HOUSE OF REPRESENTATIVES - FLOOR VERSION

STATE OF OKLAHOMA

1st Session of the 54th Legislature (2013)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 1640 By: Jordan of the House

and

Johnson (Rob) of the Senate

COMMITTEE SUBSTITUTE

An Act relating to agriculture; amending 2 O.S. 2011, Sections 20-3 and 20-8, which relate to the Oklahoma Swine Feeding Operations Act; modifying definition; requiring Oklahoma Department of Agriculture, Food, and Forestry to review certain information and make a determination within certain time period; modifying procedure; prohibiting the State Board of Agriculture from taking certain action; modifying hearing procedure and requirements; requiring certain content when requesting certain hearings; providing time limit to correct deficiencies in certain requests; providing requirements for certain preliminary hearings; requiring a written order be issued within a certain time; requiring an administrative law judge to submit findings or schedule hearing; providing requirements for certain administrative hearing; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 2 O.S. 2011, Section 20-3, is amended to read as follows:

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Section 20-3. A. Concentrated swine feeding operations are point sources subject to the license program established pursuant to the provisions of the Oklahoma Swine Feeding Operations Act.

B. As used in the Oklahoma Swine Feeding Operations Act:

1. "Affected property owner" means a surface landowner within:

a. one (1) mile of the designated perimeter of a swine feeding operation which:

(1) does not meet the definition of a licensed managed feeding operation, or

(2) is previously unlicensed or an expanding licensed managed feeding operation with a capacity of two thousand (2,000) or less swine animal units, or

b. two (2) miles of the designated perimeter of a licensed managed feeding operation or an expanding operation with a capacity of more than two thousand (2,000) swine animal units for which a license is being sought;

2. "Swine feeding operation" means a lot or facility where the following conditions are met:

a. swine have been, are, or will be stabled or confined and fed or maintained for a total of ninety (90) consecutive days or more in any twelve-month period, and

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b. crops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility;

3. "Swine animal unit" means a unit of measurement for any swine feeding operation calculated by adding the following numbers: The number of swine weighing over twenty-five (25) kilograms, approximately fifty-five (55) pounds, multiplied by four-tenths (0.4), plus the number of weaned swine weighing under twenty-five (25) kilograms multiplied by one-tenth (0.1);

4. "Swine waste" means swine excrement, swine carcasses, feed wastes, process wastewaters or any other waste associated with the confinement of swine from a swine feeding operation;

5. "Swine Waste Management Plan" or "Nutrient Management Plan" means a written plan that includes a combination of conservation and management practices designed to protect the natural resources of the state prepared by an owner or operator of a swine feeding operation as required by the Department pursuant to the provisions of Section 20-10 of this title;

6. "Swine waste management system" means a combination of structures and nonstructural practices serving a swine feeding operation that provides for the collection, treatment, disposal, distribution, storage and land application of swine waste;

7. "Artificially constructed" means constructed by humans;

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8. "Best Management Practices" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state as established by the Oklahoma Department of Agriculture, Food, and Forestry pursuant to Section 20-10 of this title;

9. "Board" means the State Board of Agriculture;

10. "Common ownership" includes but is not limited to any corporation, partnership or individual where the same owner has power or authority to manage, direct, restrict, regulate or oversee the operation or has financial control of the facility;

11. "Concentrated swine feeding operation" means:

a. a licensed managed feeding operation, or

b. a swine feeding operation which meets the following criteria:

(1) more than the number of swine specified in any of the following categories are confined:

(a) 750 swine each weighing over 25 kilograms or approximately 55 pounds,

(b) 3,000 weaned swine each weighing under 25 kilograms, or

(c) 300 swine animal units, and

(2) either one of the following conditions are met:

(a) pollutants are discharged into waters of the state through an artificially constructed

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ditch, flushing system or other similar artificially constructed device, or

(b) pollutants are discharged directly into navigable waters which originate outside of and pass over, across or through the facility or otherwise come into direct contact with the swine confined in the operation.

