



# **Agricultural Pollutant Discharge Elimination System (AgPDES) General Permit #OKG01000 Concentrated Animal Feeding Operation (CAFO) Discharges within the State of Oklahoma**

## **Response to Comments**

The Oklahoma Department of Agriculture, Food, & Forestry (ODAFF) published a notice in The Daily Oklahoman, a daily business and legal newspaper, as well as posted on our website at <https://ag.ok.gov/divisions/agricultural-environmental-management/>, on November 18, 2022 regarding the permit draft 2023-2028 OKG0100 Concentrated Animal Feeding Operation (CAFO) discharges within the State of Oklahoma pursuant to Oklahoma Agricultural Pollutant Discharge Elimination System (AgPDES) Act, Title 2A O.S. § 2A et seq. and the Oklahoma Administrative Code (OAC) 35:44.1 and 35:44.3, the rules of the ODAFF and made it available for public review and comment. The public review period ended on December 18, 2022.

ODAFF reviewed the comments and prepared the following responses and several changes were made in the draft 2023-2028 OKG01000 permit in response to the comments received. The ODAFF's responses to comments were sent to all individuals/entities that submitted comments during the 30-day public review period. The permit will become effective on March 24, 2023. This will be the ODAFF's final permit decision. A summary of the comments, ODAFF's responses, and changes made to the draft 2023-2028 permit after the public review are listed below. A copy of the final permit, fact sheet, and responses to comments are available on ODAFF's website at: <https://ag.ok.gov/divisions/agricultural-environmental-management/>.

### **COMMENT #1 from Save the Illinois River, Inc:**

“What changes, if any, are included in the proposed permit?”

### **AEMS/AgPDES RESPONSE #1:**

The draft AgPDES Concentrated Animal Feeding Operation Permit posted contained no substantial operational changes. Minor grammar and formatting changes were updated throughout the document as well as updates to AEMS program forms noted in the appendices. In addition, to be consistent throughout the permit, waters of the U.S., waters of the United States, and/or surface waters were updated to waters of the state to be consistent with the Clean Water Act and federal regulations .

### **COMMENT #2 from Oklahoma Cattlemen's Association:**

“Why is the public comment process for this proposed rule not the same for the other rules (found here – <http://app.ag.ok.gov/proposedrules/>)?”

### AEMS/AgPDES RESPONSE #2:

The Draft AgPDES Concentrated Animal Feeding Operation Permit (OKG#010000) is not an Oklahoma Rule. It is a general permit issued under the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program. Environmental Protection Agency (EPA) has approved ODAFF as the NPDES permitting authority for agriculture related discharges in Oklahoma, which is referred to as AgPDES in Oklahoma for our agricultural permits. [OAC 35:45-1-7(c)(2)] Pursuant to Title 2 Oklahoma Statutes Section 2A-29, the administrative process for rulemaking is not applicable to the issuance of AgPDES general permits. The process for issuance of CAFO general permits under the AgPDES program, including the public comment process, is established under Title 2 O.S. § 2A-26 .

### COMMENT #3 from Oklahoma Cattleman's Association:

“Will the implementation of this rule be the same process as others or will it be different also? Specifically going before the Board then before the Legislature?”

### AEMS/AgPDES RESPONSE #3:

As noted in Response to Comment #2, reissuance of this general permit is not a rulemaking. Because this permit is not an Oklahoma rule, it does not follow the process of a rule change which in summary is:

- 1.) Department identifies updates
- 2.) Department puts the draft out for 30-day public comment
- 3.) Department responds to public comment and makes changes as applicable
- 4.) Department sends final rule proposal to Board of Agriculture
- 5.) Department sends final, Board approved rule to Legislature for final approval

While reissuance of the general permit has a similar process, because it is a Tier II general permit issued pursuant to the AgPDES permitting program, the process is as follows:

- 1.) Department prepares an updated draft general permit upon expiration based on state and federal statutes, regulations, and stakeholder comments.
- 2.) Prior to public notice, Department forwards the draft permit to EPA for a 90-day review period. to ensure it does not conflict with the CWA or federal regulations. EPA may provide comments or objections to issuance of the draft general permit within this 90-day period.
- 3.) Department puts the draft out for 30-day public comment.
- 4.) Department responds to public comment and makes changes as applicable and not in conflict with state or federal statutes or regulations.
- 5.) Department reissues general permit without further review by EPA unless the permit to be issued differs from the draft permit reviewed by EPA, EPA objected to the draft permit, there were significant comments on the draft permit, or EPA requests in writing to review the permit to be issued. See Memorandum of Agreement between ODAFF and EPA Relating to the Administration and Enforcement of ODAFF's AgPDES program.

