

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: November 8, 2023

DATE OF REQUEST: October 20, 2023

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

CAPTION: Docket No. 2023-1229-RUL. Consideration for publication of, and hearing on, proposed amendments to 30 Texas Administrative Code (TAC) Chapter 321, Control of Certain Activities by Rule, Subchapter B, Concentrated Animal Feeding Operations to implement House Bill 692, 88th Legislature.

The proposed rulemaking would amend 30 TAC Chapter 321, Subchapter B, to add new Sections 321.48 and 321.49, which would allow dairy operations to directly land apply dairy waste to land application areas and dispose of dairy waste in a retention control structure, including a lagoon or playa, and irrigate land application areas with dairy waste from the retention control structure. (Shannon Gibson, Michael Parr; Rule Project No. 2023-139-321-OW)

Cari-Michel La Caille

Director

Robert Sadlier

Division Deputy Director

Gwen Ricco

Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** October 20, 2023

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Interim Executive Director

From: *CML* Cari-Michel La Caille, Director
Office of Water

Docket No.: 2023-1229-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 321 Control of Certain Activities by Rule, Subchapter B -
Concentrated Animal Feeding Operations
Land Application and Disposal of Dairy Waste
Rule Project No.: 2023-139-321-OW

Suggested short title: Land Application of Dairy Waste and Disposal of Dairy Waste In Control Facility

Background and reason(s) for the rulemaking:

This rulemaking is required to implement House Bill (HB) 692, 88th Regular Legislative Session, which added §361.1215 to Chapter 361, Subchapter C of the Texas Health and Safety Code (THSC) and §26.0481 to Chapter 26, Subchapter B of the Texas Water Code (TWC).

This legislation is a result of the need for other means to dispose of dairy waste by dairy farm operators. Once dairy milk leaves a farm, it is considered 'food' and travels to a bottling or processing facility before making its way to grocery store shelves. If milk becomes contaminated, is graded out, or a bottler or processing facility is otherwise not able to accept it, then the milk is no longer considered viable for human consumption. Milk is then labeled as 'dairy waste' and must be legally disposed.

During the COVID-19 pandemic and Winter Storm Uri, bottlers and processors were unable to accept milk, leaving dairy operators with the responsibility of disposing of the dairy waste. However, many dairy operators had no avenue to dispose of dairy waste. Current TCEQ regulation allows this type of waste to be disposed by injection into a disposal well, of which there are only two locations in Texas, at an approximate cost of \$3,000 per truckload of approximately 50,000 pounds (source: Texas Association of Dairymen). The proposed rule additions would provide other avenues to dairy operators and less costly means of disposing of dairy waste within existing dairy operations.

Through additions to THSC and TWC, HB 692 grants Texas Commission on Environmental Quality (TCEQ) rulemaking authority to: 1) issue an authorization by rule for land application of dairy waste and to adopt rules governing that land application; 2) to adopt rules allowing the disposal of dairy waste from dairy operations, as defined in the proposed rules to include permitted concentrated animal feeding operations (CAFOs) and unpermitted animal feeding operations (AFOs), into a control or retention facility, including a lagoon or playa; and 3) authorize land application by irrigation associated with that disposal.

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Scope of the proposed rule:

The rulemaking would amend 30 Texas Administrative Code (TAC) to add new §321.48 and §321.49 to 30 TAC Chapter 321, Subchapter B, to create a new permit-by-rule which would allow dairy operations to land apply dairy waste directly to land application areas and dispose of dairy waste in a retention control structure (RCS), including a lagoon or playa, and irrigate land application areas with dairy waste from the RCS. The proposed rule provides a definition of “emergency conditions” under which dairy waste disposal and land application can take place. Dairy waste is defined in HB 692 as milk, milk by-products, or milk processing waste that is spilled, spoiled, adulterated, unmarketable, stranded, or otherwise unfit for human consumption produced by a dairy operation.

New §§321.48 and 321.49 would reference other sections of the rules in 30 TAC Chapter 321, Subchapter B, without making any changes to the existing rules. Information from the State Technical Standards of the Natural Resource Conservation Service (NRCS) for nutrient management plans (NMP) would be included for guidance. The condition that precipitated the bill is not frequent, and as such, the provisions would not be added to CAFO permits (general or individual). The requirements would mandate that dairy operators update the site-specific NMP should the need arise for land application of dairy waste and to irrigate land application areas based on the application rates that are determined in accordance with the narrative rate approach from both Title 40 Code of Federal Regulations (CFR) §122.42(e)(5)(ii), and 30 TAC §321.36(c). This approach allows changes to the NMP to occur at the facility at any time, and adjustments can be made in the implementation of the plan.

