

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §321.43. Section 321.43 is adopted *without change* to the proposed text as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7255) and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill (SB) 1740, passed by the 79th Legislature, 2005, amended Texas Health and Safety Code (THSC), §382.05195, Standard Permit, to modify how distance limits, setbacks, and buffers are evaluated at facilities authorized by an air quality standard permit. Under new THSC, §382.05195(j), if a standard permit requires a distance limit, setback, or buffer from other properties or structures, the determination of whether the distance, setback, or buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

A revision to Chapter 321 is necessary to maintain consistency between the new statutory requirements and commission rules concerning distance limits, setbacks, and buffers. The adopted rule would revise §321.43 to incorporate the new distance limit, setback, and buffer zone provisions of THSC, §382.05195(j), into the Air Standard Permit for Animal Feeding Operations (AFOs).

The commission is also adopting a concurrent rulemaking to 30 TAC Chapter 116 in this issue of the *Texas Register*.

## SECTION DISCUSSION

### §321.43. *Air Standard Permit for Animal Feeding Operations (AFOs)*

The commission adopts a revision to §321.43(j)(2)(A) to implement THSC, §382.05195(j). Under the rule, the determination of whether the applicable buffer is satisfied shall be made on the basis of conditions existing at the earlier of: 1) the date new construction, expansion, or modification of a facility begins; or 2) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility. Minor administrative changes are also adopted to conform with *Texas Register* requirements.

## FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a “major environmental rule” as defined in that statute. A major environmental rule means 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. This rulemaking action implements Section 2 of SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195, to add new subsection (j). The amendment to §321.43 implements this new subsection for the AFO air standard permit to modify when compliance with distance limits, setbacks, and buffers is determined at these facilities. The amendment does not specifically protect human health or the environment.

The amendment to Chapter 321 is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rule does not meet any of the four applicability requirements. Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, this amendment implements SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195, and therefore specifically meets an express requirement of state law. Section 2 of SB 1740 only establishes the timing for the determination of property line distance, buffers, or setbacks under state air standard permits, and therefore does not exceed a standard set by federal law. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.017, and 382.05195. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of this rule is to implement Section 2 of SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195. The amendment would substantially advance this stated purpose by changing §321.43 to modify when the buffer requirement is evaluated at AFOs authorized by an air quality standard permit.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rule provides applicants for an AFO standard permit more clarity and certainty as to when the buffer requirement is to be determined. Therefore, this rule will not constitute a takings under the Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), relating to Actions and Rules

Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The revisions are necessary to ensure that commission rules maintain consistency with applicable statutes. The revisions do not authorize or allow increased emissions of air contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The adopted rule affects all sites, regardless of the applicability of the Federal Operating Permits Program. The rule has no specific effect on federal operating permit sites.

#### PUBLIC COMMENT

A public hearing for this rulemaking was held on October 2, 2006, and the comment period closed on October 9, 2006. The commission received comments on the proposed rule from the Galveston

Houston Association for Smog Prevention (GHASP) and the Sierra Club Houston Regional Group (HSC).

#### RESPONSE TO COMMENTS

HSC opposed the proposed changes to §116.615(11) and §321.43(j)(2)(A), which specify how compliance with distance limits and buffer zones are evaluated. HSC commented that these changes create the potential for nuisance situations (such as odors from confined animal feeding operations), leading to citizen complaints, diminished citizen confidence in government, and wasted state resources.

**The proposed changes are necessary to implement provisions of SB 1740 and maintain consistency with the TCAA. Under existing rules and policies, standard permit facilities are already allowed to continue operation in the event a new residence, school, place of worship, or other structure is built in close proximity, at some time after the standard permit facility is authorized. If nuisance conditions are confirmed, these situations can be addressed through existing rules under 30 TAC §101.4, Nuisance. No changes were made in response to this comment.**

HSC commented that the proposed rules allow a company to bypass using the required authorization (an air quality permit under §116.110), when it does not meet the distance limit, setback, or buffer zone. HSC suggested that compliance with distance limits and buffer zones could be determined at the time TCEQ determines that the application is administratively complete.

