Water Environment Association of Texas

TEXAS ASSOCIATION OF CLEAN WATER AGENCIES
TACWA
A CLEAR COMMITMENT TO TEXAS WATERS

October 4, 2024

VIA USPS Mail and E-Mail

Texas Feed and Fertilizer Control Service
Office of the Texas State Chemist
c/o Dr. Tim Herrman, State Chemist and Director
P. O. Box 3160
College Station, Texas 77841-3160
tjh@otsc.tamu.edu

RE: Water Environment Association of Texas
Texas Association of Clean Water Agencies
Comments on Proposed Rulemaking
Title 4, Agriculture
Chapter 65, Commercial Fertilizer Rules

Dear Dr. Herrman:

The Water Environment Association of Texas ("WEAT") and Texas Association of Clean Water Agencies ("TACWA") appreciate the opportunity to comment on the rulemaking proposal to amend TAC Title 4, Part 3, Chapter 65, Subchapter B, §§ 65.13 (concerning Waste Products Distributed as Fertilizers) and 65.24 (concerning Warnings or Cautionary Statements Required). WEAT/TACWA are non-profit member organizations and collectively are composed of 4,300+ water professionals hailing from entities representing over 19 million ratepayers that have been at the forefront of solving Texas' water quality challenges for over 55 years. WEAT/TACWA's collective mission is to benefit society through protecting and enhancing the environment by providing education and awareness on the value of water. WEAT/TACWA seeks to ensure future generations have clean water for drinking, agriculture, and recreation. WEAT/TACWA strongly supports sustained and improved public participation/engagement. Transparency and public involvement are important to the regulatory process and WEAT/TACWA values stakeholder input that can further the protection and enhancement of our water environment.

With respect to the specific rule changes proposed, WEAT/TACWA shares the Office's concerns about the presence of PFAS in the environment. Protecting public health and the environment is fundamental to WEAT/TACWA's mission and to the water professionals that make up these organizations. That said, WEAT/TACWA is opposed to the rule as it is currently proposed, and, in accordance with the invitation to provide comments in the proposed rule notice, WEAT/TACWA respectfully submits the following comments.

Stakeholder meetings be held to fully vet the impacts of the rule changes.

WEAT/TACWA notes that the proposed rule changes are extremely broad – far broader than the preamble to the rule purports the intent to be, and with foreseeable significant impacts to the biosolids industry, state government, local governments, rural communities, and agricultural businesses far beyond the intent of the proposed rule

Therefore, *WEAT/TACWA hereby respectfully requests a public hearing on the proposed rule*. Pursuant to Tex. Gov't Code § 2001.029(b)(3), "a state agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by: … (3) an association having at least 25 members." WEAT/TACWA has over 4,300 members.

WEAT/TACWA further requests, because of the far-reaching implications of the proposed rule, that the Office of the Texas State Chemist (the "Office") hold stakeholder meetings (not just one public hearing) to ensure the Office fully understands the implications of the proposed rule changes.

The proposed rule is a major environmental rule and fails to meet procedural requirements.

"Major environmental rule" is defined as "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." Tex. Gov't Code § 2001.0225(g)(3). Rulemakings for major environmental rules are required to include a regulatory analysis and fiscal note that goes beyond what is presented in the preamble to the proposed rule. Tex. Gov't Code § 2001.0225(b) – (c).

The costs to the public, local governments, and wastewater industry, the fertilizer industry, and the agriculture industry are significantly higher than indicated in the conclusory statements provided in the preamble. Further, many utilities have already invested in large-scale capital projects to produce biosolids meeting TCEQ's requirements. These projects were funded through bonding and other loans that will be paid off across decades by ratepayers of Texas. A ban on the land application of biosolids fertilizers is effectively an opportunity cost tax on rate-payers.

Local governments and the wastewater industry, which produce the biosolids that are being targeted by the proposed rule, will be significantly burdened by the proposed rule. Because of the breadth and lack of specificity of the proposed rule (discussed below), the effect of the proposed rule will be to not just discourage, but to effectively ban, the use of biosolids in fertilizers. Such biosolids producers will be forced to find other methods of biosolids disposal, likely resulting in greater costs to the local governments and to ratepayers. Biosolids producers that certify their biosolids as fertilizers under the Office's registration do so because it is the most economically favorable option; therefore, there will be increased costs by not having the ability to register. These costs were not evaluated in the preamble. Nor were downstream costs (for example, to the fertilizer industry, the agriculture industry, or the public) evaluated.

Further, the Office overstates the benefits of the proposed rule. In fact, WEAT/TACWA contends that there will be no benefit to the proposed rule. The effect of the proposed rule will be to force farmers to use fertilizers not made from biosolids, and there is no evidence that such a change would reduce the amount of PFAS in "farm ground and water systems in Texas"; in fact:

- PFAS have been detected in compost, garden soil, and potting mix not containing biosolids.[1]
- PFAS have been detected in yard waste.[2]
- PFAS have been detected in agricultural pesticides[3]
- PFAS have been detected in rain and snow all over the world.[4]

The preamble does not address that outcome.

Terminology should be specific.

WEAT/TACWA requests that both the rule and the preamble use more specific terminology so that the regulated community will be on notice of the intent of the rule and what specific actions are prohibited.

First, the preamble describes the intent of the proposed rule to be to prevent "application of forever chemicals found in waste products from permanently contaminating farm ground and water systems in Texas." However, the term "forever chemicals" is not a term with any specific meaning, either scientifically or legally; the term is currently used in the media to refer vaguely to per- and polyfluoroalkyl chemicals ("PFAS"), which are themselves not well defined.[5] According to the National Institute of Environmental Health Sciences, there are nearly 15,000 PFAS chemicals;[6] EPA simply says that there are "thousands" of PFAS chemicals. The Centers for Disease Control and Prevention says that there are over 9,000 PFAS chemicals.[7] There is no specific, comprehensive list of PFAS chemicals, much less a list of "forever chemicals."