The rules would include water quality-based limitations to control all pollutants that could be discharged at a level that would cause, or have the reasonable potential to cause, or contribute to an excursion above any state surface water quality standard. This would include water quality-based effluent limitations for the production area and land application area of the dairy operation.

All recordkeeping and annual reporting requirements would be under proposed 30 TAC §§321.48 and 321.49.

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

Rules adopted under state statutes in the THSC, §361.1215 must:

- authorize land application of dairy waste by rule;
- minimize the risk of water quality impairment caused by the land application; and
- prescribe the conditions under which an authorization is issued, including the following:
 1. the duration of the authorization;
 2. the location of the land application unit;
 3. the maximum quantity or application rate of dairy waste that may be applied or disposed of under the authorization;
 4. the suggested agronomic application rate for the dairy waste or other beneficial uses of the dairy waste; and

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5. best management practices for the handling and disposal of dairy waste.

Rules adopted under state statutes in TWC, §26.0418 must:

- authorize the disposal of dairy waste from a dairy operation into a RCS, including a lagoon or playa;
- authorize the land application by irrigation associated with that disposal;
- include requirements that minimize the risk of water quality impairment caused by the disposal of dairy waste into the RCS and by the land application by irrigation associated with that disposal; and
- require best management practices to ensure that the disposal of dairy waste into the RCS does not impair water quality.

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

None.

Statutory authority:

TWC, §26.121, which makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission;

TWC, §26.0481, which provides the commission with authority to adopt rules to allow the disposal of dairy waste from a CAFO into a control or retention facility, including a lagoon or playa; and the land application by irrigation associated with that disposal; and

THSC, §361.1215, which provides the commission with authority to issue an authorization by rule for land application of dairy waste and to adopt rules governing that land application.

Effect on the:

A.) Regulated community:

After adoption of the proposed rule, a permit-by-rule will be required for dairy operations that propose to store dairy waste and irrigate to land application areas. Dairy CAFOs must update the site-specific NMP to determine the application rates of nutrients from all sources; revise the site-specific odor control plan; and implement best management practices for the RCS(s) and land application areas to prevent water quality impairment. Additional laboratory analysis fees will be required for the wastewater that includes dairy waste, and soil testing of the land application areas that will or have received the dairy waste.

B.) Public:

There is the potential for air quality/odor complaints from properties adjacent to the dairy operations or their land application areas.

C.) Agency programs:

The Water Quality Division (WQD) will have to develop the rules and update 30 TAC Chapter 321, Subchapter B by adding new Sections 321.48 and 321.49. The Office of Compliance and Enforcement will have to conduct investigations, respond to complaints,

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and receive notifications when dairy waste is disposed of in a control or retention facility and/or land applied.

Planned Stakeholder involvement:

Regular updates will be provided at the quarterly Water Quality Advisory Work Group meetings hosted by WQD. WQD also plans to send outreach emails to CAFO stakeholders regarding the rulemaking, soliciting comments and input on the suggested additional sections to the rules in 30 TAC Chapter 321, Subchapter B. A public hearing will be held in Austin during the comment period for the rulemaking.

Public Involvement Plan

A Public Involvement Plan is required.

Alternative Language Requirements

There are alternative language requirements for this rulemaking. The notice for this state-wide rulemaking will be published in Spanish.

Potential controversial concerns and legislative interest:

No outstanding or anticipated controversial issues.

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

The proposed rulemaking would not affect the current policy but would create a new mechanism (new §321.48 and §321.49) for dairy operations to dispose of dairy waste during emergency conditions.

