

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §321.32, Definitions; §321.33, Applicability; §321.34, Procedures for Making Application for an Individual Permit; §321.35, Procedures for Making Application for Registration; §321.39, Pollution Prevention Plans; and new §321.48, Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs); and §321.49, Dairy Waste Application Field Soil Sampling and Testing.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The primary purpose of the proposed amendments and new sections is to implement the following legislation from the 77th Legislature, 2001: House Bill (HB) 2912, an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties, Article 12, Regulation of Certain Animal Feeding Operations; Senate Bill (SB) 2, an act relating to the development and management of the water resources of the state, including the ratification of the creation of certain groundwater conservation districts; providing penalties, Article 8, Concentrated Animal Feeding Operations; and SB 1339, an act relating to requiring owners or operators of poultry facilities to implement and maintain certified water quality management plans.

House Bill 2912, Article 12, added Texas Water Code (TWC), Chapter 26, Subchapter L, relating to Protection of Certain Watersheds, which regulates certain CAFO wastes and sets forth waste application field soil sampling and testing requirements. Senate Bill 2, Article 8, amended TWC, §26.0286, relating to Procedures Applicable to Permits for Certain Concentrated Animal Feeding Operations, which establishes the requirement that the TNRCC process an application for authorization to construct or operate any CAFO located in the protection zone of a sole-source surface drinking water

supply as an application for an individual permit. Senate Bill 1339, §3, basically exempts certain poultry operations from the commission's CAFO rules.

SECTION BY SECTION DISCUSSION

Section 321.32 is proposed to be amended to define, in a manner consistent with HB 2912 and SB 2, the definitions of "historical waste application field" under paragraph (16); "major sole-source impairment zone" under paragraph (21); "new CAFO" under paragraph (23); "protection zone" under paragraph (33); and "sole-source surface drinking water supply" under paragraph (38).

Section 321.33 is proposed to be amended to add (TWC) after "Texas Water Code" in subsection (b), and to add the phrase "including all poultry operations as described in TWC, §26.302" in subsection (d) in order to implement the requirements in this regard under SB 1339. Thus, the proposal implements the aforementioned statute to conditionally exclude certain poultry operations from the CAFO requirements of this subchapter. Section 321.33 is also proposed to be amended to add new subsections relating to applicability of certain requirements under Chapter 321. Under proposed §321.33(q), the applicability statement states that §321.48, Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs) and §321.49, Dairy Waste Application Field Soil Sampling and Testing, apply to a feeding operation confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole-source impairment zone, as defined in §321.32. Under proposed §321.33(r), CAFOs located or proposed to be located within the protection zone of a sole-source surface drinking water supply must obtain authorization to construct or operate through the individual permit process and the individual permit application must be filed by the

owner or operator for any new permit or for any major amendment or renewal of an existing permit.

Under proposed §321.33(s), the commission is required to process an application for a CAFO located or proposed to be located within the protection zone of a sole-source surface drinking water supply as an individual permit under TWC, §26.028, relating to Action on Application, subject to the procedures provided by TWC, Chapter 5, Subchapter M, relating to Environmental Permitting Procedures. The individual permit requirement is triggered if, on the date the executive director (ED) determines that the application is administratively complete, any part of any pen, lot, pond, or other type of control or retention facility or structure of the CAFO is located in the protection zone of a sole-source surface drinking water supply.

Section 321.34(a) is proposed to be amended to remove the reference to the paragraphs of §321.35(c)(1) - (13) by deleting “(1) - (13).” This proposed change will make future changes to this subsection unnecessary when more paragraphs are added to §321.35(c), because the reference to §321.35(c) includes all the paragraphs in the subsection.

Section 321.35 is proposed to be amended in subsection (c) to add an exception to the sentence which states that a facility which is not required under federal law to obtain National Pollutant Discharge Elimination System (NPDES) authorization may apply for a state-only registration, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event, or may transfer from an individual permit to such a registration in accordance with §321.33(l) of this title. Because the CAFOs regulated under §321.48 must obtain an individual permit, the phrase “Except as provided in §321.33(r) of this title (relating to Applicability)

and §321.48 of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations,” is added at the beginning of the aforementioned sentence. Section 321.35(c) is also proposed to be amended to add paragraphs (14) and (15), which require certain applications for CAFOs to include documentation showing whether or not they are located in a major sole-source impairment zone or a protection zone of a sole-source surface drinking water supply.

Section 321.39(f)(28)(G) is proposed to be amended to add the phrase “an employee of the” prior to “NRCS”; add the phrase “a nutrient management specialist certified by NRCS”; change “Texas Agricultural Extension Service” to “Texas Cooperative Extension”; and insert the phrase “after approval by the executive director based on a determination by the executive director that another person or entity identified in this subparagraph cannot develop the plan in a timely manner” at the end of the first sentence.

