventilation fans that might co-mingle with storm water should be considered Clean Water Act exempted agricultural storm water and not “discharging or proposing to discharge.” Tyson requests that ADEQ make it clear concerning who must obtain coverage under this permit and that the presence of dust and feathers around a farm should not necessitate obtaining a permit.

**Response:** This a general permit that is applicable to discharges of pollutants to waters of the State from all CAFO operations across the State. Discharges are not limited to manure or manure nutrients and include all pollutants in the manure, litter, and process wastewater. In general, runoff of manure, litter, or process wastewater from a land application area is allowed only when the CAFO has an NPDES permit and has applied the manure, litter, or wastewater in accordance with the site specific nutrient management plan that is required by the permit. ADEQ expects that no dry weather discharges will be allowed under NPDES permits for CAFOs. Additionally, the type of manure handling system is used only to determine whether an operation is defined as a Large or Medium CAFO. It does not affect which Effluent Limitation Guideline (hereinafter “ELG”) applies. Therefore, the ELGs for poultry operations with wet systems are the same as the ELGs for operations with dry systems. All discharges from these operations would be covered in an NPDES permit issued under that point source category. See Comment 4.

**Comment 60** ADEQ should make it clear in the permit that compliance with this permit’s provisions will provides a shield from nuisance and trespass litigation.

**Response:** Nuisance and trespass litigation are common law legal actions, not under the regulatory authority of either the Clean Water Act or the Arkansas Water and Air Pollution Control Act. ADEQ cannot insert language in the permit that provides a shield from legal actions brought under the common law and outside the agency’s authority.

**Comment 61** Language needs to be added to the draft permit that clearly states that the agricultural storm water exemption applies to all discharges associated with the farm, including the production areas, provided that a nutrient management plan is being properly implemented.

**Response:** Federal regulations and this general permit are clear as to when the agricultural stormwater exemption would apply. The following statement also has been added to Part 10.4 of the permit:

The term “agricultural stormwater discharge” as a discharge composed entirely of stormwater, as defined in § 122.26(a)(13), from a land area upon which manure or wastewater has been applied in accordance with proper agricultural practices, including land application of manure or wastewater in accordance with either a nitrogen-based or, as required, a phosphorus-based manure application rate. In addition, as noted, the proposed effluent guidelines included technology-based requirements for a CAFO’s land application areas that were based on the CAFO’s use of proper agricultural practices. (See 66 FR at 3029–32). Any dry weather discharge of manure or process wastewater resulting from its application to land area under the control of a CAFO would not be considered an agricultural storm water discharge and would thus be subject to Clean Water Act requirements.

**Comment 62** A portion of Section 1.2 states, “Once an operation is defined as a CAFO, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.”

This section is confusing because “confinement” is not defined within the permit. The confusion would especially be true in the case of a farm with both poultry and cattle on site. If a farmer wanted to permit a poultry farm, it is not clear as to whether the farmer would also have to include other livestock into the permit.

Tyson recommends that ADEQ create the following definition of “confinement”: the raising of animals (other than aquatic animals) for a total of 45 days or more in any 12-month period in a roof covered structure or in an area where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. (Note: this language comes from the draft permit definition of an Animal Feeding Operation)

**Response:** Determining “confinement” under the permit is a function of two criteria. See Part 10.5.10.5.1 where animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and Part 10.5.2 where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility). See Comment 4 above.

**Comment 63** Section 2.2.2.3 contains a quotation mark at the end of the sentence that does not seem to belong.

**Response:** The extra quotation mark will be removed from Section 2.2.2.3.

**Comment 64** Among other things, Section 3.2.4.1 requires the farmer to report the number and type of animals as part of an annual report. The draft permit does not indicate whether the required inventory should be taken at the time of the report, the maximum inventory throughout the previous 12 months, or it should be the average inventory during the previous 12 months. The number of head placed at a farm can be variable and depends upon items such as weather, production flow, and market conditions. ADEQ should require farmers to report the maximum number of animals housed during the previous 12 months.

**Response:** The permittee must report the total number and type of animals, whether in open confinement or housed under roof of animal in the past 12 months. See comment 10 above for the definition of the past 12 months.

**Comment 65** Section 3.2.4.8 requires the farmer to submit as part of the annual report the amount of any supplemental fertilizer applied during the previous 12 months. Tyson fully supports the regulation of all nutrients on an equal basis, including the use of commercial fertilizer. This requirement unfairly requires only those farmers that have a CAFO permit to report commercial fertilizer usage. Tyson recommends that ADEQ develop a regulation that puts all farmers on equal footing including the requirement for all nutrient sources to be land applied according to a Nutrient Management Plan.