**The proposed changes are necessary to implement provisions of SB 1740 and maintain consistency with the TCAA. The commission does not agree that the proposed rules allow a company to bypass using a required authorization (such as an air quality permit). The rules still require the registrant to comply with all distance limits, setbacks, and buffer zones, as determined at the time the notification or registration is filed, or at the time construction, expansion, or modification begins. The statute specifies that the date is determined the earlier of when the application or notice is filed with the commission, or when new construction, expansion, or modification of a facility begins, not the date that the application is found to be administratively complete. No changes were made in response to this comment.**

GHASP commented that nothing in the proposed regulations concerning setbacks, buffers, and distance limits would prohibit an applicant from filing applications for standard permits simply to limit prospective obligations to nearby property owners without their knowledge.

**The proposed changes are necessary to implement provisions of SB 1740 and maintain consistency with the TCAA. No changes were made in response to this comment.**

**SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS**

**§321.43**

**STATUTORY AUTHORITY**

This amendment is adopted under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and maintenance of adequate visibility; §382.011, concerning General Powers and Duties, which authorizes the commission to establish and control the level of quality to be maintained in the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the TCAA; and §382.05195, concerning Standard Permit, which authorizes the commission to issue standard permits for new or existing similar facilities.

The amended section implements TWC, §5.103 and §5.105; and THSC, §§382.002, 382.011, 382.017, and 382.05195.

**§321.43. Air Standard Permit for Animal Feeding Operations (AFOs).**

(a) Air quality authorization required. All animal feeding operations (AFOs), regardless of size, are required to obtain air quality authorization under the Texas Clean Air Act, Texas Health and Safety Code, Chapter 382, Subchapter C. AFOs may obtain air quality authorization in one of the following ways:

(1) by meeting the requirements of a permit by rule under Chapter 106, Subchapter F of this title (relating to Animal Confinement);

(2) by obtaining an individual permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(3) by meeting the requirements in this section and the general conditions for air standard permits in §116.615 of this title (relating to General Conditions).

(b) Applicability. The air standard permit requirements in this section and in §116.615 of this title are applicable to all portions of AFOs including permanent odor sources, land management units, and associated operations. The air standard permit requirements are also applicable to associated feed handling or feed milling operations (including, but not limited to, natural gas-fired boilers, milling equipment, and grain cleaners) located on the same site. This air standard permit may not be used to authorize the construction or operation of unassociated operations or equipment, including incinerators or emergency generators, located at the AFO.

(c) Water quality authorization. Authorization under this air standard permit may be obtained by AFOs with water quality authorization under:

- (1) a Texas Pollutant Discharge Elimination System permit;
- (2) a state-only water quality general permit;
- (3) a state-only individual water quality permit; or
- (4) a permit by rule under this subchapter.

(d) Air standard permit in lieu of individual permit. A concentrated animal feeding operation (CAFO) or other AFO that obtains water quality authorization as provided in subsection (c) of this section, and also satisfies the air quality requirements contained in this section qualifies for an air standard permit in lieu of an individual air quality permit under Chapter 116 of this title.

(e) Obtaining the air standard permit for AFOs. The air standard permit may be obtained in conjunction with a water quality application for an individual or CAFO general permit. If no water quality application is pending, a separate written request for authorization under the AFO air standard permit may be submitted that must indicate that the AFO will comply with all the requirements in this section. Registration for authorization to operate under the air standard permit is not required.

(f) Fee. There is no fee for the air standard permit for AFOs.

(g) Facilities not eligible. A CAFO or other AFO does not qualify for authorization under the air standard permit if:

(1) the CAFO or other AFO does not have water quality authorization; or

(2) the CAFO or other AFO constitutes a new major source or is located at a site that constitutes a major source as defined by Chapter 116 of this title.

(h) Dual authorization. No person may concurrently hold both an individual permit under Chapter 116 of this title and authorization under this air standard permit for the same AFO and associated facilities. This does not preclude the operator from holding individual permits or other applicable authorizations for facilities not authorized by this air standard permit.

(i) Restriction on use of permit by rule. An AFO authorized under this air standard permit may not claim authorization under §106.532 of this title (relating to Water and Wastewater Treatment) to construct a new retention control structure (RCS).

