

## **RESPONSE SUMMARY**

### **GENERAL PERMIT 3-9100 FOR MEDIUM CONCENTRATED ANIMAL FEEDING OPERATION PERMITTING**

#### **GENERAL PERMIT 3-9100**

The Vermont Agency of Natural Resources, Department of Environmental Conservation (Department or DEC), proposes to issue General Permit 3-9100. The Department placed the General Permit 3-9100 on public notice from March 15, 2022, through May 10<sup>th</sup>, 2022. The Department held one public meeting during the public comment period.

The Department received written comments on General Permit 3-9100. The following is a summary of the public comments on the General Permit and the Department's responses to those comments. Comments have been paraphrased and combined where appropriate.

Comments on the General Permit were submitted by the following parties: Agri-Mark, Inc.; Conservation Law Foundation; Ayana Curran-Howes; Lake Champlain Committee; Kylie Quesnel; Vermont Dairy Producers Alliance; Vermont Natural Resources Council; and Woodnotch Farms, Inc.

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1. Comment: *See Attachment 1 – Curran Howes Policy Memo*

Response: The recommendations contained in the policy memo are beyond the jurisdiction of the Department and the scope of the General Permit.

2. Comment: Will a CAFO permitted farm be required to update, at great expense, their waste storage facility every time they are re-certified even if they have had no reported overflows or discharges? Currently, recertification of waste storage is done every ten years at a cost of approx. \$10,000. Has an economic impact study been done to assess the cost of upgrading non-failing manure storage each time the rain standards change?

Response: The General Permit requires that newly constructed waste storage facilities (WSF) or existing WSFs undergoing modification are designed and built in accordance with the most recent technical standards developed by the Vermont NRCS or an equivalent standard certified by a professional engineer licensed in the State of Vermont. The General Permit only requires certification of an existing WSF by a Professional Engineer on a case-by-case basis following an overtop. The Agency has discretion to determine when certification of an existing facility is necessary following an overtopping event. It is important for the Department to retain this requirement should the structural integrity of the storage be in question due to something like wall failure.

At the time of application and renewal, the farm must prove that they can store the wastes generated during the storage period, and direct rainfall and runoff. An applicant will prove this in part by submitting WSF as-builts or an evaluation conducted by a Professional Engineer – not certification. Average annual precipitation in Vermont has increased by 5-9” over the last 30 years<sup>1</sup>. Many farms already understand that it is in their interest to ensure that they have adequate storage. These farms have worked with NRCS to design new storages using updated precipitation data or an extended storage period and have maintained their herd size. Because the General Permit will authorize discharges from compliant, permitted farms when discharges occur due to rainfall, it is imperative that the farm calculate their storage volumes using up-to-date precipitation data. If the design standards in the General Permit are updated in the future, a farm will need to ensure that existing waste storage facilities meet the new design standards before an authorization or re-authorization can be issued.

The federal permit term for National Pollutant Discharge Elimination System (NPDES) Permits is 5 years. If new or improved data or practices come to light during the permit term, it is the obligation of the permitting authority to take that new information into consideration when updating the permit. All permit updates will be subject to public notice and public comment periods. ANR revised the General Permit to account for state specific conditions, equipment needed, and to be consistent with EPA’s NPDES regulations which were subject to extensive economic analysis. The General Permit is intended for farms that elect to apply for permit coverage and believe they can comply. Given the varying levels of management and farm configurations, ANR believes that individual farms are best suited to determine the economic impact of compliance with the General Permit on their individual facilities should they elect to seek coverage under the Permit.

3. Comment: What types of discharges will a CAFO permit cover? It is unclear what will be acceptable other than the 25-year precipitation event.

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<sup>1</sup> National Oceanic and Atmospheric Administration. National Climatic Data Center. 2020. NOAA-National Climatic Data Center Website. [www.ncdc.noaa.gov](http://www.ncdc.noaa.gov).

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Response: A farm permitted under the General Permit whose production area is properly designed, constructed, maintained, and operated to store all waste including runoff and direct precipitation during the storage period (180-days), and the 25-year, 24-hour storm event and who is in compliance with all the terms of the permit will be authorized to discharge waste from the production area due to precipitation. In short, if you're in compliance with this General Permit, discharges from the production area caused by precipitation will be authorized.