Provided, however, that no swine feeding operation pursuant to this subparagraph is a concentrated swine feeding operation if the swine feeding operation discharges only in the event of a twenty-five-year, twenty-four-hour storm event, or

c. the Board determines that the operation is a significant contributor of pollution to waters of the state pursuant to Section 20-6 of this title;

12. "Department" means the Oklahoma Department of Agriculture, Food, and Forestry;

13. "Designated perimeter" means the perimeter of any structure or combination of structures utilized to control swine waste until it can be disposed of in an authorized manner. Structures shall include but not be limited to pits, burial sites, barns or roof-covered structures housing swine, composters, waste storage sites, or retention structures or appurtenances or additions thereto;

14. "Expanding operation" means:

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a. a facility that either increases its swine animal unit capacity to a number that causes the facility to initially meet the definition of a licensed managed feeding operation, or

b. a licensed managed feeding operation that seeks to increase its licensed capacity in excess of five percent (5%) of the original facility's licensed capacity;

15. "Facility" means any place, site, or location or part thereof where swine are kept, handled, housed, or otherwise maintained and processed and includes but is not limited to buildings, lots, pens, and swine waste management systems;

16. "Interested party" means an affected property owner ~~who validly requests an individual hearing, in accordance with the provisions of the Oklahoma Swine Feeding Operations Act and rules promulgated pursuant thereto regarding the issuance of a swine feeding operation license and asserts rights to relief in respect to or arising out of the same license~~ <u>found to meet the burden of proof pursuant to the provisions of Section 20-8 of this title</u>;

17. "Land application" means the spreading on, or incorporation of swine waste into the soil mantle primarily for beneficial purposes;

18. "Licensed managed feeding operations" means a swine feeding operation primarily using a liquid swine waste management system,

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where swine are primarily housed in a roof-covered structure and which has more than the number of swine specified in any of the following categories confined:

a. 2,500 swine each weighing over 55 pounds,

b. 10,000 weaned swine each weighing under 55 pounds, or

c. any combination of swine weighing over 55 pounds or under 55 pounds which would equal one thousand (1,000) swine animal units;

19. "Liquid swine waste management system" means any swine waste management system which uses water as the primary carrier of swine waste into a primary retention structure;

20. "Nutrient-limited watershed" means a watershed of a water body which is designated as "nutrient-limited" in the most recent Oklahoma Water Quality Standards;

21. "Nutrient-vulnerable groundwater" means groundwater which is designated "nutrient-vulnerable" in the most recent Oklahoma Water Quality Standards;

22. "Odor Abatement Plan" means schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce odor as established by the Department pursuant to Section 20-11 of the Oklahoma Swine Feeding Operations Act;

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23. "Occupied residence" means a habitable structure designed and constructed for full-time occupancy in all weather conditions and:

a. is not readily mobile,

b. is connected to a public or permanent source of electricity and a permanent waste disposal system or public waste disposal system, and

c. is occupied as a residence;

24. "Pollution Prevention Plan" means a written plan to control the discharge of pollutants which has been prepared in accordance with industry-acceptable engineering and management practices by the owner or operator of a swine feeding operation as required pursuant to Section 20-9 of this title;

25. "Process wastewater" means any water utilized in the facility that comes into contact with any manure, litter, bedding, raw, intermediate, or final material or product used in or resulting from the production of swine and any products directly or indirectly used in the operation of a facility, such as spillage or overflow from swine watering systems; washing, cleaning, or flushing pens, barns, manure pits, direct contact, swimming, washing or spray cooling of swine; and dust control and any precipitation which comes into contact with swine or swine waste;

26. "Retention structures" means, but is not limited to, all collection ditches, conduits and swales for the collection of runoff

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water and process wastewater, and basins, ponds and lagoons or other structures used to store swine wastes;

27. "Spill" means the release from a swine feeding operation of any process wastewater or manure that does not reach waters of the state;

28. "Waste facility" means any structure or combination of structures utilized to control swine waste until it can be disposed of in an authorized manner. The structures shall include but not be limited to pits, burial sites, barns or roof-covered structures housing swine, composters, waste storage sites, or retention structures or appurtenances or additions thereto; and

29. "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof. Provided, waste treatment systems, including treatment ponds and lagoons designed to meet federal and state requirements other than cooling ponds as defined in the Clean Water Act or rules promulgated pursuant thereto, are not waters of the state.

