

ENVIRONMENTAL PROTECTION AGENCY
[FRL-]

Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges from Horse, Cattle and Dairy Cows, Swine, Poultry, and Veal Calf Concentrated Animal Feeding Operations (CAFOs) in Oklahoma (except Indian Country)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed permit issuance.

SUMMARY: EPA Region 6 Water Quality Protection Division, today is proposing for public comment the issuance of a National Pollutant Discharge Elimination System general permit for discharges from eligible owners/operators of existing concentrated animal feeding operations (CAFOs), in Oklahoma, except those discharges on Indian Country. CAFOs discharging on Indian Country would be required to apply for an individual permit.

All currently operating animal feeding operations that are defined as CAFOs or designated as CAFOs by the permitting authority (See Part VII Definitions, “CAFOs”) and that are subject to 40 CFR Part 412, Subpart A (Horses), Subpart C (Dairy Cows and Cattle Other than Veal Calves), and Subpart D (Swine, Poultry, and Veal Calves) are eligible for coverage under this permit. Hereinafter, this NPDES general permit will be referred to as “permit” or “CAFO permit” or “CAFO general permit.” Eligible CAFOs

may apply for authorization under the terms and conditions of this permit, by submitting a notice of intent (NOI) to be covered by this permit. This permit covers animal feeding operations listed above which meet the definition of a CAFO and discharge or propose to discharge pollutants to waters of the United States. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.

To determine whether your facility is regulated by this action, you should carefully examine the definition of "concentrated animal feeding operation" in existing EPA regulations at 40 CFR 122.23. (also found in Part VII of the draft permit). If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding "FOR FURTHER INFORMATION CONTACT" section.

This permit was originally issued in the Federal Register at 58 FR 7610 with an effective date of March 10, 1993, and an expiration date of March 10, 1998. Applicable requirements from that 1993 permit are continued in the proposed permit. The proposed permit adds additional requirements contained in revised CAFO regulations at 40 CFR 122 and 412 which were published in the Federal Register at 73 FR 70,418 (November 20, 2008.)

The permit adds new requirements relating to Nutrient Management Plans (NMPs) for permitted CAFOs. CAFO operators were required to develop and implement NMPs under the 2003 rule; the 2008 rule requires CAFOs to submit the NMPs along with their

notice of intent (NOI). EPA Region 6 as the permitting authority will review the NMPs submitted along with the NOIs and will also establish the terms of the NMP that are enforceable elements of the permit. The region will provide the public with an opportunity for meaningful review and comment on the NMPs and the terms of the NMPs will be incorporated into the permit.

DATES: Comments must be submitted in writing to EPA on or before [30 DAYS AFTER PUBLICATION].

PROPOSED DOCUMENTS: The proposed general permit and fact sheet which sets forth principal facts and the significant factual, legal, and policy questions considered in the development of the proposed general permit, may both be obtained via the Internet at <http://www.epa.gov/region6/water/npdes/cafo/index.htm>

To obtain hard copies of these documents or any other information in the administrative record, please contact Ms. Diane Smith using the contact information provided below.

How do I comment on this proposal?

COMMENT SUBMITTALS: Submit your comments, by one of the following methods:

- Email: smith.diane@epa.gov .
- Mail: Ms. Diane Smith, Environmental Protection Agency, Water Quality Protection Division (6WQ-NP), 1445 Ross Ave., Suite 1200, Dallas, TX 75202.

- Hand Delivery: EPA Region 6, 7th Floor Reception Desk, 1445 Ross Ave., Suite 1200, Dallas, TX 75202. Such deliveries are only accepted during normal business hours.

FOR TECHNICAL INFORMATION CONTACT: Scott Stine, NPDES Permits and TMDL Branch (6WQ-PP), Environmental Protection Agency, 1445 Ross Ave., Suite 1200, Dallas, TX 75202; telephone number: (214) 665-7182; fax number: (214) 665-2191; email address: stine.scott@epa.gov.

Administrative record: All documents and references used in the development of this permit are part of the Administrative Record for this permit. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available materials are available either electronically or in hard copy from Ms. Diane Smith at the address above. The Administrative Record may also be viewed at the EPA Region 6 Offices from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. For more information on scheduling a time to view the Record or to obtain copies of available documents, please contact Ms. Diane Smith at 214-665-2145 or smith.diane@epa.gov.

Public Hearings.

