

MEMORANDUM OF UNDERSTANDING
2005-2007

Between the
WASHINGTON STATE DEPARTMENT OF AGRICULTURE
and the
WASHINGTON STATE DEPARTMENT OF ECOLOGY

Related to the

The State of Washington's Livestock Nutrient Management Program to protect water quality under the authority of Chapter 90.64 RCW, Dairy Nutrient Management Act and Chapter 90.48 RCW, Water Pollution Control Act

I. PREAMBLE

In 2003, Engrossed Substitute Senate Bill 5889 was enacted, which expanded Chapter 90.64 RCW, the Dairy Nutrient Management Act, beyond dairies to cover nutrient management for certain other livestock operations. The bill transferred all powers, duties, and functions pertaining to Chapter 90.64 RCW from the Washington State Department of Ecology (ECOLOGY) to the Washington State Department of Agriculture (WSDA) on July 1, 2003. Additionally, this legislation authorized ECOLOGY to delegate to WSDA authority under RCW 90.48.260 to administer both the state waste discharge program and the federal National Pollution Discharge Elimination System (NPDES) regarding animal feeding operations (AFOs) and concentrated animal feeding operations (CAFOs). The legislation acknowledged that WSDA must receive delegated authority under the Clean Water Act (CWA) from the US Environmental Protection Agency (EPA) before it can fully administer the livestock and dairy NPDES program. In 2005, Substitute Senate Bill 5602 was enacted that directed WSDA and ECOLOGY to provide the legislature with recommendations for statutory changes to fully implement the authorized livestock nutrient management program within WSDA for CAFOs, AFOs, and dairies.

Ecology will continue to be responsible to meet the CWA obligations regarding AFOs and CAFOs until EPA delegates that responsibility to WSDA. Therefore, activities related to the development, issuance and enforcement of NPDES CAFO permits remains the responsibility of ECOLOGY, although WSDA staff will work with ECOLOGY staff to assist them and learn that part of the program. Implementation of these changes will require good communications, close coordination and cooperation between ECOLOGY and WSDA.

This MOU has no effect on NPDES program activity unrelated to AFOs and CAFOs.

II. PURPOSE AND SCOPE

The purpose of this interagency MOU is to delegate authority under Chapter 90.48 RCW, as amended by ESSB 5889, regarding dairies, AFOs and CAFOs from ECOLOGY to WSDA and to describe the roles and responsibilities, timelines and cooperative efforts of the two agencies in the transition and implementation of that authority. Delegation of Chapter 90.48 RCW authority from ECOLOGY to WSDA related to the administration of the state waste discharge permit and NPDES permit programs related to AFOs and CAFOs shall not become final until such time as WSDA receives CWA delegation for NPDES permits from EPA. This MOU describes the responsibilities for working with EPA to achieve CWA delegation to Agriculture for the AFO/CAFO NPDES program.

Delegation of Chapter 90.48 RCW authority from ECOLOGY to WSDA related to enforcing water quality violations by dairies, AFOs and CAFOs is in process. The two agencies will continue to jointly manage this authority through cooperation and coordination.

In addition, this MOU is intended to define the roles, responsibilities, timelines and cooperative efforts of the two agencies until all administrative responsibility for Chapter 90.64 RCW from ECOLOGY to WSDA is complete.

III. DEFINITIONS

“AFO” means an Animal Feeding Operation that is a lot or facility (not aquatic) meeting the following conditions: 1) animals are stabled or confined and fed or maintained for a total of 45 days or more within a 12-month period; and 2) vegetation, forage or post-harvest residue are not sustained in the normal growing season over any part of the lot or facility.

“CAFO” means a Concentrated Animal Feeding Operation as defined in the December, 2002 federal revisions to the CAFO rule.

“CAFO NPDES Permit” means a National Pollutant Discharge Elimination System Permit issued by the delegated federal Clean Water Act permitting authority for the regulation of wastewater discharges from confined animal feeding operations. CAFO NPDES permits may be general permits to apply to a broad class of operations, or individual permits specific to only one operation.

