

**Colorado Department of Public Health and Environment**  
***Environmental Agriculture Program***

**MEMORANDUM**

TO: Water Quality Control Commission

CC: Paul Frohardt, Water Quality Control Commission  
Steven Gunderson, Water Quality Control Division  
Phyllis Woodford, Environmental Agriculture Program

FROM: Ron Jepson, Environmental Agriculture Program *RJ*  
Office of Environmental Integration and Sustainability

DATE: October 28, 2009

SUBJECT: Request to Postpone the March 9, 2010 Rulemaking Hearing for Revisions of the CAFO Permit Regulations (section 61.17) and HCSFO Permit Regulations (section 61.13)

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The U.S. Environmental Protection Agency promulgated revisions to the federal Concentrated Animal Feeding Operation (CAFO) rule (rule) on December 4, 2008. In accordance with 40 CFR 123.62(e), delegated states, such as Colorado, are required to revise applicable state regulations within one year of the date of promulgation of the revised rule. The applicable state regulations are sections 61.13 and 61.17 of Water Quality Control Commission Regulation No. 61, which are the housed commercial swine feeding operation (HCSFO) and CAFO permit regulations, respectively. Based on stakeholder's input, it may be necessary to also propose revisions to commission Regulation No. 81 ("Animal Feeding Operations Control Regulation") in response to the rule.

A rulemaking hearing before the commission is scheduled for March 9, 2010, for proposed changes to the regulations described above. However, as discussed at the commission's October 2009 meeting, the Environmental Agriculture Program is requesting that the rulemaking hearing be postponed until the commission's March 2011 meeting. The reasons for the requested postponement are as follows:

1. In the spring of 2009, the rule was challenged by numerous livestock producer and environmental organizations. The petitions have been consolidated in the Fifth Circuit Court of Appeals. Oral arguments from petitioners are scheduled for the summer of 2010.
2. In response to EPA's 2003 revision of the rule, the commission made corresponding revisions to sections 61.13 and 61.17 within one year after the rule was promulgated. However, this rule was challenged by industry and environmental groups, which resulted in the Waterkeeper decision by the federal Second Circuit Court of Appeals. This decision vacated some parts of the rule and required EPA to revise other parts of the rule. In response to the court's ruling to vacate parts of the rule, and an interim EPA rule revision prior to the December 4, 2008 promulgation of the revised rule, the commission revised section 61.17 twice, once in 2006 and once in 2007. This rulemaking history has resulted in section 61.17 being in a state of flux since 2004. In addition, the regulatory changes created a considerable amount of confusion within the livestock industry on what regulatory requirements were applicable and when.
3. On September 28, 2009, Peter Silva, EPA's assistant administrator for the Office of Water, stated during a public interview that EPA is discussing stricter regulation of large farms, including CAFOs, and is still determining whether to focus on changing the CAFO rule (promulgated on

December 4, 2008) via settlement negotiations over industry and environmentalist challenges or through a new notice-and-comment rulemaking.

In light of the discussion above, the Environmental Agriculture Program requests the commission's consideration of postponing the March 2010 rulemaking hearing on sections 61.13 and 61.17 of Regulation No. 61, and possibly to Regulation No. 81, to March 2011. This additional period of time will allow for any subsequent changes to the rule to occur, while keeping regulatory flux to a minimum.

Thank you.