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SECTION 2. AMENDATORY 2 O.S. 2011, Section 20-8, is amended to read as follows:

Section 20-8. A. 1. Any person applying for a license for a new or expanding swine feeding operation shall comply with the notice and hearing requirements as specified by this section and rules promulgated by the State Board of Agriculture.

2. Notice requirements shall include notice to affected property owners by certified mail, return receipt requested pursuant to subsection C of this section and public notice pursuant to subsection D of this section.

B. 1. After submission of a completed application as provided by the Oklahoma Swine Feeding Operations Act and rules promulgated pursuant thereto, the Oklahoma Department of Agriculture, Food, and Forestry shall have sixty (60) working days to review the application for a new or expanding operation for physical and technical suitability.

2. a. After review of the application the Department may request additional information from the applicant. Upon receipt of the additional information the Department shall then have an additional thirty (30) working days to review the additional information.

b. On or before the expiration of an additional thirty-working-day period, the Department shall make a determination as to whether the application is

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complete and in compliance with all statutory requirements and relevant rules of the Department or request additional information pursuant to subparagraph a of this paragraph.

C. 1. After ~~review and after the applicant has submitted any additional required information to~~ the Department has determined that the application is complete, the Department shall require the applicant to notify all affected property owners ~~of the proposed facility or expanding operation~~ that a completed application is on file with the Department. Notice shall be sent by certified mail, return receipt requested. The notice shall ~~identify~~ state that an application for a new or expanding swine feeding operation has been submitted to the Department and has been deemed to be complete, the location ~~where~~ of the facility ~~is to be located~~, that a hearing may be requested ~~pursuant to this subsection, and the date the application will be available for public review beginning no earlier than the day following the certified mailing of all the required notices, and any other information required by the Department.~~

~~2. Each affected property owner requesting a hearing shall submit, in writing, the following information:~~

~~a. the name and address of the interested party and proof of standing by showing that the interested party is an affected property owner,~~

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~~b. a statement of specific allegations showing that the proposed facility or expanding operation may have a direct, substantial and immediate effect upon a legally protected interest of the interested party, and~~

~~c. the relief sought by the interested party.~~

~~3. If any of the affected property owners request an administrative hearing and all information listed in paragraph 2 of this subsection is found to be complete and adequate in the request for hearing, the scheduling conference for the hearing shall be held by the Department at a reasonable time within sixty (60) calendar days after the close of the public review period. Should the interested party have failed to provide any of the information listed in paragraph 2 of this subsection, the interested party shall have thirty (30) calendar days with which to cure any deficiencies after notice by the Department of such failure and receipt thereof in writing by the interested party. All interested parties may be joined as parties to the hearing.~~

~~4. a. In addition to any other information deemed necessary by the Department, at the hearing the Department shall hear testimony and accept evidence pertaining to the physical and technical suitability of the proposed facility or expanding operations.~~

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~~(1) Prior to the hearing, and after a reasonable opportunity for discovery, the interested party shall identify with specificity the reasons why the applicant has failed to show that the application should be granted.~~

~~(2) In a prehearing order, the Department shall identify the allegations that are relevant and applicable to the hearing.~~

~~(3) At the hearing, the interested party shall be afforded a reasonable opportunity to present evidence and argument in support of the allegations identified in the prehearing order and the applicant shall be afforded a reasonable opportunity to present evidence and argument to controvert those allegations.~~

~~b. For new applications submitted on and after August 1, 1998, the Department shall deny the issuance of a license to an applicant for a licensed managed feeding operation if an interested party within:~~

~~(1) one (1) mile of the designated perimeter of the proposed licensed managed feeding operation or expansion thereof, or~~

~~(2) the setback distance of an occupied residence if setback distances are greater than one (1) mile,~~

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~~proves that the granting of the license will cause significant harm to the property value of the interested party.~~

~~5. Any administrative hearing held pursuant to the provisions of this subsection shall comply with the Administrative Procedures Act and rules promulgated by the Board.~~

~~6.~~ within fifteen (15) working days from the receipt of notice by the affected property owner and that a copy of the completed application is available for public review pursuant to paragraph 3 of subsection D of this section.