Because issuance of the general permit is not a rulemaking, it does not need approval by the Board of Agriculture or the Legislature.

### COMMENT #4 from Oklahoma Cattleman's Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

#### **“Part I.F.1 and 1.c.**

We request a maximum of 60 days for the expedited review process”

#### AEMS/AgPDES RESPONSE #4:

Any expedited permit notice of intent (NOI) will be prioritized based on first received, first reviewed; however, new NOI applications will take precedence since expedited applications will continue to be administratively extended until approved under the new permit or upon the Department to deny the approval for the new permit timeframe. In addition, general permits are still subject to Tier II administrative procedures which includes public participation which is not possible within a 60 day timeframe.

With the expected influx of NOIs and NMPs following the approval of the permit, and the time for the Department to review following Tier II administrative procedures, the Department will not be setting a review timeframe due to workload and staffing.

#### **Title 2 Oklahoma Statutes Section 2A-29 – Common and Routine Permit Applications – Expedited Permitting Process – General Permits**

*For common and routine permit applications, the Oklahoma Department of Agriculture, Food, and Forestry may expedite the permitting process by issuing permits of general applicability, hereafter identified as general permits. General permits shall be subject to all the Tier II administrative procedures including the public participation requirements. The administrative process for rulemaking shall not be applicable to the issuance of general permits. Individual applicants may obtain authorization through the Tier I process to conduct an activity covered by a general permit. General permits are limited to activities under the Tier I and Tier II classifications.*

Again, those facilities requesting an expedited review process will not be affected in the event the review period is over sixty (60) days as their previous authorization will still be in effect. At this time, the Department will not be modifying the permit to incorporate this comment.

#### COMMENT #5 from Oklahoma Cattleman's Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

##### **“Part II.A.2.b.vii.**

**There shall be no discharge of rainfall runoff from manure or litter storage piles.**

We recommend the language be changed to read:

*Manure or sludge stored for more than 30 days must be stored within the drainage area of a RCS or stored in a manner (i.e. storage shed, bermed area, tarp covered area, etc.) that otherwise prevents contaminated stormwater runoff from the storage area.”*

#### AEMS/AgPDES RESPONSE #5:

According to Part II.A.1 *“There shall be no discharge of manure, litter, or process wastewater pollutants into waters of the United States from the production area except as provided below.”*

The permit further outlines the allowed exceptions as:

- a. *Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into waters of the United States provided:*
  - i. *The production area is properly designed, constructed, operated, and maintained to contain all*

*manure, litter, process wastewater, plus the runoff and direct precipitation from the 25-year, 24-hour storm event for the location of the CAFO.*

- ii. *The design storage volume is adequate to contain all manure, litter, and process wastewater accumulated during the storage period considering, at a minimum, the following:*
  - (A) *The volume of manure, litter, process wastewater, and other wastes accumulated during the storage period;*
  - (B) *Normal precipitation less evaporation during the storage period;*
  - (C) *Normal runoff during the storage period;*
  - (D) *The direct precipitation from the 25-year, 24-hour storm;*
  - (E) *The runoff from the 25-year, 24-hour storm event from the production area;*
  - (F) *Residual solids after liquid has been removed;*
  - (G) *Necessary freeboard to maintain structural integrity; and*
  - (H) *A minimum treatment volume, in the case of treatment lagoons.*
- b. *The production area must be operated in accordance with the additional measures and records specific in Part II.A.2 of this permit.*

As such, regardless of the time the manure is stored, the same requirements remain. At this time, the Department cannot change the permit to allow discharge from these storage piles, except in the exceptions noted above, if it is there for less than thirty (30) days.

COMMENT #6 from Oklahoma Cattleman's Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

**“Part III.A.2.c.**

We propose to remove the following language from this paragraph:

**The owner/operator shall make available the NOI and NMP at a public location for public viewing (i.e. county courthouse or public library) within the county that the facility is located in. Prior to the date the application will be made available for public viewing, the owner/operator shall publish the public notice as a legal notice in at least one newspaper of**

**general circulation in the county that the facility is located in. The notice will also provide the opportunity for a public hearing on the NOI and draft NMP in accordance with 40 CFR § 124.11 and 12.**

EPA Region 6 in New Mexico and other EPA delegated states do not require CAFOs to submit public viewing notice documents for general permit renewals. In the previous two permit cycles in Oklahoma, minimal and in most cases no substantive comments have been received on NOI/NMP submissions. This would eliminate the extra burden and resources spent on preparing the documents and coordinating the viewing location. Posting the renewal NOI/NMP on the ODAFF website is sufficient.”

