

Date: July 5, 2021

To: Environmental Quality Commission

From: Leah Feldon, Deputy Director

Subject: Item E: Renew Memorandum of Understanding between the Environmental Quality Commission and Oregon Department of Agriculture for the Confined Animal Feeding Operation Permit Program (Action)
July 22-23, 2021, EQC meeting

Purpose Oregon statute requires that the commission and Oregon Department of Agriculture have a Memorandum of Understanding to allow ODA to operate Oregon's CAFO permit program, as outlined in ORS 468B.217. DEQ received EQC's approval to renew the current MOU in November 2015 for a five-year period and an extension was approved by the commission through July 2021.

DEQ is proposing a five-year and five-month MOU as presented to the commission.

Recommendation DEQ recommends that the Oregon Environmental Quality Commission approve the proposed 2021 MOU, as seen in Attachment A of this report, and authorize DEQ Director Richard Whitman to sign the MOU on behalf of the commission.

New proposed MOU elements DEQ and ODA proposed a seven-month extension to the MOU at the commission meeting in November 2020. That approved extension allowed for additional time to develop several new elements for this proposed five-year MOU, including:

- Creating a two-step NPDES and WPCF permitting process for new Large Tier 2 General Permit CAFOs, all new Large Individual CAFOs, existing CAFOs expanding to become Large Tier 2 General Permit CAFOs or expanding to become Large Individual CAFOs.
 - The first step is review and approval of the plan for construction and the second step is review and approval to populate and operate the facility.
 - Permit coverage does not begin until written notice is issued by ODA to the applicant.
 - A water supply plan may be required as part of the two step process.
- Agency-specific reporting and review requirements.

- A new option for CAFO facilities to include other types of agriculture-generated wastewater under a CAFO permit rather than requiring coverage through a separate DEQ issued wastewater permit.
- The addition of OAR 340-052 to clarify that the general requirements governing approval of facility plans and specifications in that rule division are applicable to CAFOs.
- A commitment to proactive engagement of potentially impacted communities with attention to traditionally under-represented individuals and communities where new CAFOs are proposed.

**Oregon CAFO
Program
background**

CAFOs are the confined feeding or holding of animals in buildings, pens or lots where the surface is prepared to support animals in wet weather or where there are wastewater treatment facilities. Typical CAFOs in Oregon include dairies, beef feedlots, poultry, swine, horse and other animal farms that apply their wastewater and manure to crops at agronomic rates. CAFOs typically generate manure, silage pit drainage, washdown waters, contaminated runoff and milk wastewater, which must all be managed properly to protect human health and the environment.

A majority of Oregon's CAFOs have permit coverage under NPDES General Permit #01. NPDES General Permit #01 does not allow a discharge to surface water except in the event of a large storm. This permit was last renewed in 2016, expired on Feb. 28, 2021, and is administratively extended. DEQ and ODA are working together to renew this permit and expect it to be completed by Oct. 30, 2021.

CAFOs that do not discharge to a surface water, even during a large storm event, can obtain coverage under a Water Pollution Control Facility permit. DEQ and ODA issued a new general WPCF CAFO permit in 2015, which expires Sept. 30, 2025.

In addition to the general NPDES and WPCF permits, the program also issues individual permits. An individual permit receives review and evaluation by DEQ and ODA. There are currently five individual CAFO permits in Oregon.

History of the CAFO MOU between EQC and ODA

- 1989: Oregon Legislature required DEQ to develop and issue CAFO permits and directed ODA to inspect facilities for compliance
- 1993: Oregon Legislature directed EQC and ODA to transition the permit program for CAFOs from DEQ to ODA
 - 1995: First EQC/ODA MOU, which included this transition

- 2001: Oregon Legislature gave ODA authority to seek direct delegation of Federal Clean Water Act CAFO permit program for National Pollution Discharge Elimination System permits
 - 2002 and subsequent MOUs reference this option, not yet exercised

Attachment

- A. Proposed 2021 Memorandum of Understanding

Supporting materials

1. November 2020 memorandum of understanding
https://www.oregon.gov/deq/EQCdocs/120320_C_CAFOs.pdf
2. Confined Animal Feeding Operations Program NPDES General Permit
<https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/NPDESGeneralPermit.pdf>
3. Confined Animal Feeding Operations Program WPCF General Permit
<https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/WPCFPermit.pdf>

Report prepared by CAFO Program staff

**Environmental Quality Commission and Oregon Department of Agriculture
Memorandum of Understanding
Relating to the Confined Animal Feeding Operations Program
(July 2021)**

I. Parties

The Environmental Quality Commission (EQC), through the Oregon Department of Environmental Quality (DEQ), and the Oregon Department of Agriculture (ODA) are the parties to this Memorandum of Understanding.

