

---

## COMMISSIONER'S RESPONSE TO PUBLIC COMMENT

---

The Texas Commission on Environmental Quality (commission or TCEQ) adopts this Response to Public Comment (Response) on Concentrated Animal Feeding Operations (CAFO) general permit TXG920000 (CAFO GP) to discharge manure, sludge, and wastewater only under chronic or catastrophic rainfall conditions or events. As required by Texas Water Code (TWC), §26.040(d) and Title 30 Texas Administrative Code (30 TAC) Section (§)205.3(c), before a general permit is issued, the Executive Director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the Commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. Comments received after the end of the comment period on April 14, 2014 are not responded to in this Response. Timely public comments were received from the following entities:

Texas Association of Dairymen, Texas Cattle Feeders Association, Texas Farm Bureau, Texas Pork Producers Association and Texas Poultry Federation (CAFO Industry Groups).

If you need more information about this permit or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. The complete Commissioner's Response to Public Comment may be found at the following website: <http://www10.tceq.state.tx.us/epic/CCD/>. Additionally, general information about the TCEQ can be found at our website at [www.tceq.texas.gov](http://www.tceq.texas.gov).

### **Background**

This is an amendment with renewal of a Texas Pollutant Discharge Elimination System (TPDES)/State GP authorizing the discharge of manure, sludge, and wastewater into or adjacent to water in the state by CAFOs. The draft permit will replace the current permit that expires on July 20, 2014.

On November 20, 2008, the United States Environmental Protection Agency (EPA) made revisions to the Effluent Limit Guidelines for CAFOs under the Code of Federal Regulations in response to an 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 2008 rule was challenged in the Fifth Circuit Court of Appeals in *National Pork Producers Council v. U.S.E.P.A.*, 635 F.3d 738 (5<sup>th</sup> Cir. 2011). The court vacated the provisions of the 2008 rule that requires CAFOs that "propose to discharge" to apply for National Pollutant Discharge Elimination System (NPDES) permit and the provisions which create "liability for failure to apply for an NPDES permit." On July 19, 2012, EPA issued a final rule clarifying that only CAFOs that discharge pollutants into waters of the United States are required to obtain a permit under the NPDES program. The 2012 Final CAFO Rule is essentially the 2008 final rule, without the provisions vacated in the *National Pork Producers* case and the provisions rendered inapplicable by the removal of the vacated portions from the rule. The revisions to this draft permit incorporate the changes remaining after the vacated portions of the rule revisions were removed.

## **Procedural Background**

TCEQ published notice of the draft CAFO GP to solicit public comment in the *Dallas Morning News*, *Stephenville Empire Tribune*, *The Daily Sentinel*, *Amarillo Globe-News*, *Sulphur Springs News – Telegram* and the *Texas Register* on March 14, 2014. The notice was published in the *Gatesville Messenger* on March 12, 2014 and in the *Comanche Chief* and *The Hamilton Herald-News* on March 13, 2014. During the comment period, TCEQ conducted a public meeting on April 8, 2014 to take oral and written public comment. The public comment period ended on April 14, 2014. TCEQ also took public comment via letter and electronic-comment.

## **COMMENTS and RESPONSES**

### **Comment 1:**

The CAFO Industry Groups comment that the group appreciates the efforts of TCEQ staff to maintain consistency between the TCEQ CAFO General Permit (GP) and TCEQ CAFO rules. The CAFO Industry Groups also support the current TCEQ permitting system and process for both TPDES individual permits and the CAFO GP as both permitting programs have been effectively implemented by the TCEQ and the CAFO permittees over the past decade. The CAFO Industry Groups appreciate the ability to apply for permits based on regulatory provisions that are clearly articulated in writing, which minimizes the need for special permit conditions. The CAFO Industry Groups note that the proposed changes to the GP, while not insignificant, appear to be incorporated in a reasonable and effective manner.

### **Response 1:**

The Commission acknowledges these comments and thanks the CAFO Industry Groups for their support during this CAFO GP revision process.

### **Comment 2:**

The CAFO Industry Groups recommend that the first sentence of Part II.C.1.(a) be revised by replacing "... a certified site specific NMP [nutrient management plan]..." with "... a NMP certified by a Certified Nutrient Management Specialist.."

### **Response 2:**

In response to the comment, Part II.C.1.(a) was revised as suggested and now reads as follows:

"Submission of a NOI, and for Large CAFOs, a NMP certified by a Certified Nutrient Management Specialist is an acknowledgment that the conditions of this general permit are applicable to the proposed discharge, and that the applicant agrees to comply with the conditions of this general permit."