**Response:** The Department acknowledges this comment.

**Comment 66** Section 4.2.1.4 requires inspections of land application equipment however it does not state the frequency in which inspections should be made. Dry litter application equipment does not pose the same risk that liquid manure application equipment does. Further, it is not clear if a permit holder would be responsible for inspecting land application equipment owned by a contract applicator. ADEQ should consider language that requires farmers to conduct inspections of liquid manure application systems on a “once daily – when in use” basis and dry litter equipment on an “annual basis.” Additionally, language should be included that a farmer only has to inspect equipment that is owned or operated by the farmer.

**Response:** Part 4.2.1.4 directly incorporates the language of 40 C.F.R. § 412.4(c)(4). Specifics regarding inspections of equipment based on type of manure and other factors are left up to the discretion of the operator, as long as this part of the nutrient management plan is designed to prevent discharges of pollutants from the facility.

**Comment 67** Tyson recommends that the word “documented” be inserted into the text of Section 4.4.1.1 to read, “There must be documented routine visual inspections of the CAFO production area.”

**Response:** The word “documented” will be inserted in Part 4.4.1.1.

**Comment 68** Section 4.4.1.1 b requires daily inspection of waterlines and cooling lines “when the facility is in normal operation.” Cooling lines are not in operation 12 months out of the year, therefore Tyson recommends that the phrase be reworded to say, “when the cooling lines are in operation.”

**Response:** The daily inspection would only be required during normal operations of the cooling lines. When the cooling lines are not in operation, the report would be noted as such.

**Comment 69** In the last line of Section 4.4.2 there appears to be a period (“.”) at the end of “Director” that needs to be deleted.

**Response:** The period will be deleted.

**Comment 70** Section 4.4.2.6 requires, “Records of the date, time, and estimated volume of any overflow.” to be made available at the request of the Director. The previous sections (4.4.2.1 – 4.4.2.5) appear to be applicable to liquid manure. Therefore, Tyson recommends that Section 4.4.2.6 be amended to read, “Records of the date, time, and estimated volume of any overflow of liquid manure.”

**Response:** The Department disagrees that Parts 4.4.2.1. – 4.4.2.5 are primarily applicable to liquid manure. Only Part 4.4.2.2 specifically mentions a “liquid impoundment.” The recordkeeping requirements of this general permit apply to all facilities, regardless of the type of litter. Therefore, this part will not be changed.

**Comment 71** Section 4.5.4 requires the farmer to keep records on “Test methods consistent with University of Arkansas Extension recommendations used to sample and analyze manure, litter, process waste water, and soil.” This section does not describe what test methods ADEQ expects farmers to utilize. Farmers do not conduct analysis on manure, litter, and soil and therefore the farmer would not have analytical techniques to provide. Further, the University of Arkansas does not provide this documentation



to the farmer indicating what analytical techniques are used to analyze manure, litter, and soil. Tyson recommend that this section be reworded to state, “Manure, litter, and soil sampling shall be in accordance with University of Arkansas guidance, such as FSA1029.”

**Response:** The Department does not concur. In accordance with Part 8.2, monitoring must be conducted according to test procedures approved under 40 CFR Part 136 or other test procedures that have been specified in this permit. In this case, the permit is allowing any test methods consistent with University of Arkansas Extension recommendations. Therefore, Part 4.5.4 requires the permittee to keep records noting which testing methods were employed when sampling and analyzing manure, litter, process wastewater, and soil.

**Comment 72** Part 5 of the draft permit outlines the public notification process. Section 5.2 states, “Comments will only be considered if they regard a specific facility’s NOI or NMP.” There may be some cases in which a permittee decides to sell or give away all litter or manure. Therefore, a sentence needs to be added to this section that states, “If a permittee certifies to the Director that all litter or manure will be sold or given away, a NMP is not required; therefore there will be no public notice required for the NMP.” In addition, language should be added to Part 5 stating that only adjoining landowners have standing to provide comments to ADEQ.

**Response:** ADEQ cannot agree to either request, as those changes would not be in compliance with the federal regulations governing CAFOs. 40 C.F.R. § 122.23(h) sets forth the procedures for “CAFOs seeking coverage under a general permit.” These requirements apply to this general permit issued through ADEQ’s delegated authority under the Clean Water Act. 40 C.F.R. § 122.23(h) states that the owner or operator of a CAFO must submit a NMP that meets the requirements of 40 C.F.R. § 122.42(e) with their NOI. The NMP is intended to address all aspects of litter or manure management, not just the ultimate land application or sale. Therefore, if the facility sells the litter or manure, the NMP would be written to address nutrient management while the litter or manure is still at the facility prior to sale.

