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August 28, 2006

Water Docket
Environmental Protection Agency
Mail Code 4203M
1200 Pennsylvania Ave., NW.,
Washington, DC 20460
Attention Docket ID No. OW-2005-0037. Docket ID No. **EPA-HQ-OW-2005-0037**

To Whom It May Concern:

Enclosed please find comments from Dairy Producers of New Mexico (DPNM) on the **Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision.** I have enclosed a self-addressed stamped envelope in which EPA can verify receipt of these comments. I have also sent an electronic copy to ow-docket@epa.gov, Attention Docket ID No. **EPA-HQ-OW-2005-0037**.

Thank you for your consideration of these comments.

Sincerely,

Jay Lazarus
Pres./Sr. Geohydrologist
Glorieta Geoscience, Inc.
Consultant to Dairy Producers of New Mexico

X-C: Sharon Lombardi, Executive Director, DPNM

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DAIRY PRODUCERS OF NEW MEXICO COMMENTS ON REVISED NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REGULATION AND EFFLUENT LIMITATION GUIDELINES FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN RESPONSE TO *Waterkeeper* DECISION

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Dairy Producers of New Mexico (DPNM) represents dairies in New Mexico and West Texas. DPNM is presenting comments on EPA's proposed Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision.
Our comments attempt to follow the outline provided to commenters by EPA, and we have added additional topics for consideration. *DPNM proposed language for inclusion into the regulation is presented in italics.* DPNM modified EPA's proposed template for Nutrient Management Plans (NMPs), which is presented in Appendix A.

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DUTY TO APPLY AND DEFINITION OF A DISCHARGE

DPNM agree with EPA that there are many factors a CAFO owner or operator should consider in determining whether to seek permit coverage. However, the decision to apply for permit coverage is a business decision that the CAFO owner/operator will make based on a risk-based analysis. DPNM recognize that some CAFOs have a higher likelihood of actually discharging due to certain geographic and physiographic conditions. DPNM will inform our membership about the relevant factors in order to assist our members in making a decision on whether or not to seek permit coverage.

DPNM agree with EPA that the proposed rule changes shall limit the duty to apply requirement so that only CAFOs that discharge or propose to discharge would need to seek NPDES coverage.

NUTRIENT MANAGEMENT PLANS (NMPs)

NMPs are living, dynamic documents that should be designed to reflect the fact that farming is not an exact science and successes often occur when the farming operation blends some art with the science. The timing of application of green water is based on numerous factors that cannot always be precisely planned. Management decisions that dictate when and how the storage can be emptied often change on a weekly or daily basis depending on weather conditions.

NMPs are a subset of Natural Resources Conservation Service (NRCS) Comprehensive Nutrient Management Plans (CNMP). Both NMPs and CNMPs are dynamic documents and are developed to accommodate routine variations. Such routine changes include but are not limited to changes resulting from anticipated crop rotation or climatic variability inherent in agricultural operations, changes in numbers of animals and volume of manure or process wastewater resulting from normal fluctuations or a facility's planned expansion. Such changes should not be considered as substantial changes and will be documented in the annual report.

DPNM agree with EPA that the design, operation and maintenance elements and analytical assessments required under this alternative are sufficient for this purpose. Even if a CAFO operator does not chose to apply for permit coverage, DPNM will encourage our members that small or medium AFOs use nutrient management practices consistent with 40 CFR 122.42(e)(1)(vi–ix) and comply with the applicable technical standards in their land application of manure, litter, or process wastewater.

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PUBLIC NOTICE

Standing to Request a Public Hearing

DPNM members have extensive experience responding to public comments on NMED-approvable discharge permits from the untrained general public. Based on our members' experience, public comments are often based on the emotional, non-scientific perspectives of individuals or groups who abuse the regulatory process to further personal agendas. Many of these individuals attempt to use the environmental permitting process to accomplish land use or zoning objectives that are outside of the rules and permit conditions allowed by EPA or other regulatory agencies. Although DPNM respects the public's right to comment on NOIs based on *Waterkeeper*, DPNM urge EPA to set a standard to determine if an individual or group has standing to comment on a NOI and attached NMP.