### **Comment 3:**

The CAFO Industry Groups recommend separating the requirements for submitting a notice of intent (NOI) for new and significant expansions from substantial changes by adding a sub-section titled "Application for substantial change" to Part II.C.2. The CAFO Industry Groups also recommend making it clear that a notice of change (NOC) and only the applicable revised pages of the NMP are required from those CAFOs applying for a "substantial change." The CAFO Industry Groups recommend adding the following language to Part II.C.2.: "A NOC for a substantial change and any required

supporting documentation shall be submitted on forms prescribed by the Executive Director. Depending on the type and scope of proposed changes that may be classified as a 'substantial change,' the content and extent of supporting documentation required to be submitted with the NOC may be different."

**Response 3:**

In response to the comment, all references to substantial change in Part II.C.2, and the former Part II.C.2.(1)(1) were deleted. A new subsection "Part II.C.3.(a)" titled "Application for a Substantial Change" was created and the section was renumbered to be consistent with the new subsection. In addition, the section was revised to allow submission of substantial changes on a NOC form. Also, what was numbered as Part II.C.2.(1)(2)-(4) in the proposed GP was re-numbered to Part II.C.3.(c)-(e) in the adopted GP.

Part II.C.3.(a) now reads as follows:

"Application for Substantial change

An applicant for a CAFO operation requesting a substantial change to the terms of the nutrient management plan shall adhere to the following procedures:

- (a) The applicant must submit the NOC and those portions of the technical packet that are applicable to the change to the Executive Director.
- (b) The TCEQ's Office of the Chief Clerk shall issue and post the notice of the Executive Director's preliminary determination of the NOC and the revised terms of the NMP on the TCEQ website at <http://www.tceq.texas.gov>. The notice shall include:
  - (1) the legal name of the CAFO applicant;
  - (2) the address of the applicant;
  - (3) a brief summary of the information included in the NOC, such as the general location of the CAFO, proposed change to the terms of the NMP and a description of the receiving water;
  - (4) the location and mailing address where the public may provide comments to the Executive Director;
  - (5) the public location where copies of the NOC, Executive Director's technical summary, NMP and CAFO general permit may be reviewed; and
  - (6) if required by the Executive Director, the date, time and location of the public meeting."

**Comment 4:**

The CAFO Industry Groups recommend revising Part II.C.8.(2)(ii) to retain the existing language from the current GP that relates to construction or modification of a RCS, or any change to the site map for TPDES. Furthermore, the CAFO Industry Groups recommend that it should be clarified in the GP as to what constitutes a non-substantial change to the terms of the NMP. Therefore, the CAFO Industry Groups recommend adding the following two sentences to this section: "Those changes that constitute a 'substantial change' are defined in Part I, relating to definitions. Non-substantial changes include, but are not limited to, a change in the permittee address, permittee phone number, construction or modification of a RCS, or any change to the site map."

#### **Response 4:**

In response to the comment, Part II.C.9.(a)(1)(ii) (renumbered from Part II.C.8.(a)(1)(ii) in the proposed GP to be consistent with the changes made) was revised to add construction or modification of a RCS, or any change to the site map for TPDES. The section now reads as follows:

“[T]he time when relevant facts in the NOI or NOI attachments change, including but not limited to: permittee address, permittee phone number, construction or modification of a RCS, or any change to the site map; or...”

The Commission agrees that additional clarity would help provide CAFO owners/operators a better understanding of what constitutes a substantial versus non-substantial change to the terms of the NMP. Therefore, in response to the comment, a new subsection Part II.C.9.(a)(2) titled “Changes to the terms of the NMP” was added to clarify a substantial versus non-substantial change:

“(2) Changes to the terms of the NMP

- (i) Substantial change to the terms of the NMP. Those changes that constitute a “substantial change” are defined in Part I, relating to definitions; or
- (ii) Non-substantial changes include but are not limited to, changes to the site-specific LMU information on Table 1 of Appendix I – Phosphorus Index Worksheet of this general permit; changes to the maximum application rates, lbs/ac of nitrogen or phosphorus as P<sub>2</sub>O<sub>5</sub> to be land applied; or changes in the phosphorus index rating.”

#### **Comment 5:**

The CAFO Industry Groups comment that since the NRCS no longer uses Code 633 for manure-related management activities, TCEQ should revise Part III.A.12.(b)(5)(viii) to delete the reference to Code 633. In addition, the CAFO Industry Groups comment that since CAFOs have accurate and reliable site-specific historic crop yield data, TCEQ should allow CAFOs to use this data.