Likewise, 40 C.F.R. § 122.23(h) states that “the Director must notify the public of the Director’s proposal to grant coverage under the permit...” Language that only allowed adjoining landowners to provide comments would be counter to the intent of the federal regulation.

**Comment 73** Section 7.6 pertains to management of “removed substances” such as “solids, sludges, filter backwash, or other pollutants.” The last sentence of this section states, “Written approval for such disposal must be obtained from the ADEQ.” There are instances, such as the land application of

solids from a liquid manure retention structure that should be managed according to the NMP. Therefore, Tyson recommends that the sentence be altered to state, “Written approval for such disposal must be obtained from the ADEQ Director, unless management of the material is contemplated by the Nutrient Management Plan.”

**Response:** Part 7.6 has been revised to state, “Written approval for such disposal must be obtained from the ADEQ Director, unless management of removed substances is specifically addressed in the Nutrient Management Plan.”

**Comment 74** Maintaining a strong Bio-security policy is instrumental to the sustainability of a farm. Having assurance that ADEQ will follow Bio-Security policies is very important to farmers. Therefore, Tyson requests that Section 8.7 include language that states that ADEQ will follow the permittees or the owner of the animal’s bio-security policy when inspecting and entering farms.

**Response:** Part 8.7.5 will be added to state, “ADEQ will follow the bio-security policy of the permittee or owner of the animals when inspecting and entering the facility.”

**Comment 75** Part 10.9 also provides that if “an operation is found to be a significant contributor of pollutants, the permitting authority may designate a medium-sized facility as a CAFO,” and a Small CAFO is, inter alia, one that “has been designated as a CAFO by the permitting authority as a significant contributor of pollutants.” There is not, however, a definition of “significant contributor of pollutants”. (Note: Section 502 of the CWA does define “pollutant,” and this definition is of course incorporated expressly.) Whether an AFO is determined to be a “significant contributor of pollutants” might be material (e.g. converting an AFO into a CAFO) and therefore guidance on what is a “significant contributor” could be helpful. (Note: Section 2.2 of the “FACT SHEET FOR DRAFT GENERAL PERMIT NO. ARG590000, CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) IN THE STATE OF ARKANSAS” references factors which might be considered in determining whether a “discharge” is a “significant contributor of pollutants” (and is similar to 40 CFR 122.28(b)(3)(i)), and maybe this could be incorporated similarly into the determination of whether an AFO is a “significant contributor of pollutants”.)

**Response:** Because this is a general permit issued under the Clean Water Act and its related federal regulations, the provisions of 40 C.F.R. § 122.28 would also apply to the CAFO general permit. Therefore, in determining that a discharge is a “significant contributor of pollutants,” the Director would consider the following factors:

- (1) The location of the discharge with respect to waters of the United States;
  - (2) The size of the discharge;
  - (3) The quantity and nature of the pollutants discharged to waters of the United States, and
  - (4) Other relevant factors.
- 40 C.F.R. § 122.28(b)(3)(i)(G).

**Comment 76** Part 1.5.1.5 appears to contain an incomplete sentence. Add “Submit” to Part 1.5.1.5 to read “Submit an ADEQ Form 1 and plans and specifications that are stamped by Professional Engineer in Arkansas for the new facility to build pond or ponds.” Also, Part 1.5.1.4 could be re-organized to state what the operators of CAFOs seeking to be covered “must” do, e.g. Submit permit fees upon invoicing, after the initial permit and annually thereafter.

**Response:** Part 1.5.1.4 and Part 1.5.1.5 have been revised as recommended in the comment.

**Comment 77** The draft CAFO permit provisions might be improved by including the following:

- a. An amnesty provision so that, for example, operators voluntarily reporting potential violations would face reduced, or no, regulatory repercussions.
- b. An immunity provision, so that, for example, operators applying for permits would be immune from regulatory enforcement and civil liabilities arising from conduct covered by the permit, but occurring in the past.
- c. A primary or exclusive jurisdiction provision, so that violations of regulations/permitting requirements are adjudicated in administrative proceedings.

**Response:** ADEQ chooses not to include these provisions in the draft permit because most of the issues raised in the comment are addressed in other laws that apply to CAFOs covered under this general permit. Under APCEC Regulation No. 7, Section 9(c), the “violator’s cooperativeness and expeditious efforts to correct the violation” can be taken into account in decreasing the amount of an assessed fine. This could include voluntary reporting of violations.

40 C.F.R. § 122.23(f) sets forth when in time a CAFO is required to seek coverage under a NPDES permit. Until the facility is required to have coverage under a permit, the provisions of the permit do not apply. Past violations of the provisions of the permit are not applicable, if the facility was not required to have a permit at that time.

