



**SRAP**  
Socially Responsible  
Agriculture Project

September 28, 2022

Via Email [NDEE.moreinfo@nebraska.gov](mailto:NDEE.moreinfo@nebraska.gov)  
NPDES and State Permits Section  
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Final Comments Regarding Draft CAFO General Permit (NEGO23000)

Dear NDEE:

Enclosed please find the final comments from the 501(c)(3) organization the Socially Responsible Agriculture Project (SRAP) regarding Nebraska's CAFO Draft General Permit (NEGO23000).

Thank you for granting the public hearing requested in our July 29, 2022 comments. We incorporate the July 29, 2022 comments (Attachment 1) and September 29, 2022 public testimony by reference.

**I. Permit is Impermissibly Narrow.**

A. Legal authority to limit permit to "Large Cattle" is unspecified.

NDEE's draft NPDES General Permit for CAFOs limits the permit to large cattle operations. The federal Clean Water Act, under which NDEE has permitting authority, requires all point sources that discharge pollutants to waters of the United States be regulated under the NPDES permitting system. 33 U.S.C. § 1342. NDEE also issues the permit under the Nebraska Environmental Protection Act (Neb. §§ 81-1502 to 81-1533 (the "EPA")), which carries out the purposes of the EPA, the Integrated Solid Waste Management Act (§ 13-2032 et seq.), and the Livestock Waste Management Act (Neb. §

54-2427). None of these statutes, or the accompanying regulations, or the NPDES General Permit's interface with state construction and operating permits, limit NPDES permitting to "large" and "cattle" operations. Even the draft NPDES CAFO General Permit itself continues to reference other livestock (e.g. effluent limitations for production areas for existing and new CAFOs, and several definitions).

In looking at NDEE's NPDES CAFO permitting framework more broadly, several points confirm that NDEE's draft NPDES CAFO permit approach is simply insufficient to protect Nebraska's air, water, and land because other "large" operations and operations of other species have environmental problems. For example, based on NDEE's spreadsheets provided to SRAP in response to our public records request:

- Nebraska has approximately 92 poultry and 372 swine of the "large" size, and
- Nebraska has approximately 43 "medium" poultry, 633 "medium" swine, and 1512 "medium" cattle operations.

Of these "large" poultry and swine, and "medium" poultry, swine, and cattle operations (meaning facilities not covered by Nebraska's NPDES general permit), NDEE's records available on its website indicate several discharge and reporting related problems for these facilities. Had they been required to apply for the NPDES general permit, presumably some of these problems could have been avoided. For example:

- There is a repeated pattern of discharges occurring into the Platte River.
- There are repeated patterns of failing to report discharges and poor record keeping. Facilities are not reporting discharges in an appropriate time frame (24 hour verbal notice, 5 day written report under the NPDES permit framework) and are not keeping records.
- Discharges are not being appropriately handled by the agency even when reported. The path of Pawnee Creek, for example, was rerouted in 2005 to make room for a holding pond. The holding pond's location is noted in inspection reports as "less than ideal due to the frequency of discharge from the pond to Pawnee Creek". Pawnee has had a high number of discharges even post-flood years.
- There is a repeated pattern in the NDEE documents showing that a number of facilities fail to notify NDEE upon constructing or modifying, and therefore begin operating without permission, appropriate permitting, or best management practices.

To protect Nebraska's waterways, and Nebraskans, we request that NDEE's NPDES CAFO General Permit be re-issued to cover *all* animal species, certainly for large and medium size facilities, as is intended by the Clean Water Act, Nebraska's Environmental Protection Act, and the Livestock Waste Management Act.

B. *Permit treats "mega" cattle operations of 20, 40, 60 and even **80,000***

head the same as 1,000 head operations.

Additionally, restricting the NPDES CAFO General Permit, with the exact same terms and conditions, to all “large cattle” facilities is an oversimplified regulatory approach that ignores the steadily increasing size of industrial livestock agriculture in Nebraska. In Nebraska, any facility with 1,000 or more cattle (Neb. Admin Code § 130-024.03) is a “large” operation. Our review of NDEE’s information suggests that while Nebraska has approximately 1,212 facilities subject to state construction and operating permits, but it appears that only 457 “large” operations have NPDES permits. Of the 457 NPDES permits, approximately 5 are poultry and approximately 35 are “large” cattle CAFOs with individual NPDES permits. Even the individual permits are apparently insufficient to protect Nebraska’s waters from CAFO pollution because we identified at least 3 individual large cattle NPDES permit permittees with discharges from NDEE’s records online.