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

Rulemaking is required by HB 692. If this rulemaking doesn't go forward, TCEQ would not be compliant with state statute.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: November 8, 2023

Anticipated *Texas Register* publication date: November 24, 2023

Anticipated public hearing date: December 27, 2023 (adjusted for Christmas holiday)

Anticipated public comment period: November 24, 2023-December 28, 2023

Anticipated adoption date: February 21, 2024 (estimated date)

Agency contacts:

Joy Alabi, Rule Project Manager, Water Quality Division, (512) 239-1318

Michael Parr, Staff Attorney, Environmental Law Division, (512) 239-0611

Gwen Ricco, Texas Register Rule/Agenda Coordinator, General Law Division, (512) 239-2678

Attachments:

Draft rule addition (30 TAC §§ 321.48-321.49)

[HB 692](#)

Commissioners
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October 20, 2023

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Electronic cc: Cari-Michel La Caille, Director
Steven Schar
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Joy Alabi
Shannon Gibson
Michael Parr

AN ACT

relating to the authorization for certain land applications and disposal of dairy waste.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter C, Chapter 361, Health and Safety Code, is amended by adding Section 361.1215 to read as follows:

Sec. 361.1215. PERMISSIVE LAND APPLICATION OF DAIRY WASTE.

(a) In this section, "dairy waste" means milk, milk by-products, or milk processing waste that is spilled, spoiled, adulterated, unmarketable, stranded, or otherwise unfit for human consumption produced by a dairy operation.

(b) Notwithstanding any other law, the commission shall issue an authorization by rule for land application of dairy waste.

(c) The commission shall adopt rules governing the land application of dairy waste authorized under this section.

(d) Rules adopted under Subsection (c) must:

(1) minimize the risk of water quality impairment caused by the land application; and

(2) prescribe the conditions under which an authorization is issued, including:

(A) the duration of the authorization;

(B) the location of the land application unit;

(C) the maximum quantity or application rate of dairy waste that may be applied or disposed of under the

1 authorization;

2 (D) the suggested agronomic application rate for
3 the dairy waste or other beneficial uses of the dairy waste; and

4 (E) best management practices for the handling
5 and disposal of dairy waste.

6 SECTION 2. Subchapter B, Chapter 26, Water Code, is amended
7 by adding Section 26.0481 to read as follows:

8 Sec. 26.0481. DISPOSAL OF DAIRY WASTE IN RETENTION
9 FACILITY. (a) In this section, "dairy waste" means milk, milk
10 by-products, or milk processing waste that is spilled, spoiled,
11 adulterated, unmarketable, stranded, or otherwise unfit for human
12 consumption produced at a concentrated animal feeding operation.

13 (b) Notwithstanding any other law and to the extent
14 permitted by federal law, the commission shall adopt rules under
15 this section to allow:

16 (1) the disposal of dairy waste from a concentrated
17 animal feeding operation into a control or retention facility,
18 including a lagoon or playa, as that term is defined by Section
19 26.048; and

20 (2) the land application by irrigation associated with
21 the disposal described by Subdivision (1).

22 (c) Rules adopted under Subsection (b) must:

23 (1) minimize the risk of water quality impairment
24 caused by:

25 (A) the disposal of dairy waste into the control
26 or retention facility; and

27 (B) the land application by irrigation

1 associated with the disposal described by Paragraph (A); and
2 (2) require best management practices to ensure that
3 the disposal of dairy waste into the control or retention facility
4 does not impair water quality.

5 SECTION 3. Not later than March 1, 2024, the Texas
6 Commission on Environmental Quality shall adopt rules necessary to
7 implement Section 361.1215, Health and Safety Code, and Section
8 26.0481, Water Code, as added by this Act.

9 SECTION 4. This Act takes effect September 1, 2023.

President of the Senate

Speaker of the House

I certify that H.B. No. 692 was passed by the House on April 28, 2023, by the following vote: Yeas 140, Nays 4, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 692 was passed by the Senate on May 11, 2023, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to add new §321.48 and §321.49.

Background and Summary of the Factual Basis for the Proposed Rules

TCEQ is proposing to amend 30 Texas Administrative Code (30 TAC) Chapter 321 (Control of Certain Activities by Rule), Subchapter B (Concentrated Animal Feeding Operations) to implement House Bill (HB) 692, 88th Legislative Session, which added §361.1215 to Chapter 361, Subchapter C of the Texas Health and Safety Code (THSC), and §26.0481 to Chapter 26, Subchapter B of the Texas Water Code (TWC). The bill directs TCEQ to: 1) issue an authorization by rule for land application of dairy waste and to adopt rules governing that land application (THSC §361.1215); 2) amend the TWC to adopt rules allowing the disposal of dairy waste from dairy operations either permitted as a concentrated animal feeding operation (CAFO) or unpermitted animal feeding operation (AFO) into a control or retention facility, including a lagoon or playa (TWC §26.0481(b)(1); and, 3) authorize land application by irrigation associated with that disposal (TWC §26.0481(b)(2)).

