

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:

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Attachments:

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

[HB 692](#)

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