EPA has not scheduled any public hearings to receive public comment concerning the proposed permit. All persons will continue to have the right to provide written comments

during the public comment period. However, interested persons may request a public hearing pursuant to 40 CFR 124.12 concerning the proposed permit. Requests for a public hearing must be sent or delivered in writing to the same address as provided above for public comments prior to the close of the comment period. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. Pursuant to 40 CFR 124.12, EPA shall hold a public hearing if it finds, on the basis of requests, a significant degree of public interest in a public hearing on the proposed permit. If EPA decides to hold a public hearing, a public notice of the date, time and place of the hearing will be made at least 30 days prior to the hearing. Any person may provide written or oral statements and data pertaining to the proposed permit at the public hearing.

III. Compliance with the Regulatory Flexibility Act.

EPA's Approach to Compliance with the Regulatory Flexibility Act for General Permits.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

The legal question of whether a general permit (as opposed to an individual permit) qualifies as a “rule” or as an “adjudication” under the Administrative Procedure Act (APA) has been the subject of periodic litigation. In a recent case, the court held that the CWA Section 404 Nationwide general permit before the court did qualify as a “rule”

and therefore that the issuance of that general permit needed to comply with the applicable legal requirements for the issuance of a “rule.” *National Ass’n of Home Builders v. US Army Corps of Engineers*, 417 F.3d 1272, 1284-85 (DC Cir.2005) (Army Corps general permits under Section 404 of the Clean Water Act are rules under the APA and the Regulatory Flexibility Act; “Each NWP [nationwide permit] easily fits within the APA’s definition ‘rule.’ . . . As such, each NWP constitutes a rule . . .”).

As EPA stated in 1998, “the Agency recognizes that the question of the applicability of the APA, and thus the RFA, to the issuance of a general permit is a difficult one, given the fact that a large number of dischargers may choose to use the general permit.” 63 FR 36489, 36497 (July 6, 1998). At that time, EPA “reviewed its previous NPDES general permitting actions and related statements in the Federal Register or elsewhere,” and stated that “[t]his review suggests that the Agency has generally treated NPDES general permits effectively as rules, though at times it has given contrary indications as to whether these actions are rules or permits.” *Id.* at 36496. Based on EPA’s further legal analysis of the issue, the Agency “concluded, as set forth in the proposal, that NPDES general permits are permits [i.e., adjudications] under the APA and thus not subject to APA rulemaking requirements or the RFA.” *Id.* Accordingly, the Agency stated that “the APA’s rulemaking requirements are inapplicable to issuance of such permits,” and thus “NPDES permitting is not subject to the requirement to publish a general notice of proposed rulemaking under the APA or any other law . . . [and] it is not subject to the RFA.” *Id.* at 36497.

However, the Agency went on to explain that, even though EPA had concluded that it was not legally required to do so, the Agency would voluntarily perform the RFA’s

small-entity impact analysis. *Id.* EPA explained the strong public interest in the Agency following the RFA's requirements on a voluntary basis: "[The notice and comment] process also provides an opportunity for EPA to consider the potential impact of general permit terms on small entities and how to craft the permit to avoid any undue burden on small entities." *Id.* Accordingly, with respect to the NPDES permit that EPA was addressing in that Federal Register notice, EPA stated that "the Agency has considered and addressed the potential impact of the general permit on small entities in a manner that would meet the requirements of the RFA if it applied." *Id.*

Subsequent to EPA's conclusion in 1998 that general permits are adjudications rather than rules, as noted above, the DC Circuit recently held that nationwide general permits under section 404 are "rules" rather than "adjudications." Thus, this legal question remains "a difficult one" (*supra*). However, EPA continues to believe that there is a strong public policy interest in EPA applying the RFA's framework and requirements to the Agency's evaluation and consideration of the nature and extent of any economic impacts that a CWA general permit could have on small entities (e.g., small businesses). In this regard, EPA believes that the Agency's evaluation of the potential economic impact that a general permit would have on small entities, consistent with the RFA framework discussed below, is relevant to, and an essential component of, the Agency's assessment of whether a CWA general permit would place requirements on dischargers that are appropriate and reasonable. Furthermore, EPA believes that the RFA's framework and requirements provide the Agency with the best approach for the Agency's evaluation of the economic impact of general permits on small entities. While using the RFA framework to inform its assessment of whether permit requirements are appropriate

and reasonable, EPA will also continue to ensure that all permits satisfy the requirements of the Clean Water Act. Accordingly, EPA has committed to operating in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency has committed that it will apply the RFA in its issuance of general permits as if those permits do qualify as "rules" that are subject to the RFA).

Authority: Clean Water Act, 33 U.S.C. 1251 et seq.

Dated:

Miguel I. Flores

Director, Water Quality Protection Division

EPA Region 6.