Of the approximately 417 large cattle operations currently covered by the NPDES CAFO General Permit, only 379 operations (91 % of the total) have less than 20,000 cattle. The NPDES CAFO General Permit appears, thus, to be written only for approximately 91% of the large cattle operations in the state. In fact, reviewing NDEE data, it appears that the approximate allocation of “large” cattle operations in Nebraska can be broken down as follows:

- 379 operations (91%) have 1,000 to 19,999 cattle,
- 19 operations (5%) have 20,000 to 29,000 cattle,
- 10 operations (2%) have 30,000 to 39,999 cattle,
- 1 operations (0.2%) have 40,000 to 49,999 cattle,
- 2 operations (0.5%) have 50,000-59,999 cattle,
- 2 operations (0.5%) have 60,000 to 69,999 cattle,
- 1 operation (0.2%) have 70,000 to 79,999 cattle, and
- 3 operations (0.7%) have 80,000 to 85,000 cattle.

Because only about 38 operations are greater than 20,000 cattle, NDEE should regulate those “mega” operations under individual NPDES permits to address the increased magnitude of operating, maintaining, monitoring, overseeing the environmental impacts from “mega” cattle operations, and enforcing the public protections from these impacts, not the NPDES CAFO General Permit. The impacts are not just environmental and public health impacts, but cattle operations larger than 5,000 or 10,000 or even 20,000 head are too big for local resources to sustain. “Mega” operations over 20,000 head are not beneficial for the local farming economy, and have to haul in feed, and transport cattle long distances. The sheer size, waste management and nutrient management problems, and transport problems put these “mega” operations into an entirely different level of impacts, and they should be separately regulated through an individual NPDES permit system.

Nebraska has also seen a significant increase in poultry operations in recent years. The expansion of Costco’s production, processing, and selling operations established contracts with approximately 500 poultry operations, to produce up to 100 million

chickens per year.<sup>1</sup> For years, Nebraska farmers have been “gearing up” to produce poultry for Costco. Despite several NPDES CAFO General Permit cycles, NDEE has not extended permit coverage to the exceptionally large influx of poultry operations in Nebraska.

Our cursory review of the information on NDEE’s website regarding discharges and permit violations points to several problems. First, it appears that some CAFOs are unclear as to whether they even have a NPDES permit and/or a state construction and operating permit, and whether a problem violated the NPDES permit or the state construction and operating permit. If permittees cannot understand their own permits, they cannot ensure compliance. NDEE enforcement is thus all the more important. In fact, some of the inspection reports NDEE conducted and communications from NDEE were unable to identify what permit a CAFO was or was not operating under. Without clear identification of permits, permittees, CAFOs, the public, and NDEE cannot assess whether permit terms and conditions are being followed (or the number of permitted versus non-permitted facilities in the state). We also noted that some inspections were not conducted until *months* after a discharge. Our initial review of the NDEE information suggests that:

- in 2018 there were approximately 56 discharges;
- in 2019 there were approximately 142 discharges;
- in 2020 there were approximately 12 discharges;
- in 2021 there were approximately 23 discharges.

We noted that in several instances, several years passed after the discharges, and permit terms and conditions continued to be the same and were not strengthened. This lack of enforcement is contrary to Title 130, Chapter 6, says:

*001 A NPDES permit, a construction and operating permit, construction approval, major modification, or application may be denied, revoked, modified or suspended for cause, including, but not limited to, the following:*

*001.01 Allowing a discharge of livestock wastes into waters of the State, except as provided by a permit or these regulations;*

...

*001.05 Failure to inspect, operate, and maintain the operation and facility as specified in the approved application and these regulations;*

...

*001.08 Violation of, or failure to comply with, the requirements in these rules and regulations, or the terms or conditions of a NPDES permit, construction approval, operating permit, or construction and operating permit.*

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<sup>1</sup> See, e.g., M. Meisenzahi, “See inside Costco’s controversial Nebraska chicken plant that produces millions of \$4.99 rotisserie chickens each year.” *Business Insider* (Jun. 18, 2022) <https://www.businessinsider.com/costco-rotisserie-chicken-plant-nebraska-photos-2022-6>

Even “exempt” facilities are still at risk of polluting Nebraska’s waters and should be subjected to stronger terms and conditions of the NPDES permit system.<sup>2</sup> Furthermore, if NDEE, with its general permit structure for a majority of large cattle CAFOs under 20,000 head, is already having significant record-keeping and permit clarity and enforcement problems for the existing CAFO industry, we encourage NDEE to get its house in order before opening up Nebraska for business for large cattle CAFOs over 20,000 head.