It is DPNM's opinion that individuals in distant States or individuals who do not reside in the community where the CAFO exists should not have the right to comment on or oppose a NMP. Comments from the untrained public will result in increased cost to the producer and regulatory agencies and unnecessarily lengthen the time for permit review and approval.

DPNM propose that EPA adopt the following language in 40 CFR §122.28(d) regarding standing:

Only those individuals or organizations who will be directly financially impacted by the granting of a CAFO permit or who can show that granting of the permit will have a substantial adverse impact on their property rights shall have standing to submit comments on a NOI or NMP. Such comments shall be prepared by a person or persons who have completed appropriate technical training.

Length of Public Comment Period

The Director must specify by regulation or in the permit an appropriate period of time for the public to comment and request a hearing on the information submitted and the terms of the facility's nutrient management plan to be incorporated into the permit. Abuse of the Public Comment procedure can delay an approvable discharge permit for months or years. As a balance between stakeholders in both the regulated and environmental communities, DPNM propose that EPA includes the following language in 40 CFR §122.28(d) for a week Public Comment period:

Once received, EPA shall review the NOI for technical completeness within 10 days of EPA's receipt of the NOI. If EPA does not respond back to the CAFO operator within 10

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days after receipt, the NOI shall be deemed technically complete. After the Director has deemed the NOI technically complete, the Director shall post the NOI on the appropriate EPA website for Public Comment on the technical portions of the NOI. All comments on the NOI and accompanying documents shall be submitted to the Director within 10 days of posting. The Director shall complete review of the comments for both standing and technical accuracy within 10 working days after the Public Comment period ends and provide the CAFO operator with a list of scientific-based comments/suggestions on the NOI. If the CAFO operator is not in agreement with the proposed changes, the Director shall provide for an appeal process that shall be no longer than 30 days from start to finish. If the CAFO operator agrees to the comments from the Public and EPA, the CAFO operator shall modify the NOI accordingly, resubmit to the permit authority, the permit shall be issued, and no further public comment will be taken.

It is DPNM's opinion that the procedures outlined above strike an appropriate balance between the competing stakeholder concerns. DPNM believes that the public notice provisions are sufficient to notify affected States. Additionally, the permitting authority's response to all significant comments would include responses to comments from affected States.

INCORPORATION OF NMP TERMS IN NPDES PERMITS

Confidential Business Information

The ultimate goal of a NMP is to insure balance between manure and green water applied to a crop and the crop's ability to take up the applied nitrogen and/or phosphorus. This information is what *Waterkeeper* intended to be made public. Additional information beyond nutrient discharge and uptake provided in NMPs is often Confidential Business Information (CBI). DPNM want to insure that EPA adopts language in the rule that incorporates maximum flexibility for CAFOs to operate under an approved NMP that does not reveal CBI. A procedure whereby the permitting authority simply attaches the whole NMP to the permit cannot protect CBI. The permitting authority should exhibit great flexibility as to how to incorporate the terms of an NMP that meets the regulatory requirements of 40 CFR 122.42(e) and 412.4 into the permit and protects CBI.

DPNM propose the following language be included in 40 CFR §122.28(d) of the rule:

The permittee shall have the right to identify and extract specific terms of the NMP from the larger document that are Confidential Business Information (CBI) and incorporate only the non-CBI extracted terms into the NOI and attached NMP.

The information submitted for public review and comment in the NMP with the NOI shall be limited to:

- *Location of the discharge*
- *Discharge rate*

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- *Green water and storm water storage design and capacity*
- *Land Application Area*
- *Nutrient Management*
- *Cropping*

The following information related to the CAFO is CBI and shall not be made available to the public.