4. Comment: What is the purpose for requiring a farm nearing storage capacity to notify ANR of storage status? Does the CAFO permit cover the farm for managing this issue on their own? Are farms required to contact both ANR and AAFM if nearing capacity?

Response: The General Permit requires the permittee to contact the Department if the manure level in a WSF enters the top six or 12 inches (depending on WSF type). The purpose of this notification requirement is not to be punitive; it is intended to be proactive and to initiate a conversation about next steps so that the farm can better anticipate whether a resulting discharge will be authorized, in order to avoid a permit violation. Possible next steps may include transferring to another waste storage facility, land applying according to the farm's Nutrient Management Plan (NMP) or transferring to another farm. If the level of a WSF exceeds the design storage volume, the General Permit only requires notification to the Department of Environmental Conservation; the permit does not require the permittee to contact AAFM in this situation.

5. Comment: Buffers along surface waters are set at 25 feet in this proposed permit draft. However, buffers along ditches are also set at 25 feet instead of the current standard of 10 feet. AAFM demonstrated that a 10-foot buffer on ditches met the requirements of the CAFO standards. Taking 25 feet on either side of a ditch is 50 feet lost as opposed to the current 20-foot total. It is our understanding that EPA does not require 25-foot buffers and with the excellent progress VT agriculture has made on water quality, why not keep the 10-foot buffer along ditches?

Response: The General Permit requires a 25-foot buffer on surface waters and conduits to surface waters – including ditches that are conduits to surface water – that are downslope of the land application area. This requirement is consistent with the federal regulations for Large CAFOs, which does not distinguish between required practices along surface waters and conduits to surface waters (40 C.F.R. § 412.4(c)(5)). If a farm seeking authorization to discharge does not want to implement the 25-foot buffer on conduits to surface waters and they can prove that a combination of other practices on their fields is as protective as a 100-foot spreading setback, the farm may apply for an individual permit (see also response to Comment 6).

6. Comment: Will LFOs have the same 25-foot buffer standard along surface waters as MFOs in their CAFO permit?

Response: According to the Required Agricultural Practices (RAPs), LFOs and MFOs are required to maintain a minimum of 25-foot wide buffers along surface waters. A NPDES permitted Large CAFO will be required to comply with one of three options listed in 40 CFR § 412.4: (1) implement a 100-foot nutrient setback for all surface waters or conduits to surface waters that are downslope of the land application area; (2) implement a 35-foot wide vegetated buffer and setback for all surface waters or conduits to surface waters downslope of the land application area; or (3) the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 100-foot setback.

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7. Comment: It is unclear what conditions a farm must meet to “permanently eliminate” the discharge and will no longer be required to have CAFO permit coverage. Does a farm have to meet all specifications in the permit to return to operating as an MFO under the Agency of Agriculture?

Response: Farms that discharge to waters of the state are required to apply for CAFO permit coverage. Part II (H) of the General Permit lists the different ways a farm may be eligible to terminate their permit. If a farm with a discharge eliminates the discharge and demonstrates that the circumstances that led to the discharges at the CAFO have been changed or corrected and fully and permanently remedied and can prove that the fix will contain all the waste generated from the relevant source during the storage period, the runoff and the direct precipitation from the 25-year, 24-hour storm event they can apply to terminate their permit coverage. While this fix will make a farm eligible to terminate their permit, following permit termination, no discharge from the farm production area will be authorized.

8. Comment: Management of all erosion in driveways or roads: Is this going beyond CAFO oversight?

Response: Part III Section A of the General Permit requires the farm to ensure that access roads and other impervious areas within the production area are managed to prevent the discharge of agricultural waste to surface waters and undue erosion. State delegation of NPDES permitting authority allows states to establish additional conditions based on local factors. The Department has determined that management of waste and undue erosion in areas like driveways and roads is important for meeting the intent of the permit.

9. Comment: Under a CAFO permit, would farms be precluded from bringing substrates to go into waste storage facility?

Response: No, however a farm seeking coverage under the General Permit would need to prove at the time of application that it has adequate storage and land base to import substrates during the five-year permit term. If during the permit term the farm wanted to increase the annual import amount (volume or nutrient content) above the total farm nutrients or storage volume indicated at the time of permit application, the farm would need to amend their permit.