#### **AEMS/AgPDES RESPONSE #6:**

Oklahoma Law (Oklahoma Statutes) requires Tier II or Tier III applications to publish public notice in a newspaper and identify a public location. Further, a concentrated animal feeding operation renewal is defined as a Tier II permit thereby requiring the application to follow the Tier II administrative process as stated in Title 2 O.S. § 2A-29. A Tier II application definition can be found under OAC 35:44-1-39 with statutes further stating they also must public in a in a local newspaper and provide a hardcopy at a public location within the county where the existing facility is located. Although the Oklahoma Statutes and rules authorizing and implementing the AgPDES program refer to “applications for authorization to discharge under general permits” instead of NOIs, for purposes of the AgPDES program, the two terms are interchangeable. See Memorandum of Agreement between ODAFF and EPA Relating to the Administration and Enforcement of ODAFF’s AgPDES program (“the MOA”), pg. 15. The public notice for NOIs, including the NMP, follows the same procedures and requirements applicable to other Tier II draft permits. MOA, pg. 17.

#### **Title 2 of Oklahoma Statute § 2A-25.A states:**

*“Upon filing a Tier II or III application with the Oklahoma Department of Agriculture, Food, and Forestry, the applicant shall publish notice of the filing as legal notice in one newspaper of general circulation local to the proposed new site or existing facility. The publication shall identify public locations where the application may be reviewed, including a public location in the county where the proposed new site or existing facility is located.*

#### **OAC 35:44-1-30. Notices**

- (a) ***Statutory requirements for notice.*** *The Agriculture Environmental Permitting Act requires an applicant to publish notice of filing a legal notice in one newspaper local to the proposed location or existing facility in accordance with 2 O.S. § 2A-25.*

#### **35:44-1-38. Water quality applications - Tier I**

*The following water quality authorizations require Tier I applications:*

- (1) *New, modified or renewed authorization under a general permit, except authorization pursuant to a concentrated animal feeding operations general permit.*
- (2) *Transfer of discharge permit considered minor pursuant to 40 CFR 122.63(d).*
- (3) *Minor modification of discharge permit or of an authorization pursuant to a general permit.*
- (4) *Administrative amendment of permits or other authorizations for the correction of administrative or typographical errors.*

#### **35:44-1-39. Water quality applications - Tier II**

*The following water quality authorizations require Tier II applications.*

- (1) *New individual discharge permit for small and medium concentrated animal feeding operations.*
- (2) *Permit renewal or major modification for a facility with individual discharge permit, including concentrated animal feeding operation permits.*
- (3) *New, modified or renewed general permit promulgation.*
- (4) *New, major modification, or renewed authorization under a concentrated animal feeding operation general permit.*
- (5) *Any new individual discharge permit for a non-major facility.*

Based on state laws and rules, the Department is unable to remove language requiring the publishing of notice in a newspaper of general circulation local to the proposed site as well as making the hardcopy available for viewing in a public location for expedited applications of already existing facilities. No changes will be made to the current permit.

COMMENT #7 from Oklahoma Cattleman's Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

**“General Comments**

Throughout the permit the terms “surface water, surface waters, waters of the U.S. and waters of the United States” are used. We propose using the term surface water of the United States to provide a clear definition.”

AEMS/AgPDES RESPONSE #7:

To be consistent with the CWA and federal regulations , the Department has identified and updated these term references in the permit as waters of the United States.

COMMENT #8 from Oklahoma Cattleman's Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

“Part III.A.7.d.

We propose to remove the following language from this paragraph:

**Manure, Litter, and Process Wastewater Testing. Representative samples of manure litter, and process wastewater shall be collected and analyzed for nutrient content, including nitrogen and phosphorus, at least annually, in accordance with the protocols established in the NMP under Part III.A.3.e. At a minimum, manure sampling and analysis shall be conducted annually each year of permit coverage. Steps must be taken to ensure the collection of a representative samples. The samples shall be sent for analysis as soon after collection as practical and, where necessary, specific preservation procedures shall be utilized to prevent the degradation of the sample.**

**General Comments**

Generally, producers/farmers take waste samples in conjunction with the annual soil samples. This allows for the producers to utilize a recent waste sample for the update to the annual nutrient management plan budgets which follow a given crop rotation and not a January to December calendar year. The additionally testing prior to first land application event of the year is an extra cost to producer.”