II. Purpose

This Memorandum of Understanding (MOU) replaces the MOU dated December 2020 between ODA and EQC. The purpose of this MOU is to detail coordination between the EQC and the ODA for purposes of operating a program for the prevention and control of water pollution from a confined animal feeding operation (CAFO) and to specify the parties' respective duties with regard to regulating water quality related to CAFOs.

III. Effective Date

The MOU is effective on the date it is signed by both parties and it will remain effective until December 31, 2026 unless terminated or modified as provided in paragraphs XII and XIII.

IV. Authority

The MOU is authorized by Oregon Revised Statutes (ORS) 468B.217.

V. Definition of Terms

Unless indicated otherwise by context, terms used in this MOU will be defined consistently with the Clean Water Act (33USC §§1251), 40 Code of Federal Regulation (CFR) §122, and CFR §412, ORS 468B.005; Oregon Administrative Rule (OAR) Chapter 340, Divisions 40, 41, 44, 45, 51, and 52, as applicable to CAFOs; and OAR Chapter 603, Division 74.

VI. Background

- A. The Oregon Legislature established a special regulatory program for CAFOs in 1989 Oregon Laws Chapter 847, with an effective date of January 1, 1990. The legislation required DEQ to develop and issue CAFO permits pursuant to its WPCF permit program and it directed ODA to inspect CAFOs to ensure permit compliance.
- B. From the outset, ODA and DEQ worked cooperatively on water quality issues associated with CAFOs. This cooperation was encouraged by the governor and legislature, and in 1993 the CAFO statutes were amended to direct the EQC and ODA to enter into a formal memorandum of understanding providing for ODA to administer the CAFO program. The legislature authorized ODA to perform any function of the EQC or DEQ consistent with the MOU. See ORS 468B.217.
- C. In 2001, the legislature amended the CAFO statutes to add a provision authorizing the ODA to perform any acts necessary to be performed by the state to implement the provisions of the Federal Water Pollution Control Act. See ORS 468B.035. The purpose of the amendments was to authorize and direct the administration of the federal NPDES permit program for CAFOs from DEQ to ODA at such time as the ODA may obtain approval from the federal Environmental Protection Agency (EPA) to solely administer the program as to concentrated animal feeding operations. Absent EPA approval, however, ODA is authorized to administer and enforce the CAFO program pursuant to its state law authorities and pursuant to a MOU with DEQ.

- D. The first NPDES permit jointly issued by ODA and DEQ was the 2003 CAFO general permit #01. In 2005, the legislature provided DEQ and ODA the authority to issue general permits by department order, ORS 468B.050(2). In 2009, DEQ and ODA renewed NPDES CAFO general permit #01 (NPDES CAFO general permit) by order and updated the MOU to include additional requirements for public notice contained in EPA's November 20, 2008 Concentrated Animal Feeding Operations final rule. DEQ and ODA expect to renew the NPDES CAFO general permit by October 2021.
- E. On October 21, 2015 EPA issued regulations that will require electronic data reporting to EPA for the NPDES program starting no later than December 21, 2025. Preparation for electronic data reporting for CAFO permits is addressed in this MOU.
- F. This MOU also clarifies that DEQ and ODA work together to provide permit coverage for agricultural wastewater that might otherwise need a separate DEQ water quality permit by combining agriculturally produced wastewater in an animal waste management plan under a CAFO permit.

