
Date: Nov. 11, 2020

To: Environmental Quality Commission

From: Richard Whitman, Director
Justin Green, Water Quality Administrator

Subject: Item C: Updates to the Memorandum of Understanding between the Environmental Quality Commission and Oregon Department of Agriculture for the Confined Animal Feeding Operation Permit Program (Action)
Dec. 3, 2020, EQC special 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. The current MOU expires Dec. 31, 2020.

DEQ is proposing a six-month interim MOU, which includes some updates for recordkeeping requirements, during which time DEQ and ODA will complete updates that are more extensive, for a proposed five-year MOU presented for commission review in July 2021.

Recommendation DEQ recommends that the Oregon Environmental Quality Commission approve the proposed 2020 MOU, as seen in Attachment A of this report.

Background DEQ and ODA presented proposed updates to the MOU at the commission meeting in July 2020. These proposed updates satisfy EPA and state electronic data recordkeeping and reporting requirements. Approval of this short-term MOU will maintain DEQ and ODA roles and responsibilities for managing water quality permits related to CAFOs and address electronic data collection and reporting.

DEQ and ODA are working on additional updates to the MOU that will include greater clarity and detail on other aspects of the CAFO permit program, including:

- A two-phase permitting process for a specific group of new CAFOs;
- Clarification of agency-specific responsibilities and oversight of work performed under the MOU;

- Clarification of the application of the program to the protection of ground water quality;
- Inclusion of provisions relating to potential impacts on public health, including environmental justice impacts; and
- Incorporating any changes made to the CAFO General Permit, issued by DEQ and ODA and set to expire Feb. 28, 2021.

DEQ will request commission review and approval of proposed future updates and issuance of a new five-year MOU for the CAFO Program at a July 2021 EQC meeting.

What is a CAFO?

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 and expires on Feb. 28, 2021. DEQ and ODA are working together to renew this permit and expect to be completed by July 31, 2021.

CAFOs that do not discharge to a surface water, even during a large storm event, generally may 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. There are currently five individual permits in Oregon, which are jointly reviewed and evaluated by DEQ and ODA.

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 2020 Memorandum of Understanding

Supporting materials

1. December 2015 memorandum of understanding
<https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/CAFOMOU.pdf>
2. July 2020 EQC Informational Item: Updates to the CAFO Program
https://www.oregon.gov/deq/EQCdocs/07172020_H_CAFOs.pdf

Report prepared by CAFO Program staff

**Memorandum of Understanding
Relating to the Confined Animal Feeding Operations Program
(December 2020)**

I. Parties

The Environmental Quality Commission (EQC), 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 2015 between the parties. The purpose of this MOU is to specify those functions of the EQC and DEQ that ODA may perform to operate a program for the prevention and control of water pollution from confined animal feeding operations (CAFOs), 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 July 31, 2021, 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 and; 51; and OAR Chapter 603, Division 74.

VI. Background

- A. The Oregon Legislature established a 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 legislation was enacted directing 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 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, subject to DEQ oversight and pursuant to this MOU.

- 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 and updated the MOU to include additional requirements for public notice contained in EPA's November 20, 2008 Concentrated Animal Feeding Operations final rule.
- E. EPA has issued regulations that will require electronic data reporting to EPA for the NPDES program. Preparation for electronic data reporting for CAFO permits continues to be addressed in this MOU.

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 with respect to CAFOs:

- 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 and Division 51 Confined Animal Feeding or Holding Operations of Chapter 340.

VIII. ODA Roles and Responsibilities

- A. Prior to EPA's approval of the modification of the state's NPDES program to authorize ODA to administer the federal concentrated animal feeding operation program on its own, ODA will:

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.

NPDES Program Development

3. Develop and implement administrative rules to facilitate EPA approval of modifications to the state NPDES permitting program to authorize ODA alone to administer the federal concentrated animal feeding operation.
4. Work with DEQ to develop and issue NPDES individual and general permits for qualifying CAFO facilities until such time as EPA authorizes ODA alone to operate a NPDES program for CAFOs.