- *Animal Mortalities (Only method of dead animal disposal shall be disclosed to public)*
- *Land Application (General information like total amount of land available, total amount of manure, litter, green water generated and land application area sufficiency based on N and P uptake by the proposed cropping pattern(s), method of land application, shall be disclosed to the public. Specific information like field by field break down of the above information, procedures of land application equipment inspections for leaks, frequency of inspections, equipment calibration, timing of land application, is considered CBI and shall not be disclosed to the public)*
- *Chemical Handling (details of storage and disposal is considered CBI and shall not be disclosed to the public)*

Comprehensive Nutrient Management Plans (CNMP) and Nutrient Management Plans (NMP)

EPA is once again proposing development of NMPs that do not automatically incorporate terms of a CAFO's CNMP approved by the NRCS. A CNMP is a plan of operations and is not enforceable. EPA, the NRCS and other stakeholders have collaborated for several years to reach agreement on components of both CNMPs and NMPs. The NMP is a subset of the CNMP and the CNMP includes all items required except for chemical handling, and should be recognized as such by the permitting authority.

DPNM has developed a NMP template that complies with the Second Circuit's intent on submittal of a NMP with the NOI (Appendix A). DPNM's proposed template for NMP information to be submitted with the NOI extracts the terms of the NMP from the larger document and incorporates only the non-CBI terms into the permit. The template combines the requirements of NMP/CNMP/PPP and complies with the Second Circuit's ruling that the NMP must be submitted with the NOI, and restricts release of CBI. DPNM proposes that EPA adopt our NMP template for information to be submitted with the NOI.

DPNM propose the following language be included in the proposed rule:

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For those CAFOs operating under a NRCS-approved CNMP, the CAFO operator shall be allowed to substitute the NRCS-approved CNMP for the NMP which shall serve as a functional equivalent of a NMP.

Flexibility in NMP Requirements for General Permit Coverage

DPNM encourage EPA to simplify its approach to NMP requirements for General Permits. NMP required submittals are already codified in 40 CFR §122.42(e) and are applicable to all large CAFOs and EPA has previously determined the minimum requirements for NMPs are protective of surface water quality. The three-category or three-condition structure EPA is exploring for general permits is unnecessarily cumbersome and duplicative as most NMP requirements and BMPs are easily identifiable and broadly applicable to all CAFOs covered by a general permit.

EPA and the permit writer should encourage flexibility in the broadly applicable requirements of 40 CFR §122.42(e) in all General Permits. Facilities should have the option to substitute alternative measures in their NMPs that are equivalent or more effective in achieving the same objective. A flexible NMP will identify alternate crops that could be planted and other fields that might be utilized for land application, allowing the CAFO to utilize a mix of fields and crops different from the most likely or preferred combinations. The Annual Report will include a review of the effectiveness of these alternative measures and how the selected measures satisfy the relevant regulatory requirement(s).

The expired 1993 EPA Region 6 CAFO General Permit (Federal Register Vol 58, No. 24 Monday February 8, 1993) Part III B states" The facilities covered by this permit are required to document attainment of Best Available Technology (BAT) and Best Conventional Technology (BCT), and meet all Best Management Practices (BMPs) used to comply with the effluent limitations in this permit. Such documentation shall be included in the Pollution Prevention Plan (PPP) outlined in Part III B.2. of this permit and shall be made available to the Director upon request. **Where applicable, equivalent measures contained in a site specific Animal Waste Management Plan (AWMPs) prepared by the U.S. Department of Agriculture, Soil Conservation Service (SCS), may be substituted for the Best Management Practices and Pollution Prevention Plan requirements in this part of the permit. Where provisions in the Soil Conservation Service plan are substituted for applicable Best Management Practices or portions of the Pollution Prevention Plan, the Pollution Prevention Plan must refer to the appropriate section of the Soil Conservation Service plan. If the pollution prevention plan contains reference to the Soil Conservation Service plan, a copy of the Soil Conservation Service plan must be kept on site" (emphasis added).**

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To update the above language to today where appropriate, the SCS is now the Natural Resources Conservation Service (NRCS), Animal Waste Management Plans (AWMPs) are now Comprehensive Nutrient Management Plans (CNMPs) and Pollution Prevention Plans (PPPs) are replaced by Nutrient Management Plans. The expired Region 6 permit recognizes overlapping BMP measures in NMPs and CNMPs (formerly PPPs and AWMPs) that are protective of water quality and codifies a procedure whereby provisions of a CNMP are automatically substituted for NMP requirements. This procedure developed by EPA is additional support for development of a single document that combines the requirements of a CNMP and NMP.