## **II. No Accountability for Waste Transfers**

Once a CAFO transfers, or exports, waste to another entity, NDEE does not track it, it just goes “away.” Transparency and accountability are critical to protecting our state’s waters from waste runoff and contamination. The 2019 Groundwater Report noted that animal waste from widespread applications is one of the major sources of nonpoint source pollution in Nebraska. *See* 2019 Nebraska Groundwater Quality Report at 13.<sup>3</sup> The NPDES CAFO General Permit, focusing on point source pollution, can and should do a better job at controlling waste management on-site and off-site through manure export controls. Under the current draft permit, a permittee’s record keeping “requirement” is undermined by the permit itself, which only “requires” the frequency of record keeping of manure transfer information “as necessary.” Permit, Part II.E.1. Table A. This information should be required to be recorded and retained by the permittee for every transfer.

Additionally, the actual information to be recorded is limited. The draft permit only requires the date of transfer, the name and address of the recipient, the “approximate” amount of manure, litter, or process wastewater transferred, and the most current nutrient analysis results which must be provided to the recipient. To properly track waste transfers, and to truly begin to even address water quality problems in Nebraska from CAFO waste, the permit should require the following:

- (a) Requiring reporting of the actual destination of where the waste is used, not simply the “recipient” of the waste. Without waste destination information, NDEE and the public are left to find out about abuses of waste application restrictions after they are violated.
- (b) Requiring CAFO permittees claiming land available for waste applications, even if they do not own the land, to provide written agreements verifying that they have the right to apply waste to that land.
- (c) Requiring that the end-user of CAFO waste be subject to NRCS standards, have a NMP, and be subject to NDEE enforcement.

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<sup>2</sup> E.g., SRAP’s review of NDEE documents show that Krug, Inc. was an “exempt” facility but that in 2017 had an inspection where it was recommended to pump one of the pooling areas as “a substantial amount of the operation drains to this area and has the highest potential for nutrients to leach” and “to prevent possible impact to groundwater”.

<sup>3</sup> Available at <http://dee.ne.gov/Publica.nsf/Pages/WAT333>

- (d) Requiring soil sampling of receiving fields before exported waste can be applied to receiving fields.
- (e) Requiring that only certified waste operators can apply CAFO-exported waste.
- (f) Requiring that, through electronic reporting requirements, the information above is provided to NDEE in a timely fashion and is publicly available. This could be accomplished through, at a minimum, more stringent reporting requirements in the annual report and monthly reports of exported waste. EPA's new electronic NPDES "eRule" reporting requirements facilitates the reporting of this information.

### **III. General Permit Does Not Protect Against Pollution of Waterways and Groundwater**

General permits are usually allowable because point sources have similar characteristics in a similar geographic area. *See* EPA Publication No. 833-F-12-001, NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations at § 3.3 (Feb. 2012) ("Permit Writers' Manual"). NDEE has not identified any similar characteristics between a 1,000 head operation and a 85,000 head operation to justify using the identical permit terms and conditions. Clearly the environmental impacts of a 85,000 head operation are significantly greater than a 1,000 to 10,000 head operation - which is the majority of large cattle CAFOs the General Permit was designed to regulate.

Nor has NDEE identified any similarities in geographic areas or watershed or aquifer boundaries, other than they are all located within the state boundary lines. According to the U.S. EPA's ermit Writers' Manual, as of 2012 at least 20 states already had watershed based approaches to their NPDES permitting system. *See* Permit Writers' Manual at § 3.3.2. Nor does the General Permit even reference any § 303(d) listed waters, the 2020 § 305 Water Quality Integrated Report ("Neb. 2020 IR"), or TMDLs (pending or approved). Since NDEE opted to prepare an Integrated Report for the general public *but also* for the state's own "water quality management planning purposes (e.g. future monitoring, TMDL development, best management practice implementation)" (Neb. 2020 IR at 3), water quality concerns should be given significantly greater protection through the terms and conditions of the CAFO General Permit. Nebraska's major water basins have been evaluated for geographic and seasonal water quality conditions by geology, land-use, soil type, and topography for decades. *See* Neb. 2020 IR at 12. NDEE's analysis from 2002 to 2019 show increases in total nitrogen in Missouri Tributaries, Nemaha, Big Blue, Loup, Republican, South Platte, and White-Hat river basins, and increases in total phosphorus in the Republican and South Platte river basins. *Id.* at 14-15. The CAFO General Permit does not propose changes to CAFO operation, management, or monitoring to try to respond to the total nitrogen and total phosphorus increases, even though Nebraska's livestock operations are contributors to these increases. We are concerned about water quality protections and CAFOs, but particularly when long-standing drought periods, like what Nebraska has been experiencing, magnify the effects of pollutants in water when pollutants cannot be

diluted by normal flow levels and when significant percentages of Nebraska's lands are affected by drought conditions.