Proposed new §321.48 addresses the regulation of new dairy CAFOs and dairy CAFOs increasing the number of animals confined under an existing operation that are feeding operations confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole source impairment zone. Subsection (b) would require an owner or operator of such a CAFO to submit a permit application and obtain a new or amended individual permit prior to constructing or operating the new CAFO or increasing the number of confined animals.

Subsection (c) is a proposed caveat stating that nothing in this section limits the commission's authority to include in an individual or general permit under this subchapter provisions necessary to protect a water resource in this state. Subsection (d) spells out proposed permit requirements, stating that any

permit to which this section applies must, at a minimum, provide for management and beneficial use of waste in accordance with Subchapter B. The permit must also require that 100% of the collectible manure produced by the additional animals in confinement at an expanded operation or all of the animals in confinement at a new operation must be: beneficially used outside of the watershed; delivered to a composting facility approved by the ED; put to another beneficial use approved by the ED; or applied in certain ways. If applied, the manure application must meet any of three sets of requirements or options. The first option is that if it is applied to a waste application field that is not a historical waste application field owned or controlled by the owner of the CAFO, then it must be applied in accordance with the pollution prevention plan requirements of §321.39, relating to Pollution Prevention Plans, and in accordance with §321.40, relating to Best Management Practices. The other options are that if it is applied to a historical waste application field that is owned or operated by the owner or operator of the CAFO: Option 2.) if the soil has 200 parts per million (ppm) or less extractable phosphorus in the soil, then it must be applied in accordance with the aforementioned pollution prevention plan and best management practice requirements; and Option 3.) if the soil has more than 200 ppm extractable phosphorus, it must be applied in accordance with a detailed nutrient utilization plan approved by the ED which, at a minimum, meets the requirements of §321.39(f)(28)(G). Under proposed subsection (e) the detailed nutrient utilization plan required under subsection (d) must be developed by: an employee of the United States Department of Agriculture's Natural Resources Conservation Service (NRCS); a nutrient management specialist certified by the United States Department of Agriculture's NRCS; the State Soil and Water Conservation Board; the Texas Cooperative Extension; an agronomist or soil scientist on the full-time staff of an accredited university located in this state; or a professional agronomist or soil scientist certified by the American

Society of Agronomy, after approval by the ED based on a determination by the ED that another person or entity listed as the first five options cannot develop the plan in a timely manner.

Proposed new §321.49 relates to dairy waste application field soil sampling and testing. This proposed section would apply to CAFOs that are feeding operations confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole source impairment zone, as defined in §321.32. Under proposed subsection (b), for new CAFOs or CAFOs increasing the number of animals, the waste application field soil sampling and testing requirements must be implemented concurrent with the next required annual soil sampling date established in the pollution prevention plan. Under proposed subsection (c), for existing CAFOs not increasing the number of animals, these requirements must be implemented no later than September 1, 2003. Proposed §321.49(d) requires the CAFO operator to contract with a person described in proposed §321.48(e) who is approved by the ED to collect one or more representative composite soil samples from each waste application field, and the CAFO operator must sample under this section in accordance with the pollution prevention plan requirements of §321.39 not less often than once every 12 months, in accordance with the procedures in §321.39(f)(28)(A) - (D). Under proposed subsection (e), each sample collected under subsection (b)(2) must be tested in accordance with the applicable requirements of §321.39(f)(28)(A) - (F) and be tested for any other nutrient designated by the ED. Under proposed subsection (f), the analysis results from the testing performed under subsection (e) must be submitted to the ED and a copy must be submitted to the local TNRCC Regional Office and the operator of the CAFO within 60 days of the sampling. Under proposed subsection (g), if the samples tested under subsection (c) show a phosphorus level in the soil of more than 500 ppm, the operator must

file with the ED a new or amended nutrient utilization plan with a phosphorus reduction component that is certified as acceptable by a person described in §321.48(e). Under proposed subsection (h), if the samples tested under subsection (e) show a phosphorus level in the soil of more than 200 ppm but not more than 500 ppm, the operator must file with the ED a new or amended nutrient utilization plan with a phosphorus reduction component that is certified as acceptable by a person described in §321.48(e), or show that the level is supported by a nutrient utilization plan certified as acceptable by a person described under §321.48(e). Finally, under proposed subsection (i), if the owner or operator of a waste application field is required by subsection (g) or (h) to have a nutrient utilization plan with a phosphorus reduction component, and if the results of tests performed on composite soil samples collected 12 months or more after the plan is filed do not show a reduction in phosphorus concentration, then the owner or operator is subject to enforcement action at the discretion of the ED. The proposal also requires the ED, in determining whether to take an enforcement action, to consider any explanation presented by the owner or operator regarding the reasons for the lack of phosphorus reduction, including but not limited to an act of God, meteorologic conditions, diseases, vermin, crop conditions, or variability of soil testing results.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five years the proposed amendments are in effect, there will be no significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed amendments.

