

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 13, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2009-1016-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 321, Control of Certain Activities by Rule
Revisions to 30 TAC Chapter 321 Related to Revised EPA CAFO Rules
Rule Project No. 2009-011-321-OW

Background and reason(s) for the rulemaking:

The purpose of this rulemaking is to implement the new federal Concentrated Animal Feeding Operation (CAFO) regulations and effluent guidelines. The commission originally adopted this subchapter in July 2004 for National Pollutant Discharge Elimination System (NPDES) purposes and to make the Texas rules consistent with federal regulations. The commission modified the rules in October 2006 to allow dry litter poultry operations located in a sole-source surface drinking water protection zone to obtain authorization under the CAFO general permit rather than by individual permit, to remove the duty to apply for permit coverage for other dry litter poultry CAFOs based on a potential to discharge, and to add a requirement for all CAFOs to develop and implement a Nutrient Management Plan (NMP). The United States Environmental Protection Agency (EPA) adopted changes to the federal CAFO regulations and effluent guidelines in response to the order issued by the United States Court of Appeals for the Second Circuit in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The federal rules became effective on December 22, 2008. Due to court challenges that successfully vacated portions of the rules, EPA did not finalize these rules until July 19, 2012. The finalized rules changed requirements to operate CAFOs as described below.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The amendments will incorporate changes in 40 Code of Federal Regulations (CFR) Parts 122 and 412, as required by 40 CFR §123.62(e) and the Memorandum of Agreement between the TCEQ and EPA Region VI. The amendments also incorporate requirements/concepts from the existing CAFO general permit and relocate certain rule requirements to other sections to improve organization, clarity and readability.

B.) Scope required by federal regulations or state statutes:

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EPA made the following revisions to the CAFO rule:

1. Required an NMP to be included in permit applications. The federal regulation allows the permitting authority to select one of the two approaches for NMP development: linear rate or narrative rate. This rulemaking incorporates the narrative rate approach, as agreed upon with stakeholders.
2. Required permitting authorities to review the NMPs and provide the public with an opportunity for meaningful public review and comment;
3. Required incorporation of the terms of the NMP into the NPDES permit;
4. Established a list of changes to the NMP that would constitute a substantial change to the terms of a facility's NMP, thus requiring permit amendment and public notice. For more information on the proposed web-based public notice (*See Effect on the Regulated Community below*);
5. Deleted the provision that allowed CAFOs to use a 100-year, 24-hour containment structure to fulfill the no discharge requirement for new source swine, veal calf, and poultry operations. This was replaced with a requirement that the permittee demonstrate through a rigorous modeling analysis that it has designed a containment system that will comply with the no discharge requirement; and
6. Deleted the voluntary superior performance new source performance standard for new swine, veal calf, and poultry operations, which allowed discharges when certain innovative technologies were utilized instead of the 100-year, 24-hour design standard.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The agency is also adopting the following revisions as a result of stakeholder input:

1. Incorporate requirements/concepts from the CAFO general permit;
2. For large CAFOs outside the North Bosque River Watershed, eliminate the requirement to develop and submit a Nutrient Utilization Plan (NUP) when the critical phosphorus level is exceeded, but retain the requirement to limit application to the crop removal rate under these circumstances, since the NUP requirement is superseded by the new federal NMP requirements;
3. Replace the 0-2", 2-6", and 6-24" soil sampling depth requirements with only a 0-6" sample, except in the North Bosque River Watershed, based on recommendations made by the Natural Resources Conservation Service and Texas AgriLife Extension Service that the 0-6" sample is more representative of field conditions; and
4. Relocate certain rule requirements to other sections to improve organization, clarity and readability.

Statutory authority:

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general authority necessary to carry out its duties and general powers under its jurisdiction; TWC, §5.103 and §5.105, which provide the commission with the general authority to adopt rules; TWC, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.027, regarding the commission's authority to issue

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permits for discharges into or adjacent to water in the state; TWC, §26.0286 regarding the procedures applicable to permits for certain CAFOs; TWC, §26.040, which provides the commission the authority to issue general permits to authorize the discharge of waste into or adjacent to water in the state; TWC, §26.041, which allows the commission to use any means provided by TWC, Chapter 26 to prevent a discharge of waste that is injurious to public health; and TWC, §26.121, which prohibits the discharge of waste into or adjacent to any water in the state except as authorized with a commission permit or other authorization.