This rulemaking proposes to add new §321.48 and §321.49 to the CAFO rules in 30 TAC Chapter 321 Subchapter B, to allow dairy operations to apply dairy waste to land application areas and dispose of dairy waste in a retention control structure (RCS), including a lagoon or playa, and irrigate land application areas with dairy waste from the RCS under emergency conditions.

Section by Section Discussion

Proposed new §321.48 would define words and terms specific to both sections. It would provide authorization to a dairy operation to land apply dairy waste, and transfer and receive third-party dairy waste to apply to land that is under the control of a dairy animal feeding operation (AFO). The new section would establish general requirements for the disposal of dairy waste via land application, as well as notification, monitoring and reporting, and recordkeeping requirements applicable to the disposal activities.

Proposed new §321.49 would provide authorization for a dairy operation to dispose of dairy waste in an RCS. The new section would establish discharge restrictions and general requirements for storage of dairy waste and final disposition via land application. In addition, it would stipulate requirements for the transfer of dairy waste from one dairy operation to another and receipt of dairy waste by a dairy operation for land application.

New §321.48 and §321.49 will reference other sections of the rules in 30 TAC Chapter 321, Subchapter B without making any changes to the existing rules. Information from the State Technical Standards of the Natural Resource Conservation Service (NRCS) for Nutrient Management Plans (NMPs) will be included for guidance. The requirements of the new CAFO Rules will mandate dairy operators to update the site-specific nutrient management plans (NMPs) if commencing land application of dairy waste and to irrigate land application areas based on the application rates that are determined in

accordance with the narrative rate approach from both Title 40 Code of Federal Regulations (CFR) §122.42(e)(5)(ii), and the rules found at 30 TAC §321.36(c). This approach allows changes to the NMP to occur at the facility at any time, and adjustments can be made in the implementation of the plan.

The proposed Rules will include water quality-based limitations to control all pollutants that could be discharged at a level that will cause, or have the reasonable potential to cause, or contribute to an excursion above any state water quality standard. This will include water quality-based effluent limitations for the production area and land application area of dairy operations. All recordkeeping and annual reporting requirements will be under proposed 30 TAC §321.48 and §321.49.

Fiscal Note: Costs to State and Local Government

Kyle Girtten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

Public Benefits and Costs

Mr. Girtten determined that for each year of the first five years the proposed rules are in effect, the public benefit will be consistency with state law, specifically HB 692 from the 88th Legislative Session (2023).

The proposed rulemaking is anticipated to result in fiscal benefit for dairy operations by providing a more cost-effective means of disposing of dairy waste under emergency conditions. Currently, dairy waste is disposed off-site in a disposal well at a cost of approximately \$3,000 per truckload (50,000 pounds). This rulemaking would provide a less costly means of disposal within an existing dairy operation. As of September 1, 2023, TCEQ regulates dairy operations at 251 permitted facilities, including 35 facilities authorized under an individual permit and 216 under the CAFO General Permit (TXG920000). Other dairy operations do not meet the threshold for necessitating permit coverage from TCEQ; however, they must comply with AFO rules in 30 TAC §321.47 or obtain a Water Quality Management Plan from the Texas State Soil and Water Conservation Board.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that it does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the

same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination [if full RIA not required]

TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code (TGC) §2001.0225 and determined that the rulemaking is not subject to §2001.0225(a) because it does not meet the definition of a “major environmental rule” as defined in §2001.0225(g)(3).

The following is a summary of that review.

Section 2001.0225 applies to a “Major environmental rule” adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A “Major environmental rule” is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The Texas Legislature enacted HB 692, amending Chapter 26 of the TWC (Water Quality Control), Subchapter B (General Water Quality Power and Duties), and THSC, Chapter 361 (the Solid Waste Disposal Act), Subchapter C (Permits) by adding §26.0481 to the TWC and §361.1215 to the THSC, which provides an additional regulatory and legal

method for dairy AFOs to dispose of dairy waste, which HB 692 defines as milk, milk by-products, or milk processing waste that is spilled, spoiled, adulterated, unmarketable, stranded, or otherwise unfit for human consumption produced by a dairy operation , as applicable.