2. The State Board of Agriculture shall not act on the application until the expiration of the time period set forth in paragraph 1 of subsection G of this section. If a hearing is requested pursuant to paragraph 1 of subsection G of this section, the Board shall not take action on the application until the hearing process is complete.

3. Establishment of property usage is the date the swine feeding operation application was made available for public review versus date of initial construction or placement of occupied residence and shall be given consideration when determining a contested matter between an applicant and an ~~interested party~~ affected property owner on issues other than pollution of the waters of the state.

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D. 1. In addition to the individual notice, the Department shall require the applicant to give public notice of the opportunity to comment on the granting of the license.

2. The public notice for a new or expanding operation shall be published as a legal notice prior to the date the application is available for public viewing, in at least one newspaper of general circulation in the county where the proposed facility or expanding operation is to be located.

3. The notice shall identify locations where the application shall be available for viewing. The locations shall include the office of the Department and a specific public location in the county where the proposed facility or expanding operation is to be located.

4. The application shall be available for public review during normal business hours. The copies of the application posted for public viewing shall be complete except for proprietary provisions otherwise protected by law and shall remain posted during normal business hours for at least twenty (20) working days after notice is published.

5. The Department, as necessary, may hold public meetings at a location convenient to the population center nearest the proposed facility or expanding operation to address public comments on the proposed facility or expanding operation.

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E. Prior to the issuance of any license for a swine feeding operation, or expanding operation, the Department shall require the applicant to submit:

1. Documentation certifying notice has been issued to all affected property owners. A map of all affected property owners and the corresponding mailing list shall be submitted with each application; and

2. Proof of publication notice of a new or expanding application for a swine feeding operation license.

F. If no hearing is requested within the time periods set forth in paragraph 1 of subsection G of this section, the application shall be submitted to the State Board of Agriculture for consideration and action.

G. 1. An affected property owner may request a hearing prior to final approval of the application. All requests for a hearing shall be filed with the Department within fifteen (15) working days after the receipt of the notice by the affected property owner. In requesting a hearing an affected property owner shall state in the request:

a. the name and address of the affected property owner and proof of standing by showing a surface ownership interest in the affected property, and

b. specific allegations showing that the proposed facility or expanding operation may have a direct,

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substantial and immediate effect upon a legally protected interest of the affected property owner. The allegations shall address with specificity the information contained within the application for licensure. Furthermore, the allegations shall be limited to demonstrating how the application is deficient, how the deficiencies have a direct effect on a legal interest of the affected property owner, and how the applicant has failed to show that the application should be granted. The allegations shall also address the physical and technical suitability of the proposed facility.

2. If any of the affected property owners request an administrative hearing pursuant to paragraph 1 of this subsection and all information listed in subparagraphs a and b of paragraph 1 of this subsection is found to be complete and adequate in the request for hearing, a preliminary hearing shall be scheduled by the Department at a reasonable time within sixty (60) calendar days. Should the affected property owner fail to provide any of the information required in the request for hearing, the affected property owner shall have ten (10) working days during which any deficiencies may be cured after receipt of notice from the Department of the failure. All affected property owners shall be

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considered parties to the preliminary hearing scheduled by the Department.

H. 1. The preliminary hearing shall be held at the Oklahoma Department of Agriculture, Food, and Forestry before an administrative law judge.

2. There shall be a rebuttable presumption on the part of the applicant that the application in question is complete and in compliance with all applicable statutes and rules.