VII. Authorities Delegated to ODA

To the maximum extent allowed by the memorandum of agreement between the state and EPA regarding administration of the NPDES permit program, ODA is authorized to perform the following functions of the EQC and DEQ in NPDES permitting of CAFOs. These authorities include but are not limited to the following statutes and regulations, along with any updates adopted by the Legislature or the Environmental Quality Commission throughout the term of this agreement:

- A. All functions authorized by ORS 468.035 Functions of Department (1)(j) and (k); 468.065 Issuance of Permits; Content; Fees; Use; 468.073 Expedited or Enhanced Regulatory Process; Payment; Disposition of Payments; 468.095 Investigatory Authority; Entry on Premises; Status of Records; 468.100 Enforcement Procedures; Powers of Regional Authorities; Status of Procedure and 468.120 Public Hearings; Subpoenas, Oaths, Depositions.
- B. All functions authorized by ORS 468B.020 Prevention of Pollution; 468B.032 Alternative Enforcement Proceedings; Request; Public Notice; Fees; 468B.035 Implementation of Federal Water Pollution Control Act; Rules; 468B.053 Alternatives to Obtaining Water Quality Permit; Rules; 468B.055 Plans and Specifications for Disposal, Treatment, And Sewage Systems; 468B.095 Use of Sludge on Agricultural, Horticultural or Silvicultural Land; Rules, and 468B.200 et seq Animal Waste Control.
- C. All functions authorized by OAR Chapter 340, including, but not limited to, Division 45 Regulations pertaining to NPDES and WPCF Permits, Division 51 Confined Animal Feeding or Holding Operations and Division 52 Review of Plans and Specifications.

VIII. ODA Roles and Responsibilities

ODA will:

A. Technical Assistance

1. To the extent possible, conduct an education program for CAFO operators in cooperation with the OSU Cooperative Extension Service to impart Best Management Practices (BMPs) for animal waste management systems.
2. Advise CAFO owner/operators about available state, federal, and private sources of technical and financial assistance for planning, designing and implementing appropriate BMPs for animal waste management systems.

B. NPDES Program Development

1. Work with DEQ to develop and issue NPDES and WPCF individual and general permits for qualifying CAFO facilities.
2. Create a two-step NPDES and WPCF permitting process for new Large Tier 2 General Permit CAFOs, all new Large Individual CAFOs, existing CAFOs expanding to become Large Tier 2 General Permit CAFOs or expanding to become Large Individual CAFOs. The first step is review and approval of the plan for construction and the second step is review and approval to populate and operate the facility. Permit coverage does not begin until written notice is issued by ODA to the applicant. A water supply plan may be required as part of the two-step process.

C. *NPDES and WPCF Permit Program Implementation*

1. Consult with DEQ on significant determinations regarding the interpretation of the permit, related rules, and the Clean Water Act.
2. Work with DEQ to include the two-step permitting process in new individual NPDES and WPCF permits, and in the next renewals of the NPDES CAFO General Permit and WPCF CAFO General Permit following the effective date of this MOU.
3. ODA will consult with DEQ on a determination to include non-traditional CAFO generated wastewater, such as agricultural wastewater from food processing that might otherwise need a separate DEQ NPDES or WPCF permit, in an animal waste management plan under a CAFO permit.
4. Receive and review permit applications for existing or proposed CAFOs.
5. On a monthly basis, notify DEQ of all WPCF and NPDES individual and Large Tier 2 General Permit new, renewal and modification applications.
6. Within 14 days of receipt of an application for a large Tier 2 General Permit Application or an individual CAFO application, ODA will provide DEQ with the application material for DEQ to review.
7. Provide public notice of permit applications and their animal waste management plans and the opportunity for public hearings.
8. Review and respond to public comments.
9. Notify the applicant if further changes are required before being assigned permit coverage.
10. Assign coverage to those applicant CAFO facilities that qualify for coverage under general permits, or issue an individual WPCF or NPDES permit as appropriate.
11. Permits will comply with OAR Chapter 340, Divisions 40 *Groundwater Quality Protection*, Division 41 *Water Pollution State-Wide Water Quality Management Plan; Beneficial Uses, Policies, Standards, and Treatment Criteria for Oregon*, Division 45 *Regulations Pertaining to NPDES and WPCF Permits*, Division 51 *Confined Animal Feeding or Holding Operations*, and, Division 52 *Review of Plans and Specifications* and wasteload allocations assigned to point sources under Division 42 *Total Maximum Daily Loads (TMDLs)*.
12. ODA will refer CAFOs discharging to injection systems regulated by OAR 340, Division 44 *Construction and use of Waste Disposal Wells or Other Underground Injection Activities* to DEQ for registration and permitting.
13. ODA in coordination with EQC or DEQ will grant groundwater concentration limit variances [OAR 340-040-0030(4)] and other exceptions or approvals as detailed in OAR 340-041-0004 [e.g., approval to lower water quality in high quality waters, OAR 340-041-0004(6)] as needed.
14. Review for approval or rejection animal waste management plans and specifications for animal waste control facilities to verify the plans and specifications have been prepared pursuant to OAR 340 Divisions 51 and 52 design criteria and plan requirements. ODA may develop its own method for accepting certification from