HB 692 requires TCEQ, not later than March 1, 2024, to adopt new TCEQ rules necessary to implement HB 692's provisions.

HB 692 grants TCEQ the rulemaking authority to create an authorization by rule for land application of dairy waste, and to adopt new Rules allowing the disposal of dairy waste from an AFO into an RCS, including a lagoon or playa, and authorize land application by irrigation associated with that disposal.

As the Bill Analysis from the Environmental Regulation Committee of the Texas House of Representatives makes clear, the 88th Texas Legislature enacted HB 692 with the aim of providing Texas dairies with other disposal methods for dairy waste. In Texas, dairy waste is disposed of in a disposal well, of which there are only two locations in Texas. According to the Texas Association of Dairymen, the average cost to dispose a truckload of milk, about 50,000 pounds, is around \$3,000, which is a costly burden for dairy operators in Texas. Whereas, land application of dairy waste has proven to be an effective fertilizer, and based on current research, milk itself can improve soil health, if applied properly. This is due to milk's ability to provide nutrients to plants and stimulate the growth of beneficial fungi by supplying sugar. Since milk is composed

mostly of water, it also contributes to putting water back into the ground. HB 692 addressed these issues by amending the TWC and THSC to allow the authorization of land applications and disposal of dairy waste in an RCS.

HB 692 requires TCEQ to issue both an authorization by rule for land application of dairy waste, that minimizes the risk of water quality impairment caused by the land application, and prescribe the conditions under which an authorization is issued, such as the duration of the authorization, the location of the land application unit, the maximum quantity or application rate of dairy waste that may be applied or disposed of under the authorization, the suggested agronomic application rate for the dairy waste, and best management practices (BMPs) for the handling and disposal of dairy waste.

HB 692 requires TCEQ, to the extent permitted by federal law, to adopt rules allowing the storage of dairy waste by an AFO into an RCS, including a lagoon or playa, and the land application by irrigation associated with that disposal. The rules must require BMPs and other conditions to ensure that the disposal of dairy wastes into the RCS and its associated land application does not impair water quality.

In order to implement the provisions of HB 692, TCEQ proposes to add new §321.48 and §321.49 to the existing 30 TAC 321, Subchapter B rules allowing dairy CAFO operations to land apply dairy waste; and dispose of dairy waste in an RCS, including a lagoon or playa, and irrigate dairy waste from the RCS to land application areas. The

rules will also allow dairy operations to transfer or receive dairy waste from other dairy operations during emergency conditions for storage or land application for beneficial use.

Therefore, the specific intent of the proposed rulemaking is related to expanding the existing CAFO Rules with regulatory options for disposal of dairy waste, as defined in HB 692.

The proposed rules are intended to protect the environment and reduce risks to human health from environmental exposure. However, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the TGC, §2001.0225 definition of "major environmental rule."

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather extends state law and TCEQ rules to adopted and effective state laws. Third, it does not come under a delegation agreement or contract with a federal program and, finally, is not being proposed under TCEQ's general rulemaking

authority. This rulemaking is being proposed under specific state statutes enacted in HB 692 of the 2023 Texas legislative session and implements existing state law. Since this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required.

Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination. Written comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under TGC Chapter 2007. The following is a summary of that analysis.

Under TGC, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the

owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to implement the legislative amendments to the THSC and the TWC in HB 692 by amending TCEQ's existing 30 TAC 321, Subchapter B rules with regulatory options for disposal of dairy waste, as defined in HB 692. The proposed rulemaking will substantially advance this stated purpose by proposing new rule language that provides for the authorization for certain land applications and disposal of dairy waste in an RCS.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, TGC, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25 percent or more beyond that which would otherwise exist in the absence of the regulations. The primary purpose of the proposed rules is to

implement HB 692 by providing for the authorization for certain land applications and disposal of dairy waste in an RCS. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking will not cause a taking under TGC, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rulemaking includes protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include that discharges must comply with water quality-based effluent limits; and that discharges which increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless

necessary for important economic or social development.

The proposed rulemaking is consistent with the above goals and policies by requiring dairy waste disposal activities to be conducted in a manner that is protective of water quality.