10. Comment: Can ANR utilize data available through the State to navigate storm sizes rather than require medium-sized CAFOs to implement duplicative systems, which is costly and time consuming.

Response: The Department expects that this comment is related to Part III(A)(6)(g) regarding the use of a rain gauge to measure rain events greater than 0.5 inches. This requirement is reflected in some other states’ permits including New York. This requirement is needed in order to help the Department determine if a discharge is authorized or not. This will also help the farm show compliance with their NMP, which prohibits the application of manure to saturated ground. The 0.5-inch threshold is based on the rainfall depth for which runoff begins for the area-weighted average runoff curve number for cultivated lands in Vermont, which is between 0.4 and 0.5 inches. If production areas are within 2.5 miles of each other, the General Permit allows that one rain gauge may be used. At the time of this drafting, a manual rain gauge costs around \$7.00 each and a digital rain gauge costs around \$34.00 each. Some farms already use rain gauges or weather stations as part of their operation. If a farm seeking authorization to discharge wants to use an alternative method, they may apply for an individual permit.

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11. Comment: Irrigation controls to protect groundwater and nuisance management for odor and flies: Do these come under the authority of a CAFO permit or is that under authority of AAFM?

Response: Part III(B)(8) has been changed to read, "Irrigation systems shall be managed in accordance with the January 2021 Vermont NRCS Conservation Practice Standard #449" to better align with ANR's authority to regulate discharges to surface waters.

12. Comment: What assurance does a farm have that ANR will not arbitrarily add requirements based on public comments to posted NMPs

Response: In order for a farm applying for the General Permit to be eligible for authorization to discharge, an NMP compliant with the permit, the Clean Water Act, and State law must be submitted and approved at the time of permit application. Any NMP changes required by the Department will not be arbitrary. If during the public comment period, an NMP deficiency is noted and is related to the permit, the Clean Water Act, or State law, the Department will require the NMP to be updated to correct the deficiency consistent with state and federal law. If during the public comment period a concern is noted that is outside of the scope of the permit, the Clean Water Act, or State law, the Department will not require an update to the NMP.

13. Comment: Confusion about reporting discharges and waste that by-passes a system. Do both need to be reported or only a discharge to a surface water?

Response: As per section VI (J) of the General Permit, the permittee must notify the Department by phone within 24 hours of a discharge to surface water, and in writing within five working days of a discharge to surface water. Details regarding information required to be included in notification, as well as sampling requirements are listed in sections VI(J)(1) and VI(J)(2). Overflows that occur that do not result in a discharge to surface water do not need to be reported to the Department, however all operation, maintenance, and recordkeeping requirements remain in effect.

14. Comment: VDPA also has concerns involving the process of the permit development, the lack of outreach within the dairy community.

Response: State and Federal law require that the Department provide a 30-day minimum formal public comment period and notice through the Environmental Notice Bulletin (ENB). In addition to the required formal public comment period and notice through the ENB, the Department voluntarily took on substantial pre-notice public process outreach and extended the formal public comment period: In March 2021 the Department reached out to all medium and large farms in the state, as well as the Champlain Valley Farmer Coalition, the Connecticut River Watershed Farmers Alliance, the Farmer's Watershed Alliance of Franklin and Grand Isle Counties, the Vermont Dairy Producers Alliance, technical service providers, VAAFAM, NRCS, UVM Extension, the Vermont Association of Conservation Districts, all fourteen conservation districts in the state, the Conservation Law Foundation, the Vermont Natural Resources Council, and the Lake Champlain Committee and held three stakeholder presentations. The Department also engaged in numerous one-on-one conversations with farmers and with specific groups to discuss the General Permit. The Department received extensive feedback during this time, responded in writing to all comments and incorporated some suggestions into the new General Permit. The Department then provided a 54-day public comment period and public meeting, and directly notified all farms and groups notified during the March 2021 outreach as well as the Farm Bureau and William Shouldice & Associates, LLC, in addition to providing notice via the ENB.

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15. Comment: The Department received three comments questioning whether the General Permit is necessary considering the adoption of the RAPs, the Agricultural Sector's progress in implementing practices that reduce non-point pollution according to the Lake Champlain TMDL, as well as 'praise from EPA'.