To be consistent with anti-backsliding requirements and to look to the future, DPNM propose that the following language be included in 40 CFR §122.42(e):

Where applicable, equivalent measures contained in a site-specific Comprehensive Nutrient Management plan (CNMP) prepared or approved by the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), may be substituted for the Best Management Practices in a CAFO's NMP. Where provisions in the CNMP are substituted for applicable Best Management Practices or portions of the NMP, the NMP must refer to the appropriate section of the CNMP. If the NMP contains reference to the CNMP, a copy of the CNMP must be kept on site. The Agency encourages development of a single record-keeping document that combines the requirements of CNMPs and NMPs.

FLEXIBILITY IN NMPs

NMPs are living documents like CNMPs and New Mexico Environment Department-approved Ground Water Discharge Permits. It is impractical for a CAFO owner/operator to revise his NMP for day-to-day management changes that do not impact the CAFOs ability to protect surface water quality. The rule and subsequent permits must allow flexibility for CAFO operators in making cropping decisions when they remain in substantial compliance with the terms of the NMP as incorporated into the permit, even if the CAFO modifies its practices somewhat from those articulated in the NMP and the permit. To comply with 40 CFR 122.42(e)(1)(i) DPNM propose that the permitting authority establish broadly applicable permit terms that could be implemented through already-codified NMP requirements, while allowing for reasonable flexibility on the farm.

It is common for CAFOs to change cropping patterns based on animal nutritional and agricultural production factors. In these cases, any change in cropping patterns would be included in the calculations provided in the NMP. The CAFO would properly document the procedures and nutrient management practices utilized, including crops grown and

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fields planted. As part of existing reasonable flexibility in the NMP, CAFOs already keep records of application rates on land application areas for the prior calendar year, and explain how the modified cropping options as implemented continued to comply with the substantive terms of the NMP incorporated into the permit.

Due to variations in climatic, market and other conditions, the use of yearly soil testing as a measure of nitrogen and phosphorus uptake by the crop may overstate long-term land application rates. Many CAFOs grow alfalfa, which routinely has a 5-year span between plantings. If a CAFO can prove through soil testing and crop production data that the green water and manure solids are applied at agronomic rates over a 5-year rolling

average, and surface waters of the US would not be adversely impacted, the CAFO should not be deemed out of compliance with the permit in any individual year if the application rate is not exceeded over the 5-year rolling average.

Greater flexibility will minimize the need for subsequent permit revisions, lessening permit writers' future workloads. An administratively and technically complete NMP should not increase the workload for a capable permit reviewer and incorporating reasonable flexibility into a NMP should not increase the up-front workload, either for the permittee or for the regulatory agency.

DPNM propose that the Agency should adopt the following language in 40 CFR §122.42 (e)(4):

All CAFOs may submit any information with the annual report indicating how the CAFO achieved substantive compliance with the terms of the NMP as set forth in the permit.

CAFOs shall only be required to seek authority from the permitting authority for changes in a NMP that: 1) increase the quantity of the discharge or 2) change the quality of the discharge water. A CAFO shall not be required to seek permit authority approval for actions that: 1) reduce volume of the discharge; 2) improves the quality of the green water; 3) reduces the area of land application or; 4) increases the land application area without changing the quality or quantity of the discharge.

If through soil testing and crop production data a CAFO can show that green water and manure solids are applied at agronomic rates over a 5-year rolling average, and surface waters of the US are not be adversely impacted, the CAFO shall not be out of permit compliance in any individual year if the application rate does not exceed the 5-year rolling average.

Changes made to the NMP due to circumstances beyond the control of the CAFO operator such as weather or market conditions shall not be considered substantial

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changes and the CAFO operator shall submit information with the annual report indicating how the CAFO achieved substantial compliance with the terms of the NMP as set forth in the permit.