Nebraska is one of the most groundwater-rich states in the U.S. *See* 2019 Groundwater Report at 5. Essentially all rural residents use groundwater for their domestic supply. *Id.* In parts of Nebraska, groundwater is encountered just a few feet below the surface, and in other areas it may be “a few hundred” feet underground. 2019 Groundwater Report at 1. Groundwater flow rates in Nebraska also vary; from 1-2 feet per day in the Platte River Valley to 1-2 inches per year in the Pine Ridge area in Northwest Nebraska or the glacially deposited sediments in Southeast Nebraska. *Id.* at 2. However, nitrate-N monitoring of Nebraska wells show numerous wells in the 1999 to 2018 timeframe in excess of the 10 mg/L MCL, and exceeding 20 mg/L in river basins such as the Elkhorn and Middle Platte. *See, e.g.,* 2019 Groundwater Report at Fig. 11, 12. Nebraska has established, and is continuing to establish, Groundwater Management Areas. The CAFO General Permit should incorporate additional requirements to further protect groundwater in GWMA's. Lastly, even though the NPDES CAFO General Permit focuses on point source pollution and water quality, the NDEE's General Permit should acknowledge regional considerations, and how water quality and water quantity issues overlap.

NPDES Permits must eliminate all discharges of pollution from point sources to comply with the Clean Water Act. “Waters of the State” in Nebraska means all waters within the jurisdiction of the state, including all [other] bodies or accumulations of water, surface or underground. Part V(41). Due to the siting of many large cattle CAFOs, and other CAFOs, in areas with shallow groundwater and over critical aquifers like the Ogallala and High Plains Aquifers, greater groundwater protections must be made requirements in the CAFO general permit.

Certain changes should be integrated into the NPDES CAFO General Permit requirements to provide more protections to Nebraska's waterways and groundwater. For example, groundwater monitoring at all large operations, greater manure application protections, and more timely reporting of discharges.

Over the next 25-30 years (only 5-7 permit cycles), Nebraska is expected to get significantly more rain than snow.<sup>4</sup> Estimates predict that approximately 75% of Nebraska's snow will come down as rainfall instead of snow. With increased rainfall will come extreme runoff and flooding events. In addition, dry seasons will become drier and longer, resulting in increased severity of drought. Some mitigation measures NDEE can require in the NPDES General Permit include:

- Protecting open waste storage structures by covering them;
- Making more freeboard space available until waste storage structures are covered;
- Bolstering facilities now to protect animals and waste from extreme flooding coming in, and runoff going out.

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<sup>4</sup> *See, e.g.,* States At Risk, Report Card, Nebraska at <https://statesatrisk.org/nebraska>

- Capturing all liquids and treat & re-use in times of drought (e.g. washwater, runoff, precipitation).

#### **IV. Factory Farm Gas**

In our July 29, 2022 comments, SRAP discussed some of the problems with “biogas”, or factory farm gas. See Attachment 1 p. 3-7. Since then, yet another dangerous rupture occurred.<sup>5</sup> Factory farm gas requires stringent regulation; without any oversight and proper management, it can be very dangerous for water quality. SRAP requests that NDEE (1) require all CAFOs, with or without NPDES permits, to report whether the operation conducts anaerobic digestion to produce biogas; and (2) that all CAFOs that produce biogas be required to obtain an individual NPDES permit.

#### **V. Conclusion**

Thank you again for the opportunity to provide public comment, and for responding to our comments. We look forward to NDEE’s additional General Permit revisions which we sincerely hope will incorporate the much-needed protections SRAP, and other community members, are advocating for in Nebraska.

Sincerely,

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Enclosure: **Attachment 1** (July 29, 2022 SRAP Comments)

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<sup>5</sup> See, e.g, Wagner. A “Really terrible science experiment” leads to weeks-long spill from NC hog-waste lagoon.” [The News & Observer](https://www.newsobserver.com/news/state/north-carolina/article264779224.html) (Sept. 6, 2022)  
<https://www.newsobserver.com/news/state/north-carolina/article264779224.html>