3. It shall be the burden of the affected property owner(s) to present an offer of proof showing by a preponderance of the evidence:

a. that the facility has a direct, substantial, and immediate effect upon a legally protected interest, and

b. that the direct, substantial, and immediate effect upon a legally protected interest arises directly from a deficiency in the application or from the physical and technical suitability of the proposed facility.

4. The administrative law judge after all evidence is presented by the affected property owner(s) shall afford the applicant an opportunity to respond to and rebut the allegations presented and to show how the affected property owner(s) failed to meet the standards set forth in subparagraphs a and b of paragraph 3 of this subsection.

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5. Upon completion of the preliminary hearing, the administrative law judge shall have twenty (20) working days in which to issue an order granting or denying the affected property owner(s) a full administrative hearing. If an affected property owner is denied a full administrative hearing, the administrative law judge shall issue a written recommended order containing specific findings of fact and conclusions of law on which the decision is based.

6. If the administrative law judge finds the affected property owner(s) failed to meet the burden of proof set forth in paragraphs 2, 3, and 4 of this subsection the application shall be sent to the State Board of Agriculture along with a copy of the recommended order of the administrative law judge for consideration and action.

7. If the administrative law judge finds the affected property owner(s) met the burden of proof set forth in paragraph 3 of this subsection, then a full administrative hearing shall be scheduled in accordance with the Administrative Procedures Act.

8. The administrative law judge may separately grant or deny a full administrative hearing for each affected property owner when more than one is party to the preliminary hearing.

I. 1. An affected property owner meeting the burden of proof pursuant to subsection H of this section shall be entitled to a full administrative hearing pursuant to the Administrative Procedures Act. Only those affected property owners found meeting the burden

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of proof pursuant to subsection H of this section are entitled to a full administrative hearing.

2. The scheduling conference for the hearing shall be held by the Department at a reasonable time within thirty (30) working days after the administrative law judge has issued a written order. All interested parties may be joined as parties to the hearing.

3. An affected property owner may at any time waive its right to a hearing. If an affected property owner waives its right to a hearing, a signed and notarized document shall be filed with the administrative law judge stating the affected property owner waived its right to a hearing, did so without force or coercion, understands it is also waiving its right to any further hearings provided for under this section or the Administrative Procedures Act, and that the waiver shall be with prejudice. The waiver of right to a hearing shall be admissible as evidence in any court of the State of Oklahoma as evidence that the affected property owner waived its rights to any additional hearings to which it may otherwise have been entitled.

4. At the hearing the administrative law judge shall hear testimony and accept evidence pertaining to the physical and technical suitability of the proposed facility or expanding operations and deficiencies contained in the original application for the license. Based on these grounds it shall be the burden of the interested party to show by clear and convincing evidence that

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the proposed facility will have a direct, substantial, and immediate effect upon a legally protected interest of the interested party. Furthermore, there shall be a rebuttable presumption that the application is complete and in compliance with the relevant statutes and rules.

5. Any evidence presented at the administrative hearing shall be directly related to allegations and evidence previously presented by the affected property owner(s) during the preliminary hearing. Evidence not meeting this criteria shall only be admitted by the administrative law judge upon a finding that:

a. the evidence was unavailable to the interested party prior to the preliminary hearing, and

b. the interested party exercised due diligence to discover and present all relevant evidence at the preliminary hearing, and

c. reasonable efforts to discover the information would not have led to its discovery prior to the preliminary hearing, or

d. the applicant willfully concealed evidence or information that would likely have assisted the interested party in presenting its case at the preliminary hearing.

6. At the hearing, the interested party shall be afforded a reasonable opportunity to present evidence and argument in support

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of the allegations identified in the preliminary hearing and the applicant shall be afforded a reasonable opportunity to present evidence and argument to controvert those allegations.

7. The administrative hearing held pursuant to the provisions of this subsection shall comply with the Administrative Procedures Act and rules promulgated by the Board.

SECTION 3. This act shall become effective November 1, 2013.

COMMITTEE REPORT BY: COMMITTEE ON AGRICULTURE AND WILDLIFE, dated 02/18/2013 - DO PASS, As Amended and Coauthored.

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