Pursuant to the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-103, and APCEC Regulation No. 8, ADEQ may assess criminal, civil, or administrative penalties for violations of regulations or permitting requirements. However, Reg.8.401(A) states, “The Department may, through cooperative efforts, give suspected violators a reasonable opportunity to resolve violations through informal procedures prior to the initiation of administrative enforcement proceedings unless the circumstances warrant otherwise.” Most enforcement actions initiated by the Department are handled through the administrative process.

**Comment 78** I understand EPA is pushing these [regulations] but someone needs to take a stand. [For] example, the proposed to discharge should be removed or clearly defined so we know if need a permit. These [regulations] will up costs to produce poultry but will not change time I have to run exhaust fans to grow chickens or reduce dust out of the fan.

**Response:** ADEQ acknowledges the comment. The EPA regulations that form the basis for this general permit were finalized on November 20, 2008. As a delegated state program under the Clean Water Act, ADEQ must implement those regulations.

**Comment 79** If [I] have horses in a field that is grass-covered, however, the area around the barn has no grass and is muddy during wet weather, does this need a permit?

**Response:** Based on the information submitted in this comment, no permit would likely be required.

**Comment 80** Several commenters requested a copy of the final permit.

**Response:** The Department will send a copy of the final permitting decision to those commenters and notes that Reg.8.211(C) requires that the Department send notice of the final permitting decision by first-class mail to those persons who submitted public comments on the record.

**ADEQ Comment:** For clarification, the following definitions have been added to Part 10: “Waters of the State;” “Point Source;” “Pollutant “and “Pollution”

**Summary of Changes to the permit-ARG590000**

<b>Part</b>	<b>Draft Permit</b>	<b>Final Permit</b>	<b>Reason</b>	<b>Comment#</b>
10.14	N/A	Discharge	Clarification	4
2.3.1	All discharges	All discharges to waters of the state	Clarification	8
3.2.4	Annual report/Previous 12 month	All reports are due by the 31st day of January each year for the previous January – December reporting period (i.e. January 31, 2012 for Year 2011). The first report may include less than the 12 months of information.	Clarification	10
3.2.4.4	Total number of acres	Total number of acres available	clarification	11
N/A	N/A	Table of Contents	Clarification	20
1.8	Disclosed	Disclosure	Typo	22
4.2.1.5.c	waster	waste	Typo	24
4.2.1.6	Wastes shall not be land applied to slopes with a gradient greater than 15%...	<b>Precipitation Event.</b> Wastes shall not be land applied to soils that are saturated, frozen, covered with snow, during rain, or when precipitation is imminent (>50% chance of rain).	Clarification	25
4.2.1.7	N/A	<b>Slope Requirements:</b> Wastes shall not be land applied to slopes with a gradient greater than 15%	Clarification	25
4.2.1.7	N/A	The CAFO may demonstrate that a higher slope is appropriate because implementation of alternative conservation practices or field-specific conditions will provide pollutant reduction equivalent or better than the reductions that would be achieved by a set slope of 15%	Clarification	34
Throughout The permit	Font size and nmp	NMP	Typo	41
1.4.5	Arkansas 303(d) list	The latest Arkansas 303(d) list	Clarification	43
1.5.1.5	for new facility to build	for construction of pond(s).	Clarification	44
1.8	Is	Are	Typo	45
3.2.1.6	N/A	Adding (see Part 4.2.1.5)	Clarification	53
7.4.1.2	Part 9.4	Part 9.3	Typo	57
7.4.2.2	7.4.2.1.1	7.4.2.1.a	Typo	58
8.4	DMR	Discharge Monitoring Report (DMR)	Clarification	59
10.4	N/A	Agricultural stormwater discharge term has been defined. Therefore, AFO's definition has been moved to part 10.5	Clarification	61
2.2.2.3	“?”	“.”	Typo	63
4.4.1.1	There must be routine ...	There must be documented routine ...	clarification	67
4.4.2	Director.	Director	Typo	69
7.6	Written approval for such disposal must be obtained from the ADEQ	Written approval for such disposal must be obtained from the ADEQ Director, unless management of the material is contemplated by the Nutrient Management Plan.	Clarification	73
8.7.5	Inspection and entry	Adding the statement “ADEQ will follow the owner of the animal’s bio-security policy when inspecting and entering farms.”	Clarification	74
1.5.1.4	Permit fee	Submit permit fees (\$200.00) upon invoicing, after the initial permit and annually thereafter	Clarification	76
1.5.1.5	ADEQ Form 1 ...	Submit an ADEQ 1 ...	Clarification	76
10	N/A	Water of State	Clarification	ADEQ
10	N/A	Point Source	Clarification	ADEQ
10	N/A	Pollution and Pollutant	Clarification	ADEQ