“Clean Water Act” means the federal water pollution control act of 1977, as amended.

“Delegated Authority under Chapter 90.48 RCW” means the state authority that ECOLOGY is authorized to share with WSDA under ESSB 5889 in order to carry out the required state actions under ESSB 5889 and Chapter 90.64 RCW.

“Delegated Authority under the Clean Water Act” means that federal authority delegated from EPA to a state entity to implement the federal clean water act with respect to AFOs and CAFOs.

“Dairy General NPDES Permit” means the National Pollutant Discharge Elimination System Permit issued by the delegated federal Clean Water Act permitting authority for the regulation of wastewater discharges from dairies. ECOLOGY issued a dairy general permit for the state of Washington in 1998.

“Water Pollution Control Act” means Chapter 90.48 RCW, as amended.

Any other terms or names used in this agreement have their statutory definitions.

IV. BACKGROUND

Starting on July 1, 2003 the administration of Chapter 90.64 RCW, Dairy Nutrient Management was transferred from ECOLOGY to WSDA. Chapter 90.64 RCW was enacted to protect ground and surface water quality from inadequate nutrient management practices that would result in violations of Chapter 173-201A WAC, Water Quality Standards for Surface Water of the State of Washington, and Chapter 173-200 WAC, Water Quality Standards for Ground Waters of the State of Washington. Engrossed Substitute Senate Bill 5889 states the intent of the Legislature to establish a unified AFO/CAFO regulatory system, provides WSDA the authority to expand nutrient management requirements from dairies to other sectors of the livestock industry, provides ECOLOGY the authority to delegate state regulatory authority under Chapter 90.48 RCW regarding dairies, AFOs and CAFOs to WSDA, and establishes the Legislature’s intent for WSDA to obtain delegated authority under the federal Clean Water Act for AFO and CAFOs.

In addition to receiving authority under state laws regarding dairies, AFOs and CAFOs, WSDA must apply for and receive delegation from the U.S. Environmental Protection Agency. Until such time as WSDA receives federal delegation from EPA it will be necessary for ECOLOGY to retain authority for CAFO NPDES permits. The state waste discharge permits issued under Chapter 90.48 RCW for CAFO facilities are the same document as the federal NPDES permit. Therefore, ECOLOGY will continue to issue the state waste discharge permit as a short term means to simplify administration. State waste discharge permits may be issued separately for non-CAFO livestock facilities should there be a discharge to waters of the state that are not waters of the US, including any discharge to groundwater. Ecology will also develop and administer any separate state waste discharge permits until WSDA gains authority to manage the NPDES permit. At that time WSDA will take on the responsibility for administering both the federal and state permits.

WSDA will assume responsibility for all other aspects of the dairy program under Chapter 90.64 RCW and will carry out the inspection and enforcement authority under

Chapter 90.48 RCW for all dairies, AFO and CAFO operations. ECOLOGY and WSDA will work cooperatively to ensure that this MOU is implemented in a manner that does not jeopardize any federal funding or delegation(s).