#### **Response 5:**

In response to the comment, Part III.A.12.(b)(5)(viii) was revised and it now reads as follows:

“The nitrogen and phosphorus recommendations from the S-Crops Table as contained in the Texas NRCS 590 Software Tool, site-specific historic CAFO yield data, or other sources as approved by the ED for each crop identified for each field, including any alternative crops identified;...”

This updates the applicable code currently in use for calculating crop yields and allows CAFOs to use site-specific historic crop yield data, where appropriate.

#### **Comment 6:**

The CAFO Industry Groups comment that the definition of “substantial change” in Part III.A.12.(c) is redundant and should be deleted since the definition of this term is already in Part I of the permit.

**Response 6:**

In response to the comment, Part III.A.12.(c) defining what changes to the NMP are substantial in the proposed GP was deleted as requested. The remainder of the section was re-numbered.

**Comment 7:**

The CAFO Industry Groups comment that on several occasions, it has proven to be difficult to meet the February 15 deadline for submission of annual reports to the TCEQ. This is especially true of those crop rotations that require collection of soil samples in December, where the delay in shipment and laboratory analysis can be significant during the holiday season. Also, the additional records and reporting requirements now required by EPA will increase the amount of time necessary to complete the TCEQ Annual Report. The CAFO Industry therefore requests that TCEQ revise the reporting deadline to be March 31 of each year. In addition, the reporting form should allow for the actual 12-month reporting period to be entered by the permittee.

**Response 7:**

In response to the comment, Part IV.B.1 was revised to change the reporting deadline from February 15 of each year to March 31 of each year and the reporting period from January 1 to December 31 was modified to reflect the actual 12-month reporting period used by the CAFO. The section now reads as follows:

“Annual Reporting Requirement. Large CAFOs must submit an annual report with all information required in this section to the appropriate TCEQ regional office and the TCEQ’s Office of Compliance and Enforcement, Enforcement Division (MC 224, P.O. Box 13087, Austin, Texas 78711) by March 31 of each year for the 12-month reporting period identified by the permittee. If the CAFO was covered under the previous CAFO general permit and selects a reporting period different from January 1 to December 31, the first annual report due on March 31, 2015 shall include the required information from January 1, 2014 to the beginning of the selected reporting cycle (for example, September 1 to August 31 selected as the reporting period, March 31, 2015 annual report would include the information from January 1, 2014 to August 31, 2014). Subsequent annual reports would be for 12 months (for example, year 2, from September 1, 2014 to August 31, 2015 due March 31, 2016).”

**Comment 8:**

The CAFO Industry Group comment that in those years where manure and/or wastewater are not land applied to the CAFO, especially in drought years, there may not be a laboratory analysis to submit to TCEQ every year. Therefore, they recommend revising Part IV.B.1(k) to add the phrase “that was land applied.”

**Response 8:**

In response to the comment, Part IV.B.1.(k) was revised as suggested and it now reads as follows:

“[T]he actual nitrogen and phosphorus content of manure, sludge, or process wastewater that was land applied...”

**Comment 9:**

The CAFO Industry Groups recommend replacing the contact information for the Soil, Water, and Forage Testing Laboratory in Appendix I with a table that lists the quantitative and descriptive classifications for various soil test P levels.

**Response 9:**

In response to the comment, the proposed Appendix I – Methodology For Calculating Maximum Application Rates and Annual Recalculation of Application Rates – Paragraph 1 was revised to include the following table that lists the Soil Test P Rating and the corresponding Soil Test P Levels:

Soil Test P Rating	Soil Test P Levels (ppm*)
Extremely Low	Less than 5
Very Low - Low	5 to less than 20
Medium	20 to less than 50
High	50 to less than 100
Very High	Greater than or equal to 100

\*ppm is equivalent to mg/kg of solids.

**Comment 10:**

The CAFO Industry Groups comment that TCEQ should recognize site-specific historic CAFO crop yield data and recommends revising Appendix I – Methodology For Calculating Maximum Application Rates and Annual Recalculation of Application Rates – Paragraph 6 to add the language “site-specific historic CAFO yield data, or other sources as approved by the ED” at the end of the sentence.

**Response 10:**

In response to the comment, Paragraph 6 was revised as suggested and it now reads as follows:

“Using one of the approved crops and yield goals approved for each LMU, determine the maximum application rate (in lbs/ac) for that crop and yield goal and the Maximum Application Rate identified in Step 5 from the S-Crop Table, site-specific historic yield data, or other sources as approved by the Executive Director.”