NPDES and WPCF Permit Program Implementation

5. Consult with DEQ on significant determinations regarding the interpretation of the permit, related rules, and the Clean Water Act.
6. Receive and review permit applications for existing or proposed CAFOs.
7. Provide public notice of permit applications and their animal waste management plans and the opportunity for public hearings.
 - (i) Review and respond to public comments.
 - (ii) Notify the applicant if further changes are required before being assigned permit coverage.
8. Assign coverage to those applicant CAFO facilities that qualify for coverage under general permits, or issue an individual WPCF or NPDES permit if necessary.
 - (i) 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* and wasteload allocations assigned to point sources under Division 42 *Total Maximum Daily Loads* (TMDLs).
 - (ii) ODA will refer CAFOs discharging to injection systems regulated by OAR 340-044 *Construction and use of Waste Disposal Wells or Other Underground Injection Activities* to DEQ for registration and permitting.
 - (iii) ODA will continue to rely on EQC or DEQ to 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)].
9. 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 340-051 design criteria. 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.
10. Review for approval or rejection proposed substantial changes to animal waste management plans. Prior to approval, ODA will provide public notice of the proposed substantial changes and an opportunity for public hearing.

Compliance Activities

11. 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.
12. 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.

13. Take prompt enforcement action when CAFOs violate permit conditions, water quality statutes, rules or orders in accordance with ODA enforcement procedures.
14. 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).
15. Notify DEQ when a discharge violation threatens public health or safety.

Permit Program Data

16. Maintain a program database on all permit activities and produce periodic reports on the status of CAFO permits,
 17. Maintain a program database on all permit compliance monitoring activities, including inspections, complaint investigations, corrective orders, enforcement actions, and civil penalties imposed.
 18. Maintain an inventory of CAFO permits that includes all required data elements as determined by the EPA Electronic Reporting Rule and Oregon Administrative Rules.
- B. At such a time as EPA approves modification of the state NPDES permit program to authorized ODA alone to administer the concentrated animal feeding operation program, ODA will:
1. Work with DEQ to draft an amended MOU to address the changes resulting from such approval.
 2. Work with DEQ to address CAFO permitting issues in groundwater management areas and water quality limited streams.
 3. Work with DEQ to maintain the EPA's approval of the State of Oregon's authority to enforce the CWA.

IX. DEQ/EQC Roles and Responsibilities

- A. Prior to EPA approval of modification of the state's NPDES Program to authorize ODA alone to administer the concentrated animal feeding operation program, DEQ/EQC will:

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 jointly develop and issue NPDES permits for qualifying CAFO facilities until such time as ODA has received the necessary approvals from EPA to operate, on its own, the concentrated animal feeding operation program.
3. 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.
4. Review plans as requested by ODA.

5. Provide public access to the ODA CAFO public notice website from the DEQ public notice website.
6. Assist ODA with responses to comments received during public comment.

Compliance Activities

7. 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.
8. 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.
9. Initiate enforcement actions, within agency discretion, resulting from inspections described in the preceding paragraph.
10. 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.

Permit Program Data

11. Provide technical assistance to support ODA in providing and maintaining data in DEQ and EPA database systems.
 12. DEQ will consult with ODA in the preparation and planning for DEQ and EPA's system of record for CAFOs.
- B. After EPA approval of changes to the state's NPDES Permit Program to authorize ODA alone to administer the concentrated animal feeding operation program, DEQ/EQC will:
1. Work with ODA to draft an amended MOU to address the changes resulting from such EPA approval.
 2. Work with ODA to address CAFO permitting issues in groundwater management areas and water quality limited streams.
 3. Work with ODA to maintain EPA's approval of the State of Oregon's authority to enforce the CWA.

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 her designee has authority to resolve disputes.
- B. In the case of DEQ, the director or his designee has authority to resolve disputes.

XII. Modification of the MOU

This MOU may be modified at any time by written agreement of the parties.

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