Promulgation and enforcement of the rules would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules would be consistent with these CMP goals and policies, and the rule would not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking with CMP goals and policies may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

Announcement of Hearing

The commission will hold a hybrid virtual and in-person public hearing on this proposal in Austin on Wednesday, December 27, 2023, at 10:00 a.m. in Building E, Room 201S at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior

to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Thursday, December 21, 2023. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Friday, December 22, 2023, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_MWQyMjFjMzItMmI0Zi00ZTgwLWJhYTgtNjU0ZjY0MTQyYTO1%40tbread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3a%22true%22%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: <https://tceq.commentinput.com/comment/search>. File size restrictions may apply to comments being submitted via TCEQ Public Comments system. All comments should reference Rule Project Number 2023-139-321-OW. The comment period closes on December 28, 2023. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Dr. Joy Alabi, Water Quality Division, at (512) 239-1318.

SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS

§321.48 and §321.49[7]

Statutory Authority

The new sections are proposed under the Texas Water Code (TWC) and the Texas Health and Safety Code (THSC). TWC, §5.013 establishes the general jurisdiction of the commission, while TWC, §5.102 provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103. TWC, §5.103 requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state. TWC, §5.120 requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state. TWC, §26.121, prohibits the unlawful discharge of pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission. TWC, §26.0481 provides the commission with authority to adopt rules to allow the disposal of dairy waste by a Concentrated Animal Feeding Operations (CAFO) and animal feeding operations (AFOs) into a control facility, including a playa; and the land application by irrigation associated with that disposal.

THSC, §361.1215 provides the commission with authority to issue an authorization by rule for land application of dairy waste and to adopt rules governing that land application.

The proposed new sections implement House Bill 692, 88th Texas Legislature

(2023), TWC, §§5.013, 5.102, 5.103, 5.120, 26.121, 26.0481, and THSC, §361.1215.

§321.48. Land Application of Dairy Waste

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Dairy Waste--Milk, milk by-products, or milk processing waste that is spilled, spoiled, adulterated, unmarketable, stranded, or otherwise unfit for human consumption produced by a dairy operation.

(2) Dairy Operation--An Animal Feeding Operation (AFO) confining cattle that have been or may be used for production of milk, or otherwise associated with a dairy, including cows, calves, and bulls.

(3) Emergency Conditions - Instances where dairy waste is generated due to conditions outside the control of the dairy operator, such as act of God, adverse weather conditions, milk spoilage, power outage, mechanical failures in the trucking process or at the milk processing plant which causes the plant to reduce capacity, other times where the dairy operator cannot transport the milk to a processing plant, or any situation that causes truck load(s) of milk to be returned to the dairy operator from the processing plant. For land application of dairy waste, emergency conditions shall not exceed a time period of 7 calendar days without expanded authorization granted by the executive director.

(b) Purpose. This section provides authorization to a dairy operation to land apply dairy waste and receive third-party dairy waste to apply to land that is under the control of a dairy AFO under emergency conditions.

(c) Applicability. The owner or operator of a dairy operation that generates dairy waste and the owner or operator of the dairy operation that accepts the dairy waste, as applicable, shall comply with all the requirements of this section.

(d) General Requirements. The following requirements apply to land application of dairy waste:

(1) Land application of dairy waste must comply with the requirements of §321.40 of this title for a CAFO or §§321.47(f)(h) and (i) of this title for an AFO.

(2) Discharge of dairy waste from a land management unit (LMU) is prohibited and shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition.

(3) Land application practices shall be maintained to minimize ponding or puddling of the dairy waste on the site and prevent the occurrence of nuisance conditions.

(4) Land application of dairy wastes shall not occur when the ground is frozen or saturated or during rainfall events.

(5) Dairy waste shall not be land applied within the well buffers identified in §321.38(b) of this title.

(6) Land application of dairy wastes shall not occur within 100-feet of any surface water in the state.

(7) Land application of dairy wastes shall not occur within a vegetative buffer strip required by §321.40(h) of this title or other authorization from the executive director.

(8) Dairy wastes shall not be land applied within the 100-year floodplain.

(9) Dairy wastes shall not be land applied to soils with shallow perched or seasonal water tables.

(10) Dairy wastes may only be applied to fields that are vegetated with actively growing crops, or if to a fallow field, the dairy waste shall be incorporated into the soils within 48 hours of land application.

(11) Dairy waste application shall be limited to a maximum of 2,000 gallons per acre per year.

(12) Dairy wastes shall be applied evenly to the soils.

(13) Dairy wastes shall not be land applied within 750-feet from an established school, institution, business or occupied offsite residence.