V. PRIMARY RESPONSIBILITIES -- WSDA

- A. Starting on July 1, 2003 WSDA will administer, implement and enforce all sections of Chapter 90.64 RCW except for Chapter 90.64.050 (1) (e) regarding administration of NPDES permits and the concurrent state waste discharge permit. WSDA will also administer, implement and enforce Chapter 90.48 RCW regarding violations by dairies, AFOs and CAFOs located outside of Tribal Reservations. This includes, but is not limited to, overseeing the development of an expanded AFO/CAFO program under the amended federal CAFO rule; administrative requirements for dairies such as registration, tracking nutrient management plan approvals, plan certifications and data management; dairy, AFO and CAFO facility inspections and compliance actions under Chapter 90.64 RCW and RCW 90.48.040 regarding the discharge of pollutants to waters of the state, unless specifically stated elsewhere in this MOU.
- B. WSDA will carry out rule writing as necessary to implement and carry out the dairy and AFO/ CAFO program and to ensure that WSDA has adequate tools and authority in order to meet the AFO/CAFO CWA delegation requirements established by EPA.
- C. WSDA will take the lead responsibility in working with EPA on steps to apply for and obtain delegation of CWA authority for the NPDES AFO/CAFO program in Washington. An updated target for applying to EPA for delegation is Autumn, 2008; however this is contingent on when legislation is successfully adopted.
- D. WSDA will actively develop its expertise and capacity to deal with AFO/CAFO and state waste discharge permits in preparation for taking over all associated permit activity at the time delegation of CWA authority for NPDES permits involving AFO/CAFO from EPA to WSDA occurs.
- E. WSDA will receive and respond to all complaints regarding dairies, AFOs and CAFOs as required by RCW 90.64.030.
- F. WSDA will conduct all dairy, AFO and CAFO inspections and take appropriate compliance actions, including the levying and collection of monetary penalties as provided for in RCW 90.64.030 and in RCW 90.48.260, regarding the discharge or potential discharge of pollutants to waters of the state. WSDA is responsible to notify all responsible governmental agencies of discharges to waters of the state.
- G. WSDA will provide ECOLOGY written results of all inspections of permitted facilities by the 15th of each month and no later than 45 days after any inspection.
- H. WSDA will complete a closeout inspection within 30 days of Ecology's request to do so. Upon completion of the closeout inspection, WSDA will submit to Ecology a written report with recommendation(s).
- I. WSDA will require corrective action by a permitted facility for documented potential discharges and actual discharges from a CAFO and will notify ECOLOGY within 30 days of imposing any required action.
- J. WSDA will develop and implement procedures to evaluate research and education grant proposals for use of the livestock nutrient management account funds that will

assist livestock operations to achieve compliance with state and federal water quality laws and regulations.

- K. WSDA will maintain most data regarding dairies, AFOs and CAFOs in the WPLCS data base in a timely manner including data in the permit, facility, inspection and enforcement modules.
- L. WSDA will organize and staff the livestock nutrient management program development and oversight committee (DOC).

VI. PRIMARY RESPONSIBILITIES -- ECOLOGY

- A. ECOLOGY delegates to WSDA the authority and duties under RCW 90.48.260(1)(h), (i), and (j) for implementing the AFO/CAFO program. The delegated authority does not yet include developing and issuing the state waste discharge permits but does include handling complaints, inspections and compliance actions whether the violation is from a discharge or noncompliance with permit conditions. ECOLOGY will retain full jurisdiction over the development, issuance, cancellation and revocation of both federal NPDES permits and state waste discharge permits to CAFO facilities. At the time that EPA delegates CWA authority for the AFO/CAFO program to WSDA, ECOLOGY's delegation of all state waste discharge and NPDES permit authority under RCW 90.48.260 for AFOs and CAFOs to WSDA shall become complete.
- B. Since for the near future ECOLOGY will continue to be responsible to EPA for CWA compliance for AFOs and CAFOs, ECOLOGY retains the right under Chapter 90.48 RCW to take compliance actions in specific cases where human health or environmental damage has or may occur due to potential or actual discharges. In such serious cases, ECOLOGY and WSDA will consult and coordinate to ensure that the compliance action to be taken is, in the opinion of both agencies, sufficient to protect human health and the environment. ECOLOGY will proceed with an enforcement action only in those cases where ECOLOGY requests that WSDA defer to ECOLOGY and WSDA takes no further action.
- C. ECOLOGY will assist WSDA in developing its application and working with EPA to obtain NPDES CWA delegation to WSDA for the AFO/CAFO program in Washington.
- D. Ecology will remain available to provide reasonable technical assistance to the WSDA program..
- E. ECOLOGY will provide available monitoring data and trends analyses for livestock related pollutants to WSDA.
- F. ECOLOGY will be responsible for carrying out any legal proceedings begun prior to July 1, 2003, and for any actions initiated under subsection B. above where ECOLOGY has requested that WSDA defer to ECOLOGY and ECOLOGY has initiated an enforcement action. This includes those cases on administrative appeal before the Pollution Control Hearings Board or in any state court. . Ecology will provide WSDA with a list of the dairies, potential CAFOs or CAFOs that are in some phase of legal proceedings.
- G. Within 10 days of receipt of a written request for permit cancellation, Ecology will ask WSDA to perform a closeout inspection. When WSDA performs the closeout inspection,

Ecology will act on WSDA recommendation(s). If, however, the closeout inspection has not been performed by WSDA within 30 days, Ecology will act on the permittee's request and cancel the permit.