(j) Requirements for air standard permit authorization. AFOs shall meet the following requirements.

(1) Air emission limitations.

(A) Facilities shall be operated in such a manner as to prevent the creation of a nuisance as defined by Texas Health and Safety Code, §341.011 and §321.32(32) of this title (relating to Definitions), and as prohibited by §101.4 of this title (relating to Nuisance). Facilities shall be operated in such a manner as to prevent a condition of air pollution as defined by Texas Health and Safety Code, §382.003(3).

(B) The AFO operator shall take necessary action to identify any nuisance condition that occurs. The AFO operator shall take action to abate any nuisance condition as soon as practicable or as specified by the executive director.

(2) Buffer requirements. The buffer requirements in the following table apply to all of the requirements in subparagraphs (A) - (F) of this paragraph.

Figure: 30 TAC §321.43(j)(2) (No change.)

AFO Status and Proposed Action	Buffer Option 1	Buffer Option 2
Construction of an AFO that started or plans to start operations after August 19, 1998.	1/2 mile buffer	1/4 mile buffer and an odor control plan in accordance with subparagraph (F) of this paragraph
Expansion of an AFO that started operations after August 19, 1998.	1/2 mile buffer	1/4 mile buffer and an odor control plan in accordance with subparagraph (F) of this paragraph
Continued operation of an AFO that was in operation on or before August 19, 1998.	1/4 mile buffer	odor control plan in accordance with subparagraph (F) of this paragraph
Expansion or modification of an AFO that was in operation on or before August 19, 1998.	1/4 mile buffer	odor control plan in accordance with subparagraph (F) of this paragraph

(A) The determination of whether the applicable buffer requirements are satisfied shall be made on the basis of conditions existing at the earlier of:

(i) the date new construction, expansion, or modification of a facility begins; or

(ii) the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of the facility.

(B) The operator of an AFO shall document that the applicable buffer requirement is satisfied in accordance with this paragraph. The operator of an AFO shall maintain such documentation on site and make it available upon request by any representative of the commission.

(C) The buffer distance shall be measured from the nearest edge of the permanent odor sources to the nearest edge of any occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park.

(D) Written consent, including a letter as defined by §321.32(26) of this title, easement, or lease agreement specifically consenting to location and operation of permanent odor sources at an AFO within the required minimum buffer distance in this paragraph from the owner of the land containing each occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park located within the buffer distance may be obtained in lieu of satisfying the buffer distance requirements in this paragraph. Written consent from the governmental entity responsible for operating a school or public park, if the governmental entity is not the owner of the land containing the receptor, is required in addition to the consent of the owner of the land containing the receptor. An easement must be recorded with the county. The written consent must include the following information at the time the actions specified in this paragraph occur:

(i) the name, physical address, mailing address, and phone number of the owner(s) of the land containing the receptor and of the governmental entity responsible for the operation of the receptor, if applicable;

(ii) the types of animals and maximum number of animals to be confined under the AFO operator's current and/or anticipated authorization;

(iii) a description of the activity within the buffer distance for which the owner of the land containing the receptor and the governmental entity responsible for the operation of the receptor, if applicable, is giving consent;

(iv) the description and location of permanent odor sources located or proposed to be located within the buffer distance;

(v) an acknowledgment by the owner of the land containing the receptor located within the buffer distance, and by the governmental entity responsible for the operation of the receptor, if applicable, that the consent for the owner of the land containing the AFO to locate and operate permanent odor sources within the buffer distance excuses the operator of the AFO from otherwise applicable legal requirements; and

(vi) the verified signature of the owner(s) of the land containing the receptor, and of the governmental entity responsible for the operation of the receptor, if applicable, who is consenting to the location or operation of the AFO within the buffer distance.

(E) An area land use map as defined by §321.32(5) of this title, an odor control plan, if required by this paragraph, and documentation and copies of the written consent

required in subparagraph (D) of this paragraph shall be kept on site and made available upon request by the executive director.

