

Protecting Texas by Reducing and Preventing Pollution

**COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY REGARDING UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY'S REGULATORY FLEXIBILITY ACT SECTION 610 REVIEW OF
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT
REGULATIONS AND EFFLUENT LIMITATIONS GUIDELINES STANDARDS
FOR CONCENTRATED ANIMAL FEEDING OPERATIONS**

I. Summary of Proposed Action

On October 31, 2012, the Environmental Protection Agency (EPA) published the request for comments on the Regulatory Flexibility Action Section 610 review of the 40 Code of Federal Regulations (CFR) Parts 122, 123, and 412 relating to NPDES permit regulations and effluent limitations guidelines standards for concentrated animal feeding operations (CAFOs). The Section 610 review determines the rule's economic impact on small entities, explores regulatory options for reducing any significant economic impact on small entities, and explains the EPA's choice of regulatory approach. As part of the review, EPA will consider comments on: 1) the continued need for the rule; 2) the nature of complaints or comments received concerning the rule; 3) the complexity of the rule; 4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal, State, or local governmental rules; and 5) the degree to which the technology, economic conditions or other factors have changed in the area affected by the rule.

As initially published in the Federal Register, written comments were to be submitted to the EPA on or before December 31, 2012 (a 60-day public comment period). Since publication, the EPA received a request for additional time to submit comments. Therefore, the EPA extended the public comment period for an additional 60 days until March 1, 2013.

II. Comments

1. The EPA's 2003 CAFO Rule expanded the number of operations covered by CAFO regulations and included requirements to address the land application of manure. The revision to the CAFO rule in December 2008 requires CAFO applicants, under both individual and general permits, to submit a Nutrient Management Plan (NMP) to the permitting authority for review and approval with an opportunity for public comment and public participation on the terms of the NMP. In addition, the terms of the NMP would be included as enforceable permit conditions. The revised rule also includes requirements related to previously submitted NMPs, including specific changes that are considered to be substantial and require an opportunity for public comment and participation (40 CFR Part 122.42(e) (6)).

In Texas, NMPs are developed and certified by nutrient management specialists, agronomists or soil scientists, the National Resource Conservation Service (NRCS), the Texas State Soil Conservation Board, or by the Texas Agrilife Extension Service, who develop the plans under the NRCS Practice Standard 590. CAFOs are required to revise the NMPs annually when the soil test data is received and manure or wastewater application rates or cropping patterns change consistent with the NRCS 590 Standard. Crop management decisions based on the soil test data and the NMP process should be implemented quickly to ensure that manure is applied at proper agronomic rates throughout the year. Considering permit application review time and notice requirements, the growing season is likely to be over and the opportunity for land application would be missed. Not only would this negatively impact CAFOs from an operational and management standpoint, but also cause a significant and unnecessary workload for states which would need to review and approve changes. With the system that we have in Texas as described above, we fail to see the need to burden state resources that could be focused on more pressing environmental concerns. Consequently, TCEQ recommends that delegated states be given the flexibility to develop a process for determining when subsequent revisions of NMPs will require review, and of those reviewed which will require public notice.

2. TCEQ uses the NRCS Practice Standard Code 590 to meet the NMP requirements of the CAFO rule. This standard involves a much more comprehensive approach to nutrient management than other currently available nutrient management tools. It was developed to limit application of Phosphorus (P) and Nitrogen (N) on sites to reduce the risk of P runoff. In order to determine if a land application site has a higher P Runoff Potential than that identified in the previous year, the output of the 590 spreadsheet tool is revised using updated soil and manure analyses. If the P Runoff Potential places a particular LMU in a higher risk category, the output will list a reduced application rate of nutrients from manure and wastewater for the growing season. The criterion to reduce P and N application to fields whose P Runoff Potential increases has been contemplated and the process to reduce P runoff is built into the spreadsheet tools developed by the NRCS and used by CAFO stakeholders in the state of Texas.

Although the NRCS Practice Standard 590 has a process built in to reduce P application if the LMU is placed in a higher risk category for runoff, EPA appears to interpret an increase in the Phosphorus Index (PI) as an increase in the transport risk of N and P to waters of the U.S. (40 CFR Part 122.42(e) (6) (iii) (D)). This interpretation of a substantial change would require all CAFOs whose annual soil and manure data indicate an increase in the PI to submit an updated NMP and allow public comment and participation regarding this change. As indicated above, the application rates determined by the 590 standards are reduced when the PI increases, thus the potential for phosphorus site runoff is unchanged. TCEQ recommends that EPA revise the rule to eliminate these

criteria and provide states with the latitude to continue to use the NRCS - NMP content guidelines and procedures it has previously developed.

3. General permits have traditionally been used by states and EPA to regulate large numbers of similar types of operations and their issuance includes a public notice process. The revised NMP notice requirements outlined in the federal rules, turn the CAFO general permit into something more akin to an individual permit, which creates a significant resource burden on the states. TCEQ recommends that EPA make every effort possible to return to the states the administrative benefits of using general permits and eliminate the need to review unnecessary NMP changes.