VII. COOPERATIVE EFFORTS BY AGENCIES

- A. WSDA and ECOLOGY will meet quarterly, or if needed more frequently, to discuss program elements of common jurisdictional interest including AFO/CAFO program implementation, permit compliance, coordination and communication with stakeholders.
- B. Local WSDA and Ecology staff will meet quarterly, or if needed more frequently, to discuss local priorities, watershed planning, TMDLs and water quality related issues.
- C. WSDA and ECOLOGY will meet on an annual basis with EPA to assess the status and progress of the program at WSDA.
- D. On an annual basis, WSDA and ECOLOGY will discuss mutual livestock work priorities to protect water quality and ensure the effective use of resources to best address identified water quality problems during the following fiscal year.
- E. ECOLOGY will actively participate in and assist WSDA in the education and guidance of the Development and Oversight Committee.
- F. WSDA and ECOLOGY will provide to each other access to all livestock facility and related records either agency may possess as necessary to fulfill state and federal requirements for livestock under the CWA, Chapter 90.64 RCW (Dairy Nutrient Management Act) and Chapter 90.48 RCW (Water Pollution Control Act).
- G. WSDA and ECOLOGY will coordinate in responding to any public disclosure requests relating to AFOs, CAFOs and dairies. ECOLOGY will answer any public disclosure requests that include AFOs, CAFOs and dairies for which there are data and appropriate reports in WPLCS.
- H. When mutually agreed to, WSDA or Ecology may request the other agency to assist in carrying out responsibilities for inspections, complaints and initial compliance actions.
- I. ECOLOGY will coordinate with WSDA on livestock impacts to water quality during TMDL scoping and implementation, and in shellfish management areas, riparian protection activities, watershed planning and state grant and loan programs.
- J. ECOLOGY and WSDA will coordinate on complaints or violations that involve both non-point and point sources or water quality and other mediums such as air quality, dam safety, solid waste or water resources.
- K. WSDA and ECOLOGY will coordinate on the development of educational materials regarding the AFO/CAFO program and the CWA.
- L. In the case of discovery by either agency of unauthorized livestock facility discharges to ground or surface waters of the state that constitute an immediate threat to human health or the environment, the discovering agency shall immediately inform the other of the situation and also the Washington State Department of Health if any release may endanger human health including shellfish bed harvest.
- M. WSDA and ECOLOGY will share or develop protocols to ensure that potentially hazardous situations related to AFO/CAFOs are dealt with in a safe and expeditious manner.

- N. WSDA and ECOLOGY will coordinate together and with the Natural Resources Conservation Service, WSU and Conservation Districts on technical issues relating to agricultural practice standards and best management practices (BMPs) to protect water quality.
- O. WSDA and ECOLOGY will coordinate with the Conservation Commission and Conservation Districts (CDs) on a revised or new interagency agreement regarding referrals to CDs for technical assistance and subsequent interactions in support of agricultural facilities reaching compliance.
- P. WSDA and ECOLOGY will evaluate the need for and if necessary develop a new or revised MOU to be effective following EPA delegation to WSDA in order to guide continuing cooperative efforts consistent with the livestock water quality program as it exists at that time.
- Q. Attached as Appendix A is a matrix of program activities that indicates the responsibilities of each agency. The matrix is intended to provide guidance only and is secondary to this MOU and state and federal laws and other legal agreements.
- R. WSDA and Ecology will continue outreach and education activities on state and federal rules with the dairy and other livestock industries. They will also provide to facilities that may be affected by the AFO/CAFO rules updates as appropriate on the CAFO NPDES jurisdictional transfer and current contact information.
- S. WSDA will maintain data regarding dairies, AFOs and CAFOs in the WPLCS data base in a timely manner including data in the permit, facility, inspection and enforcement modules.
- T. In the event that either agency is served with documents requesting remission or mitigation of a penalty under RCW 43.21B.300(1) or a notice of appeal under RCW 43.21B.230, 43.21B.300(2) or 43.21B.310 when the penalty or order being appealed was issued by the other agency, the receiving agency shall immediately contact staff with either the LNMP at WSDA or the WQ program at ECOLOGY by telephone, advising them of the documents served. The responsible agency shall immediately dispatch staff to pick up the documents. This telephone notification and pick up service shall also apply to any other documents related to such legal proceedings.
- U. WSDA and Ecology will work together on a livestock nutrient spill response procedure to include agency contact information.
- V. WSDA and Ecology will confer prior to Ecology designating a facility as a CAFO. WSDA may order a dairy to apply for a permit. For non-dairy facilities, Ecology may designate non-dairy facilities as CAFOs and issue an order to apply for a NPDES permit.