(F) The odor control plan, if required by this paragraph, shall be developed and implemented to control and reduce odors, dust, and other air contaminants, as defined by §321.32(2) of this title, from the AFO. The plan shall identify all structural and management practices that the operator will employ to minimize odor and control air contaminants at the AFO. At a minimum, the plan shall include, where applicable, procedures for manure/litter collection, manure, litter, and wastewater storage and treatment, land application, dead animal handling, and dust control. If the executive director determines that the implementation and employment of these practices is not effective in controlling dust, odors, and other air contaminants, the operator shall include any necessary additional abatement measures in the odor control plan and implement those measures to control and reduce these contaminants within the time period specified by the executive director.

(3) Wastewater treatment. Operators of AFOs that produce process-generated wastewater (excluding water trough overflow in open lots and wastewater from boiler operations) shall design and operate RCSs to minimize odors in accordance with accepted engineering practices. Each system shall be operated in accordance with the design and an operation and maintenance plan that minimizes odors.

(A) Accepted engineering practices to minimize odors include anaerobic treatment lagoons, aerobic treatment lagoons, or other equivalent technology. The retention control structures shall also meet the design criteria specified for water quality in this subchapter.

(B) Accepted design standards and requirements for each of these methods of treatment are:

(i) an anaerobic treatment lagoon shall be designed in accordance with American National Standards Institute/American Society of Agricultural Engineers EP403.3 July 1999 (or subsequent updates); Natural Resources Conservation Service (NRCS), Field Office Technical Guidance, Practice Standard 359, Waste Treatment Lagoon, or the equivalent for the control of odors. The primary lagoon in a multi-stage lagoon system shall be designed with a minimum treatment volume so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. A multi-stage lagoon system shall be designed to minimize the amount of contaminated storm water runoff entering the primary lagoon by routing the contaminated storm water runoff into a secondary RCS;

(ii) aerobic treatment lagoons shall be designed in accordance with NRCS, Field Office Technical Guidance, Practice Standard 359, Waste Treatment Lagoon; or technical requirements for sizing the aeration portion of the system located in Chapter 317 of this title (relating to Design Criteria for Sewerage Systems); and

(iii) equivalent technology or design standards shall indicate how the design of the AFO minimizes odors equivalent to an aerobic or anaerobic lagoon. These designs shall be developed and certified by a licensed Texas professional engineer. An “as-built” certification in letter form shall be completed by a licensed Texas professional engineer before operation of the AFO. These documents shall be maintained on site and made available within the time period specified by the executive director.

(4) Dust control. To minimize dust emissions, the AFO shall be operated and maintained as follows.

(A) Fugitive emissions from all grain receiving pits, where a pit is used, shall be minimized through the use of “choke feeding” or through an equivalent method of control. If choke feeding is used, operation of conveyors associated with receiving shall not commence until the receiving pits are full.

(B) As necessary, emissions from all in-plant roads, truck loading and unloading areas, parking areas, and other traffic areas shall be controlled with one or more of the following methods to minimize nuisance conditions and maintain compliance with all applicable commission requirements:

(i) sprinkled with water;

(ii) treated with effective dust suppressant(s); or

(iii) paved with a cohesive hard surface and cleaned.

(C) All non-vehicular external conveyors or other external conveying systems associated with the feedmill shall be enclosed.

(D) On-site feed milling operations with processing equipment using a pneumatic conveying system (which may include, but are not limited to, pellet mill/pellet cooler systems, flaker systems, grinders, and roller-mills) shall vent the exhaust air through a properly-sized high efficiency cyclone collector or an equivalent control device before releasing the exhaust air to the atmosphere. This requirement does not include cyclones used as product separators.

(E) If the executive director determines that the implementation and employment of these practices is not effective in controlling dust, the operator shall implement any necessary additional abatement measures to control and minimize this contaminant within the time period specified by the executive director.

(5) Maintenance and housekeeping. The AFO operator shall comply with the following to help prevent nuisance conditions.

(A) The premises shall be maintained to prevent the occurrence of nuisance conditions from odors and dust. Spillage of any raw products or waste products causing a nuisance condition shall be picked up and properly disposed of daily.

(B) Proper pen drainage shall be maintained at all times. Earthen pen areas shall be maintained by scraping uncompacted manure and shaping pen surfaces as necessary to minimize odors and ponding.