outside professional engineers as to the sufficiency and quality of the plans and specifications. Prior to plan approval and when appropriate:

- i. ODA may request that DEQ review plans and specifications for construction, modification, or expansion of CAFOs to determine whether the proposed construction conforms to groundwater protection requirements.
 - ii. ODA may request that DEQ review plans and specifications for CAFO systems not covered by Division 51, including but not limited to mechanical treatment systems or experimental treatment systems.
15. Provide public notice of proposed substantial changes to animal waste management plans and an opportunity for public hearing before approval or rejection of the proposed substantial changes.
 16. Coordinate with EPA as needed to effectively administer the CAFO program.
 17. Provide DEQ an annual report that details an overview of the CAFO program, program statistics, inspection activities, enforcement activities, and administrative activities. The report shall be submitted to DEQ by March 31st for the previous year's report.
 18. Work with DEQ on proactive engagement of potentially impacted communities with attention to traditionally under-represented individuals and communities where new CAFOs are proposed.

D. Compliance Activities

1. Conduct periodic inspections of all permitted CAFOs. Inspections of CAFOs with NPDES permits will be conducted at a frequency that meets the targets set forth in EPA's Clean Water Act NPDES Compliance Monitoring Strategy. Inspections will include an evaluation of animal waste collection, treatment, handling, disposal and management procedures for compliance with the Clean Water Act, Oregon water quality law, and permit conditions.
2. Respond promptly to citizen complaints pertaining to the operation of CAFOs. ODA has primary responsibility for response to complaints received from the public, and for investigation of known or suspected violations of laws, rules, orders, permits or water quality standards associated with CAFO facilities. ODA will ensure that persons calling with complaints during regular business hours will be able to speak to or leave a message with an appropriate ODA staff person.
3. Take prompt enforcement action when CAFOs violate permit conditions, water quality statutes, rules or orders in accordance with ODA enforcement procedures.
4. Impose civil penalties, when appropriate, on the owner or operator of a CAFO for failure to comply with the provisions of ORS 468 or 468B, or any rules adopted thereunder, or for violations of a permit issued pursuant to ORS 468B, relating to the prevention and control of water pollution from a CAFO, subject to the provisions for civil penalties contained in ORS 183.415 and ORS 468B.230 and in 2001 Oregon Laws Chapter 248 (HB 2156).
5. Notify DEQ when a discharge violation threatens public health or safety, i.e. a water quality violation, and will coordinate with DEQ prior to ODA issuing a Notice of Civil Penalty.

E. Permit Program Data

1. Maintain a program database on all permit activities and produce periodic reports on the status of CAFO permits, inspections, complaint investigations, corrective orders, enforcement actions, and civil penalties imposed.

2. Associate an EPA system common key identifier (“OR Number”) and an Oregon (DEQ) system compatible permit number key with each CAFO covered under a permit in the CAFO program database.
3. Maintain the capability to provide an electronic inventory of CAFOs covered under a permit. The inventory will include the common key identifier above and at least these data elements: facility names, facility location, facility contact information, type of permit and NAIC code.
4. Work with DEQ to develop database extracts or similar mechanisms to provide input into DEQ and EPA database systems of record for CAFOs.
5. Modify and maintain its system of record and reporting to DEQ to include all EPA required data elements as determined by the Electronic Reporting Rule.
6. ODA will track the number and percentage of new permits issued within 180 days of receiving a complete application. The NPDES general permit requires that applications must be submitted to ODA at least 180 days in advance of the date an operator wants to begin operating a facility. ODA will also track the number and percentage of Nutrient Management Plan significant modifications that are approved within the time frames specified in the new NPDES general permit, anticipated to be issued in September 2021, after receiving all required information.