AEMS/AgPDES RESPONSE #8:

Department Note – the tracked proposed changes to the language above are as follows:

- d. Manure, Litter, and Process Wastewater Testing. Representative samples of manure, litter, and process wastewater shall be collected and analyzed for



nutrient content, including nitrogen and phosphorus, at least annually, in accordance with the protocols established in the NMP under Part III.A.3.e. At a minimum, manure sampling and analysis shall be conducted ~~annually prior to the first land application event~~ each year of permit coverage. Steps must be taken to ensure the collection of a representative sample. The sample shall be sent for analysis as soon after collection as practical and, where necessary, specific preservation procedures shall be utilized to prevent the degradation of the sample.

#### **40 CFR PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) POINT SOURCE CATEGORY**

*§412.4(c)(3) Manure and soil sampling. Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed a minimum of once every five years for phosphorus content. The results of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.*

In research of this comment, the Department has made the following updates to the language as noted:

- d. ~~Manure, Litter, and Process Wastewater Testing. At a minimum, manure sampling and analysis shall be conducted annually prior to the first land application event each year of permit coverage.~~ **Prior to land application,** representative samples of manure, litter, and process wastewater shall be collected and analyzed for nutrient content, including nitrogen and phosphorus, **at least at a minimum** annually, **each year of permit coverage,** in accordance with the protocols established in the NMP under Part III.A.3.e. ~~At a minimum, manure sampling and analysis shall be conducted annually prior to the first land application event each year of permit coverage.~~ Steps must be taken to ensure the collection of a representative sample. The sample shall be sent for analysis as soon after collection as practical and, where necessary, specific preservation procedures shall be utilized to prevent the degradation of the sample. **The results of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.**

The language defining “first” event has been removed but samples must be collected and analyzed prior to the land application to ensure proper land application rates are utilized.

COMMENT #9 from Oklahoma Cattleman’s Association, Oklahoma Farm Bureau, Oklahoma Pork Council, and Texas Cattle Feeders Association:

**“Part III.A.7.e.**

We propose to modify the following language from this paragraph:

- e. *Soil Testing. Initially, representative samples of soil for all fields under the control of the CAFO operator where manure and wastewater may be applied must be collected and analyzed for nitrogen and phosphorus content in accordance with the protocols established in the NMP under Part III.A.3.e. After initial sampling, only those fields being used for land application in a given year must be sampled and analyzed annually ~~prior to land application~~. Representative samples shall be collected from each field included in the NMP. The field may include land associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used. Each sample area should consist of only one general soil type or condition. If*

*a field varies in slope, color, drainage or texture and if those areas can be fertilized separately, collect and analyze a separate sample for each area. Avoid sampling in old fence rows, dead furrows, low spots, feeding areas, and other areas that might not provide representative results. Soil samples shall not be taken when the soil is wet or frozen or shortly after applying lime or fertilizer. Collect at least 20 soil cores for each sample area. Take the soil cores randomly throughout the sampling area and combine the cores into a single sample.*

### **General Comments**

Generally, producers/farmers take soil samples between different crop rotations. This is typically performed in late summer to early fall. Soil test results are then utilized to update the annual nutrient management plan budgets which follow a given crop not a January to December calendar year. The additional testing prior to first land application event of the year is an extra cost to the producer. Furthermore, we request the inserted clarification on what a field may represent and how fields are managed for land application as it relates to soil sampling.”

### **AEMS/AgPDES RESPONSE #9:**

In research of this comment, the Department has made the following updates to the language as noted:

- e. *Soil Testing. Initially, representative samples of soil for all fields under the control of the CAFO operator where manure and wastewater may be applied must be collected and analyzed for nitrogen and phosphorus content in accordance with the protocols established in the NMP under Part III.A.3.e. After initial sampling, only those fields being used for land application in a given year must be sampled and analyzed annually prior to land application. The field may include land associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used. Representative samples shall be collected from each field included in the NMP; however, representative samples of fields with a single center pivot system must be obtained within the direct area of application, not in areas of the field where land application is not administered. Each sample area should consist of only one general soil type or condition. If a field varies in slope, color, drainage or texture and if those areas can be fertilized separately, collect and analyze a separate sample for each area. Avoid sampling in old fence rows, dead furrows, low spots, feeding areas, and other areas that might not provide representative results. Soil samples shall not be taken when the soil is wet or frozen or shortly after applying lime or fertilizer. Collect at least 20 soil cores for each sample area. Take the soil cores randomly throughout the sampling area and combine the cores into a single sample.*

Samples are required to be taken prior to land application to ensure applicable land application rates are followed. While the comments for this section state additional testing “prior to the first land application event of the year is an extra cost,” this section does not state the time of year, only that soil testing occur prior to land application at a minimum annually. So in the event the new crop rotation is planned for “late summer to early fall” as noted in the comment, the representative sample may be taken prior to that summer land application and not in January.