VIII. STATE WASTE DISCHARGE AND NPDES PERMITS

- A. ECOLOGY will provide training to WSDA staff in the development and administration of CAFO State Waste Discharge and NPDES permits.
- B. ECOLOGY will request, and WSDA will provide, a gradual increase in the involvement of Agriculture staff in the development, administration and enforcement of all CAFO permits as WSDA develops the capacity to carry out the required functions. Until EPA delegation for NPDES CAFO permits is obtained, it is intended that WSDA will assist ECOLOGY in administering the NPDES permit

program. However, ECOLOGY will retain final signature authority until CWA delegation is officially transferred by EPA to WSDA.

- C. ECOLOGY will make available to WSDA use of the Water Quality Permit Lifecycle System (WPLCS) for management of CAFO permits and related information such as permit, inspections, enforcement, and facility reports. ECOLOGY, with assistance from WSDA, will develop mutually agreed upon new WPLCS reports that are requested by WSDA in an agreed upon timeframe. Ecology will provide access and initial training on the use of WPLCS as needed and agreed to. ECOLOGY will also provide CAFO permit data to EPA's PCS system, provided that WSDA maintains the data in WPLCS. WSDA will retrieve reports and data from WPLCS that are program specific.
- D. Under the authorization of ESSB 5889 Section 7, ECOLOGY delegates authority under Chapter 90.48 RCW to WSDA for implementation and enforcement of Chapter 90.64 RCW. Delegation of Chapter 90.48 RCW authority from ECOLOGY to WSDA for the development and issuance of the state waste discharge and NPDES permits related to CAFOs shall not become final until such time as WSDA receives CWA delegation for NPDES permits from EPA.

X. FEES AND FUNDING

- A. WSDA is authorized by the legislature to spend up to \$224,000 of the CAFO NPDES permit fees through June 2007. Due to the continuing role of ECOLOGY in administering the permit, permit fees will be used by the two agencies as provided for in Addendum #1.
- B. ECOLOGY will continue to establish and revise CAFO NPDES permit fees by agency rule, as well as bill for and collect permit fees to deposit into the permit fee account. In carrying out these activities, ECOLOGY will consult with WSDA and the LNMP Development and Oversight Committee. .
- C. Penalties collected from permitted CAFO facilities will be deposited in the livestock nutrient management account rather than the coastal protection fund.
- D. Each agency will discuss the need for and extent of compensation that may be provided the other for technical assistance.
- E. If, at the request of WSDA, ECOLOGY carries out work that is now the responsibility of WSDA, ECOLOGY will be reimbursed by WSDA at a mutually agreed upon level.

XI. DISPUTE RESOLUTION

In the event of a dispute regarding implementation of this MOU and program transition activities, the parties shall make all reasonable efforts to resolve the dispute at the lowest staff level. The parties may request the assistance of a mutually agreed upon facilitator at any time. If a facilitator is engaged, the timelines will be adjusted according to a mutually agreed upon schedule. Unresolved disputes will be settled in the following hierarchical process:

Step 1: Disputes that cannot be resolved between the immediate staff involved should be documented as to timing, issue, background, attempts for resolution and any other relevant facts. A request for resolution will be presented to their immediate supervisors.