IX. DEQ/EQC Roles and Responsibilities

DEQ will:

A. Permit Program Assistance

1. Provide advice, assistance, training, and program guidance relative to surface and groundwater quality problems associated with animal waste, including but not limited to groundwater protection and monitoring requirements, permit writing, lagoon leakage testing, annual compliance inspections, data analysis, and sampling parameters and protocols.
2. Work with ODA to develop and issue NPDES and WPCF individual and general permits for qualifying CAFO facilities.
3. Work with ODA to include the two-step permitting process in new individual NPDES and WPCF permits, and in the next renewals of the NPDES CAFO General Permit and WPCF CAFO General Permit following the effective date of this MOU.
4. Assist ODA in developing administrative rules to facilitate EPA’s approval of changes to the state’s NPDES permit program to authorize ODA alone to administer the concentrated animal feeding operation program.
5. Review plans as requested by ODA in accordance with the requirements of OAR Chapter 340, Divisions 40 *Groundwater Quality Protection*, Division 41 *Water Pollution State-Wide Water Quality Management Plan; Beneficial Uses, Policies, Standards, and Treatment Criteria for Oregon*, Division 45 *Regulations Pertaining to NPDES and WPCF Permits*, Division 51 *Confined Animal feeding or Holding Operations* Division 52 *Review of Plans and Specifications* and wasteload allocations assigned to point sources under Division 42 *Total Maximum Daily Loads (TMDLs)*. This includes providing timely response to reviewing applications materials, as agreed upon by ODA and DEQ on a project specific basis.
6. DEQ will review all applications for Large Tier 2 General Permit Facilities and Individual CAFOs that are located within a Ground Water Management Area (GWMA), DEQ. This review will include assessing the need for additional monitoring for on-site drinking water wells.
7. Provide public access to the ODA CAFO public notice website from the DEQ public notice website.

8. Assist ODA with responses to comments received during public comment.

B. Compliance Activities

1. Refer all water pollution citizen complaints received on CAFOs and information regarding suspected violations of permits, rules, or water quality standards by CAFOs to ODA for investigation and follow-up. DEQ will refer to ODA website for an accurate list of area contacts.
2. Conduct inspections only when requested by ODA, except when DEQ reasonably suspects that operations related to a CAFO may present an imminent and substantial danger to human health or the environment, DEQ may exercise agency discretion and conduct the inspection after notifying ODA.
3. Initiate enforcement actions, within agency discretion, resulting from inspections described in the preceding paragraph.
4. Participate in annual reviews with ODA and work cooperatively with ODA to achieve the objectives of this agreement. The annual review may include file reviews as well as inspection of a small, agreed-upon number of CAFOs across the state by a team representing ODA and DEQ.

C. Permit Program Data

1. Provide technical assistance to ODA in providing and maintaining data to DEQ and EPA database systems.
2. DEQ will consult with ODA in the preparation and planning for DEQ and EPA's system of record for CAFOs.

X. No Third Party Rights

Nothing in this MOU creates any right or defense on behalf of a regulated party.

XI. Resolution of Disagreements Regarding the Interpretation and Application of this MOU

In the event of a disagreement regarding the interpretation and application of this MOU, agency staff will direct the disagreement to designated supervisors or other managers for resolution.

- A. In the case of ODA, the director or designee has authority to resolve disputes.
- B. In the case of EQC/DEQ, the DEQ director or designee has authority to resolve disputes.

XII. Modification of the MOU

- A. This MOU may be modified at any time by written agreement of the parties.
- B. If and at such a time as EPA approves modification of the state NPDES permit program to authorize ODA alone to administer the concentrated animal feeding operation program, DEQ and ODA will work together to draft an amended MOU to address the changes resulting from such approval.

XIII. Termination of the MOU

This MOU may be terminated at any time and by either party after 60 days advance notice of intent to terminate or within 180 days after EPA approval has been achieved by ODA. The notice must be provided in writing and served on the director of DEQ on behalf of the EQC or the Director of the State Department of Agriculture on behalf of ODA.

Richard Whitman
Director of DEQ on Behalf of the
Environmental Quality Commission

Alexis M. Taylor
Director of ODA

Date

Date

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