Second, the actual rule as proposed is even more broad than the "forever chemicals" referenced in the preamble, prohibiting any "deleterious or harmful substance," going much further than even the chemicals vaguely referred to in the preamble.

Contrast the vague and general language of the proposed rule for fertilizer with the TCEQ's regulations governing land application of biosolids not designated as fertilizer. In 30 TAC § 312.43, the TCEQ provides very specific lists of constituents and concentration limits for each constituent. These regulations were developed following a robust stakeholder process, resulting in requirements

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[1] https://doi.org/10.1016/j.envadv.2022 (last visited on 10/4/2024).
[2] https://www.sciencedirect.com/science/article/abs/pii/S004896972103521X?via%3Dihub (last visited on 10/4/2024).
[3] https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP13954 (last visited on 10/4/2024).
[4] https://doi.org/10.1021/acs.est.2c02765 (last visited on 10/4/2024).
[5] EPA has a structural definition of PFAS as part of their PFAS rule under TSCA. This definition lists certain moieties as defining PFAS, but any number of other atoms could define the remainder of the molecule, so there are infinite chemicals that could be considered PFAS. EPA states that over a thousand PFAS are known to have been made or used in the USA since 2011. https://www.epa.gov/newsreleases/epa-finalizes-rule-require-reporting-pfas-data-better-protect-communities-forever (last visited on 9/30/2024).
[6] See https://www.niehs.nih.gov/health/topics/agents/pfc#:~:text=PFAS%20are%20a%20group%20of,the%20U.S.%20Environmental%20Protection%20Agency. (last visited on 9/30/2024).
[7] See https://www.cdc.gov/niosh/topics/pfas/default.html (last visited on 9/30/2024).

that the regulated community understands. Without either providing a list of chemicals and concentrations similar to the EPA's approach in 40 CFR Chapter 503 or TCEQ's more stringent approach in § 312.43, or referencing an existing list of chemicals and concentrations such as the TCEQ's tables in § 312.43, there is no way for the regulated community to conduct testing to determine if it is complying with the purported intent, or explicit requirements, of the proposed rule.

The scope of the rule should be defined.

The rule as proposed is extraordinarily vague. Rules must give the regulated community fair notice of what activities are prohibited. *Sanders v. State Dep't of Public Welfare,* 472 S.W.2d 179, 182 ("If a regulation is incomplete, vague, indefinite and uncertain and it forbids the doing of an act which is so vague, that men of common intelligence must necessarily guess at its meaning and that such men differ as to application, it violates the first essential of due process of law").

The rule as proposed does not provide the regulated community with any guidance as to what substances it should be testing for, or at what levels any substance is acceptable. There are thousands of PFAS chemicals, many of which there are no way to test for. Only two methods have been published for detecting PFAS in wastewater or biosolids – Methods 1633 and 1621. Neither has yet been promulgated through rulemaking. Method 1621 is not applicable to testing of biosolids, and Method 1633 tests for only about 40 specific PFAS compounds. There are no tests for anywhere near the thousands of PFAS chemicals that are known and would be captured in this proposed rule. Further, of these thousands of PFAS chemicals, only six currently have a final toxicity assessment from EPA.

In addition, there are a near infinite number of other chemicals – any of which could be implicated by the rule – that might be harmful or deleterious at some level, but that one would not know to test for. Therefore, any level of harm caused by any chemical in fertilizer could be grounds for enforcement under the rule, even if that harm were de minimis.

The only guidance provided by the rule – "in sufficient amount to render it injurious to beneficial plant life, animals, humans, aquatic life, soil, or water when applied in accordance with directions for use on the label" – while apparently lifted from the AAPFCO "official publication" – does not provide any meaningful guidance, as it is not rooted in quantifiable data. Being taken from the "official publication" does not cure that defect and the labels at issue do not actually provide "directions for use." There is only a "recommended application rate" for bulk use (in terms of amount per acre per year); no actual directions. The recommended application rate is not based on anything that is specific to the land on which the fertilizer is applied. Therefore, fertilizer applied in accordance with the recommendations on the label may run off during a large rain event into area streams, adversely affecting aquatic life and running afoul of the proposed rule. By relying on vague language rather than specifying specific constituents and regulatory limits, nearly any substance (not only PFAS) could be deemed deleterious and/or harmful at any level. This potential result is clearly not the intent of the proposed rule, but it is the effect.

For these reasons, unlike EPA's and TCEQ's regulation of biosolids' land application, the proposed rule is too vague to be enforceable or workable. However, EPA has produced a PFAS Roadmap that details a timeline, rules, and strategies for addressing PFAS. The roadmap includes a risk assessment of pollutants in biosolids, which will include PFAS, and is scheduled to be released before the end of this calendar year. EPA has also promulgated rules regarding PFAS in drinking water and in CERCLA and RCRA remediations, which local governments and others are working to implement, all of which is driving more sampling, testing, and a greater understanding of PFAS and how to deal with it. The proposed rule is premature. It fails to rely on science because that science is simply not there yet but is actively being developed. WEAT/TACWA would support a rule that is based on sound science, but until that science is developed, WEAT/TACWA requests that that this rule be withdrawn.

WEAT/TACWA is glad to discuss these concerns in greater detail and can arrange a meeting with agency staff as needed. Please contact me at 210-325-3087 or Julie@WEAT.org if you have any questions regarding these comments.

Sincerely,

Julie Nahrgang,
WEAT/TACWA Executive Director