Step 2: If the dispute cannot be resolved at the immediate supervisors' level within 20 days, this step should be documented and the entire packet sent on to the ECOLOGY Water Quality Program Manager and the WSDA Assistant Director for resolution.

Step 3: If the dispute cannot be resolved at the Program Manager and Assistant Director level within 20 days, this step should be documented and the entire packet sent on to each agency's Director.

Step 4: If the dispute cannot be resolved at the Director's level within 30 days it should be elevated to the Office of Financial Management or the Governor's Office, depending on the type of dispute:

A. For disputes regarding the transfer of tangible property or apportionment of budgeted funds that are not resolved in the above process, the dispute will be presented by both agencies to the Office of Financial Management for a determination in accordance with ESSB 5889.

B. All other disputes not resolved in the above process, shall be presented to the Governor's office for resolution.

XII. ALTERATIONS AND AMENDMENTS

This MOU may be amended by mutual agreement of the parties. Such amendments will be documented in writing and signed by the signatories to this MOU, or their designees.

If representatives of either agency encounter a situation where deviation from the above listed Primary Responsibilities is necessary and/or warranted, they should immediately notify the other party and begin a cooperative dialogue in order to reach an agreeable solution.

If appropriate, the parties shall modify this agreement as needed to ensure proper program implementation and to maintain NPDES AFO/CAFO delegation from EPA.

XIII. TERMINATION

This MOU is necessary to guide activities of the two agencies until CWA delegation is gained by WSDA for the livestock program. Consequently, until WSDA becomes the CWA delegated authority for AFO/CAFO and becomes fully responsible for the dairy and AFO/CAFO program, this MOU must remain in effect.

After WSDA receives delegated authority, this MOU can be terminated with 30 days written notice by either party to the other.

XIV. DISCLAIMER

This MOU is intended solely to assist the above-listed agencies in implementing Chapters 90.64 and 90.48 RCW. No duties, rights, or benefits, substantive or procedural, are created or implied by this MOU for third parties or others.

XV. AGENCY CONTACTS

WSDA Jerry Buendel

ECOLOGY Dave Peeler

XVI. EFFECTIVE DATE

This MOU will be effective when signed by the two parties and will remain in effect until WSDA receives federal delegation to fully administer an NPDES permit program for CAFO activities. A revised or new MOU may be developed to guide coordination between the agencies following such delegation.

IN WITNESS WHEREOF, the parties have executed this Agreement.

State of Washington

State of Washington

Department of Agriculture

Department of ECOLOGY

By: _____

By: _____

Title: _____

Title: _____

Address: _____

Address: _____

City, State: _____

City, State: _____

Phone: _____

Phone: _____

Date: _____

Date: _____

ADDENDUM #1
USE OF PERMIT FEES
FY 2006 - 2007

WSDA is authorized by the legislature to spend up to \$224,000 of the CAFO NPDES permit fees through June 2007. However, with the reduced number of CAFOs anticipated over the next two years, fee income is estimated to be closer to \$158,000.

WSDA will continue to do routine inspections of CAFO dairies and begin inspections of all non-dairy CAFOs. ECOLOGY will continue to carry out permit development, and issuance activities during the transition period. Therefore, periodically, ECOLOGY may submit to WSDA an invoice for use of the CAFO permit fees based on the work done. ECOLOGY may not request more than \$49,000 during FY 2006. WSDA will make use of no more than \$70,000 during the same time period.

WSDA and ECOLOGY agree to track actual expenditures for CAFO permit related activities during the FY 2006-2007. By July 1, 2006 the two agencies will review expenditures, CAFO permit fee receipts and projections on the number of future CAFO permit applications and permit fee collections. At that time, the agencies will negotiate use of the permit fee account for the remainder of the biennium and document that agreement in Addendum #2.