Response: The agriculture community has made important efforts toward achieving state-wide clean water goals. Updates to this General Permit represent the fact that ANR's regulatory programs evolve over time to reflect best practice and available science, as well as updates to federal regulations. National Pollutant Discharge Elimination System (NPDES) permits have a permit term of 5 years; the Medium CAFO GP was first made available in 2013 and its update is overdue. Further, Federal law requires ANR to periodically review and re-evaluate the terms and conditions of any general permits issued under the state administered NPDES program as authorized by the Clean Water Act. As part of that review, ANR has relied on extensive field experience regulating discharges from CAFOs and regulatory experience in other NPDES programs to determine the appropriate revisions to the previously issued Medium CAFO GP. ANR believes these revisions are important for a farm that seeks legal authorization to discharge in compliance with the parameters of the permit and for ANR to fulfill its obligations under state and federal statutes. These requirements are separate and apart from those established by the RAPs, TMDL, or regulatory provisions under Title 6 of the Vermont statutes, which generally pertains to the Vermont Agency of Agriculture, Food, and Markets. Pursuant to its delegated authority under the Clean Water Act, ANR must manage and regulate discharges to waters of the state consistent with the requirements of Section 402 of the Clean Water Act; this work cannot be delegated to the Vermont Agency of Agriculture, Food, and Markets.

16. Comment: We would ask for more clarity and a more direct and simplified CAFO Permit which addresses the issue of why the farm fell under the Medium CAFO in the first place.

Response: The General Permit is based off the 2013 Medium CAFO General Permit and is intended for Medium Farms that want legal coverage commensurate with their investment in production area infrastructure and commitment to high-level management. Pursuant to the Clean Water Act, a Medium Farm that is discharging to waters of the state without an individual CAFO permit or authorization under this General Permit will be required to permanently eliminate the discharge or apply for a CAFO Permit.

17. Comment: DEC should revise the Draft General Permit to incorporate the Required Agricultural Practices ("RAPs") by reference and to otherwise include only those terms that exceed or differ from the standards that the RAPs establish, aligning the Draft General Permit with Vermont's existing agricultural water quality regulations and accounting for farmers' experience with the RAPs.

Response: The CAFO General Permit is a discharge permit that authorizes discharges from eligible facilities. Many of the RAPs are irrelevant to or beyond the scope of the activity authorized by the General Permit. However, ANR did incorporate some parts of the RAPs that were salient to the General Permit. In March 2021 the Department presented a table comparing the major differences between AAFM's MFO GP and the General Permit and will consider posting an updated version of the table to the website.

18. Comment: DEC should revise the Draft General Permit to extend the public notice and comment period for the notice of intent ("NOI"), nutrient management plan ("NMP"), and other attachments from at least 14 days to at least 30 days.

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Response: The notice and comment periods required in the General Permit are consistent with 40 CFR 124.11 and 10 VSA Chapter 170. The Agency has discretion to extend the comment period when necessary or upon request.

19. Comment: DEC should revise the Draft General Permit to extend the public notice and comment period for substantial changes to the NMP of a CAFO authorized to discharge under the Draft General Permit from at least 14 days to at least 30 days.

Response: The notice and comment periods required in the General Permit are consistent with 40 CFR 124.11 and 10 VSA Chapter 170. The Agency has discretion to extend the comment period when necessary or upon request.

20. Comment: DEC should revise the Draft General Permit to clarify that NOIs, NMPs, and attachments associated with an authorization to discharge under the Draft General Permit will be maintained and made accessible in a searchable database on DEC's website and in ANR's Natural Resources Atlas.

Response: The notice of application materials will be consistent with 40 CFR 122.23, 1 and 10 VSA Chapter 170. After the initial notice period, application materials and authorizations will be made available to the public consistent with other NPDES permitted facilities.

21. Comment: DEC should revise the Draft General Permit to establish separate effluent limitations and standards applicable to tile drained fields.

Response: The federal regulations do not contain separate effluent limitations for tile drainage. The General Permit instead requires the NMP demonstrate what practices will be implemented in order to reduce the risk of nutrients reaching tile drains.

22. Comment: DEC should revise the Draft General Permit to establish monitoring requirements for reasonably identifiable tile drain outlets.

Response: The federal regulations do not require monitoring of tile drains.