Effect on the:

A.) Regulated community:

All Texas Pollutant Discharge Elimination System (TPDES) CAFOs will be required to submit NMPs with their applications and notices of intent (NOI), which will result in additional public notice for NMPs. However, with this new NMP requirement, large CAFOs outside the North Bosque Watershed will no longer be required to submit a NUP. TPDES CAFOs that change their NMPs significantly will have additional review and public notice requirements as a result of the federal changes. These will be web-based notices. State-only CAFOs will not be affected by the new NMP requirements. CAFOs that apply for new source swine, veal, or poultry CAFO authorizations will have additional no discharge requirements imposed by the adopted rules. Operators located outside the North Bosque River Watershed will be required to take fewer soil samples.

B.) Public:

The public benefit anticipated from the changes in the adopted rules will be greater opportunity for public participation in the permitting process for permitted TPDES CAFOs.

C.) Agency programs:

The proposed rules will require the agency to review NMPs for all TPDES applications and NOIs, approximately 600, and provide notice for substantial changes. Current rules already require NMPs to be submitted with individual permit applications, but NMPs for general permits are only required to be maintained at the facility and updated annually instead of being submitted with the NOI and reviewed by the agency at the time of submission as required by the proposed rules. The agency plans to utilize available resources to implement the increased NMP reviews required by the proposed rules. In contrast, operators of TPDES CAFOs located outside the North Bosque River Watershed will no longer be required to submit a NUP to TCEQ for approval.

Stakeholder meetings:

TCEQ conducted initial stakeholder meetings in order to solicit advanced feedback on these rules. Stakeholders included the Agricultural Advisory Committee, which is composed of CAFO industry representatives, environmental groups, consultants, and local governments. Draft rules were made available and two stakeholder meetings were held on

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March 17, 2009 and September 5, 2012. The agency received a total of 13 comments on the draft rules, which were considered in developing the proposed rules included with this Executive Summary.

Public comment:

The commission held a public hearing on April 8, 2104 in Austin, Texas. The comment period closed on April 14, 2104. The commission received comments from the: Texas Association of Dairymen, Texas Cattle Feeders Association, Texas Farm Bureau, Texas Pork Producers Association and Texas Poultry Federation (CAFO Industry Groups).

Generally, the CAFO Industry Groups supported the rule. The CAFO Industry Groups suggested specific changes to the rulemaking as noted in the Response to Comments section of this preamble.

Significant changes from proposal:

Section 321.36(c)(1)(C) was revised to update the reference to the NRCS practice code currently in use for calculating crop yields and allows CAFOs to use site-specific historic crop yield data, where appropriate.

Section 321.36(f)(2) was revised to clarify that TCEQ or its designee collects soil samples for dairy CAFOs in sole-source impairment zones.

Section 321.36(g) was revised to change the February 15 reporting deadline to March 31 of each year and the current annual reporting period from January 1 to December 31 was modified to allow the permittee to select the actual 12-month reporting period used by the CAFO.

Potential controversial concerns and legislative interest:

The federal requirements for NMP public participation were controversial at the national level. The TCEQ is working with stakeholders to develop NMP review and public participation processes at the state level. Some stakeholders may have concerns about requiring 0-6" soil sampling.

Does this rulemaking affect any current policies or require development of new policies?

Current process requires NMPs be submitted with individual permit applications for large CAFOs, but not with NOIs for authorization under the CAFO general permit. Public notice processes for the CAFO general permit will incorporate this requirement. Consistent with the federal changes, the current process will be incorporated into the rule for all permitted TPDES CAFOs, regardless of authorization type. State-only CAFOs will not be affected by the NMP provisions.

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What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

The agency would not be able to fully implement the federal CAFO program and would not meet the NPDES delegation commitments under the memorandum of agreement with EPA. There is no alternative to implementing the amended federal rules.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** March 14, 2014

Anticipated *Texas Register* adoption publication date: July 25, 2014

Anticipated effective date: July 31, 2014

Six-month *Texas Register* filing deadline: September 14, 2014

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Attachments

Federal CAFO Rule

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