(14) There shall be no land application of dairy waste to an LMU if the LMU is required to have a Nutrient Utilization Plan (NUP) per §321.40(k)(3) of this title.

(15) There shall be no land application of dairy waste to an LMU that has or reaches a critical soil test phosphorus (P) level of greater than or equal to 500 ppm, with a P - Index rating of "High" or "Very High".

(e) Notification Requirements. The dairy operator shall notify the appropriate TCEO Regional Office orally within 24 hours of the application of dairy waste or by the next business day, and in writing within 14 days of the land application of the dairy waste. Written notification may be on paper, electronic mail, or other electronic method as prescribed by the executive director. The notification shall include the following information:

(1) the location of the dairy waste disposal including the address of the disposal area, latitude and longitude, or a map;

(2) the reason for the land application of dairy waste;

(3) the date that dairy waste was applied to the agricultural land;

(4) the volume of dairy waste land applied;

(5) proof of authorization of the use of the field for dairy waste disposal if third-party land was used; and

(6) a certification signed by the dairy operator that the requirements of this subchapter were complied with during the land application of dairy wastes.

(f) Recordkeeping Requirements. A dairy owner or operator that generates the dairy waste shall include the following information in the Pollution Prevention Plan (PPP) required in §321.46(d) of this title:

(1) a list of any significant spills of dairy waste at the AFO that have a significant potential to reach water in the state;

(2) a log of all weekly dairy waste levels observed in the retention control structure (RCS), or daily dairy waste levels in RCSs located in a major sole-source impairment zone;

(3) a log of all dairy waste used at the AFO updated at least monthly. For AFOs where dairy waste is applied on LMUs, such records must include the following information:

(i) date of dairy waste application to each LMU;

(ii) location of the specific LMU and the volume applied during each application event;

(iii) acreage of each individual crop on which dairy waste is applied;

(iv) basis for and the total amount of nitrogen and phosphorus applied per acre to each LMU, including sources of nutrients other than dairy waste on a dry basis;

(v) the percentage of moisture content of the dairy waste;

(vi) actual annual yield of each harvested crop; and

(vii) weather conditions (such as the temperature, precipitation, and cloud cover) during the land application and 24 hours before and after the land application.

(4) annual nutrient analysis of dairy waste;

(5) documentation describing any discharge into water in the state including the date, time, volume of overflow, a copy of the notification(s) provided to the regional office, and sample analysis results associated with the discharge;

(6) the results of initial and annual soil analysis reports as required by this subchapter; and

(7) copies of all notifications to the executive director, including any made to a Texas Commission on Environmental Quality regional office, as required by this subchapter, a permit, or authorization.

(g) Discharge notification requirements in §§321.44(a)(1) through (6) of this title shall apply to the discharge of dairy waste.

(h) Discharge Monitoring. The dairy operator shall sample all discharges of dairy waste to surface water in the state and comply with the discharge monitoring in

§321.44(b) of this title.

(i) Annual Reporting. The dairy operator land applying dairy waste shall include the following information in the annual report as indicated in §321.36(g) of this title. Dairy operators that are not authorized by permit, and therefore not required to submit an annual report, must mail the information in this subsection to the TCEO Regional office that is servicing the area where the dairy operation is located.

(1) estimated total dairy waste (in gallons) generated during the reporting period;

(2) total dairy waste (in gallons) land applied during the reporting period;

(3) total number of acres that was included in the nutrient management plan (NMP) that was used for land application of dairy waste under the control of the AFO operator during the reporting period;

(4) summary of discharges of dairy waste from the RCS that occurred during the reporting period including dates, times, and approximate volume (in gallons);

(5) soil monitoring reports of all soil samples collected from the LMUs where dairy waste was applied in accordance with the requirements of this subchapter;

(6) the actual crop(s) planted and yield(s) for each LMU;

(7) the actual nitrogen and phosphorus content of the dairy waste that was land applied;

(8) the data used in calculations and the results of calculations conducted in accordance with §321.36(c) of this title that relates to the NMP; and

(9) the amount of dairy waste applied to each LMU during the reporting period.

§321.49. Disposal of Dairy Waste in a Retention Control Structure or Playa at an Animal Feeding Operation

(a) Purpose. This section provides authorization to a dairy operation to dispose of dairy waste in a retention control structure (RCS) or playa under emergency conditions.