NEW SOURCE PERFORMANCE STANDARDS

DPNM encourage EPA to work with the CAFO operator to demonstrate that an open storage system meets the no discharge requirements and provide an alternate approach for facilities that comply with the enforceable design, construction, operation and maintenance measures developed under the approach. Once again DPNM encourage EPA to simplify this process by requiring new sources to comply with the minimum requirements of 40 CFR §122.42(e) for general permit coverage. DPNM encourage EPA

to develop "pre-approved" designs and operational procedures to streamline the permitting process. DPNM propose the following language be added to 40 CFR §412.46:

New source CAFOs that are designed by either the NRCS or a registered professional engineer shall be classified as "pre-approved" designs and shall not be required to run validation models.

PATHOGENS

DPNM agree with EPA that the BCT effluent limitations equal to the 2003 CAFO rule BPT limitations, and affirms that the 2003 CAFO rule BPT limitations do in fact represent the best conventional pollutant control technology. DPNM agree with EPA that the BCT-based ELGs adopted in the 2003 CAFO rule represent the best conventional pollutant control technology for removal of pathogens, including fecal coliform.

CROSS MEDIA ENVIRONMENTAL ISSUES

Review of the Clean Water Act and Clean Air Act shows no language that suggests that this rule and subsequent regulations should consider cross-media pollutant reductions and any reference to cross media issues should be eliminated from the preamble to the rule, the rule itself or any subsequent permits.

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ADDITIONAL ISSUES

Deadline for Submittal of NMPs

CAFOs are currently required by the Agency to submit NMPs by June 2007. At EPA briefing sessions, we were informed that the Agency expected to have a final rule published in Spring of 2007. Publication of the Region 6 permit will then follow the Federal rule. Region 6 has already proposed 2 permits that have been withdrawn by the Agency so the regulated industry anticipates substantial negotiation with Region 6v on the new permit.

DPNM is unaware of any rule that requires the regulated community to prepare and submit a completed permit only 3 months after a rule is published. EPA's contention that CAFO operators have had sufficient time to prepare a NMP is not based on sound business practices. No prudent businessperson is going to spend money on a NMP until the final rules and permits are negotiated. Why would a prudent businessman take a

chance on spending money twice on his/her NMP? Recent low milk prices don't allow us to spend money on a rule that can change.

DPNM propose that the deadline for submittal of NMPs be extended to June, 2009.

Storm Water Pollution Prevention Plans (SWPPPs)

Currently, any surface disturbance greater than 1 acre requires the land owner to prepare a SWPPP. SWPPP requirements are already incorporated into CNMPs and preparation of SWPPPs is duplicating the process. DPNM propose that if a CAFO is operating under a NRCS-approved CNMP, no SWPPPs are required for construction activities.

Availability of General Permits

40 CFR §122.23(d) states:
(1) *All owners or operators of a CAFO that discharges or proposes to discharge pollutants must apply for a permit.* All owners or operators of a CAFO that discharges or proposes to discharge pollutants must seek coverage under an NPDES permit. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

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Although the final *pre-Waterkeeper* rule required CAFOs to apply for an individual permit if a general permit is not available, Region 6 EPA staff repeatedly told DPNM that our dairies should not apply for individual permits because EPA would not have staff to process them and that the Region would publish a general permit in a timely manner. Preparation of an individual permit is costly, time consuming and not necessary for most CAFOs who will qualify for general permit coverage. Once again EPA is requesting that a CAFO operator spend time and money twice – once for an individual permit and once again for a general permit. DPNM is concerned that Region 6 will not guarantee that the "interim" individual permit will be automatically converted to general permit, when the general permit becomes available. DPNM propose the Agency add the following language to 40 CFR §122.23(d) (1):

If the Director has not made a general permit available, those CAFOs that are designed, constructed and operated under a NRCS-approved CNMP, or under the minimum requirements of nutrient management practices consistent with 40 CFR 122.42(e) (1) (vi–ix) and comply with the applicable technical standards in their land application of manure, litter, or process wastewater, shall not be subject to enforcement actions if a discharge occurs. Those CAFOs shall apply for General Permit coverage when a permit becomes available.