(b) Applicability. This section applies to an owner or operator of a dairy operation that disposes of dairy waste in an RCS or playa.

(c) Discharge Restrictions

(1) There shall be no discharge or disposal of dairy waste from a dairy operation into or adjacent to water in the state, except in accordance with this permit section. Dairy waste generated by a dairy operation under this subchapter shall be retained and utilized in an appropriate and beneficial manner as provided by this section.

(2) The disposal of dairy waste in an RCS is subject to the effluent limitations in 30 TAC §321.37 and the RCS design requirements in 30 TAC §321.38 and 30 TAC §321.42(c), all of this title. .

(d) General Requirements.

(1) Disposal of dairy waste into a playa shall comply with §321.41 Special Requirements for Discharges to a Playa.

(2) RCSs must be designed in accordance with the requirements in §321.38 (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs), and §321.42(c) of this title for dairy operators in a major sole source impairment zone to operate and maintain a margin of safety in the RCS to contain the volume.

(3) RCS Operation and Maintenance shall comply with the requirements in §§321.39(b)(1) through (6) of this subchapter, and 30 TAC §§321.42(f), (g) and (h) of this title for dairy operators in a major sole source impairment zone.

(i) A dairy operation using an RCS for storage and treatment of dairy waste shall ensure that the required capacity in the RCS is available to contain rainfall and rainfall runoff from the design rainfall event.

(ii) If an RCS is in danger of imminent overflow from chronic or catastrophic rainfall or catastrophic conditions, the dairy operator shall take reasonable steps to irrigate dairy waste to land management units (LMUs) only to the extent necessary to prevent overflow from the RCS. If irrigation results in a discharge from an LMU, the dairy operator shall collect samples from the drainage pathway at the point of discharge from the LMU, analyze the samples for the parameters identified in §321.44(b)(1) of this title, and provide the appropriate notifications in accordance with §321.44(a) of this title. The operator shall orally notify the appropriate regional office within 24 hours of beginning irrigation under this provision and in writing within 14 working days after the irrigation event. Written notification shall be made on a form prescribed by the executive director, and may be mailed, or send by an email to the TCEQ Regional Office that services the area where the dairy is located.

(iii) The following information shall be provided during the oral notification:

(A) the dairy's authorization status: if the dairy is permitted or not permitted and, if permitted, the permit number;

(B) the name and address of the owner and operator;

(C) the name and location of the dairy;

(D) the site-specific emergency condition(s);

(E) the proposed disposal method of the dairy waste: land application or storage in an RCS; and

(F) the duration of the emergency conditions and if additional time will be needed to complete the disposal operation either by land application, storage in an RCS, or transfer to another dairy.

(iv) Written notification. The following information shall be provided, in addition to the information required for oral notification, on a form that is prescribed by the executive director and submitted to the TCEQ Regional office:

(A) location of the LMUs, including the latitude and longitude, if dairy waste was land applied;

(B) the date(s) that the dairy waste was land applied to the LMUs;

(C) the volume of dairy waste (in gallons) that was land applied or stored in an RCS;

(D) if there was any discharge of dairy waste from the LMUs or RCSs, and the estimated volume of the discharge (in gallons);

(E) if the dairy is permitted, the date of the last review or revision of the nutrient management plan (NMP), and certification that the NMP was prepared by a nutrient management specialist; and

(F) if dairy waste was transferred to another dairy, and the volume that was transferred (in gallons).

(v) Maps. The following facility maps will be attached to the written notification: USGS topographical Map, Site and Runoff Control, and the LMU Maps of where the dairy waste was land applied.

(e) Dairy Waste Transfer. A dairy operation may transfer dairy waste to another dairy operation site for land application or storage in an RCS to use for irrigation when needed.

(1) The owner or operator generating the dairy waste shall keep a record of all dairy waste (gallons, or acre-feet) that is transferred to another dairy operation.

(2) The owner or operator generating the dairy waste shall provide the laboratory report for total nitrogen, total phosphorus, and total potassium content of the dairy waste to the receiver of the dairy waste.

(3) The owner or operator generating the dairy waste shall keep records of the name(s) and address(s) of the recipient(s) of the dairy waste.

(f) Dairy Waste Received.

(1) A dairy operator that receives dairy waste shall comply with the land application requirements in §321.48 of this title.

(2) Storage of dairy waste shall comply with the requirements in §321.49(d) of this section.