The proposed amendments implement certain provisions in HB 2912, SB 2, and SB 1339, 77th Legislature, 2001. The proposed amendments would implement SB 2 provisions which would require individual permits for CAFOs within the protection zone of a sole-source surface drinking water supply. These proposed amendments will affect all CAFOs within the watershed of a sole-source surface drinking water supply that is within two miles of a sole-source drinking water supply reservoir or within two miles of that part of a perennial stream that is a tributary of a sole-source drinking water supply; and within three linear miles upstream of a sole-source drinking water supply reservoir or within two miles of a sole-source surface drinking water supply river, extending three linear miles upstream from the sole-source water supply intake point. These proposed amendments will affect all CAFOs in the state which are near sole-source surface drinking water supplies.

The proposed amendments would also provide new requirements for the regulation of certain dairy CAFOs in watersheds that are classified as major sole-source impairment zones as required by HB 2912. These proposed amendments will affect the dairy CAFOs in the Bosque River watershed. The proposed amendments would require individual permits for the construction or operation of a new dairy CAFO, or an increase in the number of animals confined under an existing operation, in major sole-source impairment zones. A major sole-source impairment zone means a watershed that contains a reservoir: 1.) that is used by a municipality as a sole source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and 2.) at least half of the water flowing into which is from a source that is on the list of impaired state waters adopted by the commission: A.) at least in part because of concerns regarding pathogens and phosphorus; and B.) for which the commission, at some time, has prepared and submitted a total maximum daily load standard.

Finally, the proposed amendments would implement SB 1339 exemptions for certain poultry operations that operate under Texas State Soil and Water Conservation Board (TSSWCB) certified water quality management plans from CAFO permitting requirements.

Owners or operators of new or expanding dairy CAFOs in the Bosque River watershed would be required to obtain a new or amended individual permit to meet HB 2912 requirements. The proposed permit requirements would include provisions for waste management, soil testing, and nutrient utilization plans. Facilities would be required to provide soil sampling results showing levels of phosphorus. If the phosphorus levels meet certain thresholds, a nutrient utilization plan must be developed and implemented.

In order to meet the HB 2912 requirements for individual permits, some dairy CAFOs in the Bosque River watershed may be subject to contested case hearings. Out of the approximately 64 CAFOs in the Bosque River watershed, it is estimated that a total of 50 CAFOs will require individual permits due to new or expanding operations. In order to meet the SB 2 requirements for individual permits, CAFOs determined to be within protection zones of sole-source drinking water supplies may be subject to contested case hearings. Out of the estimated 600 permitted or registered CAFOs in the state, it is estimated that approximately 70 additional CAFOs will require individual permits. Costs for those seeking permit applications may include consultant and/or engineering fees, permit fees, and potential costs associated with facility design and construction. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, no significant costs are anticipated to obtain an individual permit unless a request for a contested case hearing is granted. If

a contested case hearing is granted, estimated costs to the applicant may reach \$50,000 for attorney and other fees. The amount of these fees would vary depending on the complexity of the issues involved and the length of the hearing.

The processing of additional individual permits and the potential increased involvement in public hearings may represent additional workload for agency staff, though significant fiscal implications are not anticipated for the agency or other units of state or local government to implement these provisions.

The proposed individual permit requirements for the Bosque River watershed would also include provisions for waste disposal and management, soil testing, and nutrient utilization plans. Estimated costs to meet the proposed manure handling provisions are not considered significant due to the joint program conducted with TNRCC and the TSSWCB in the Bosque River watershed which reimburses manure haulers to transport manure to a composting facility. This grant program is funded with 60% federal funds and 40% matching state funds. It is assumed funding will continue to be available for the next two years and possibly for the next five years. However, if funding is not available, costs to approximately 70 owners and operators could be significant. Costs to transport manure would vary widely and depend upon the number of animals, the distance from a compost facility, and many other factors. The TSSWCB has reimbursed approximately \$1.2 million this year for costs to transport manure. In addition, the legislature appropriated \$565,863 each year of the 2002 - 2003 biennium to the TSSWCB to be used for payments to transport manure. The Texas Department of Transportation (TxDOT) has expended approximately \$600,000 in federal grant funds and \$400,000 in state funds for

costs associated with using dairy compost for roadside revegetation and erosion control projects using a pass-through grant from TNRCC.

Facilities that choose to use land applications to beneficially use the manure on land that has had manure applications since 1995, or otherwise have high levels of phosphorus in soil samples, would be required to develop and implement nutrient utilization plans. Soil testing costs are not considered significant. The proposed amendments would require the use of a certified nutrient management specialist to develop the nutrient utilization plans. Estimated costs to employ a certified nutrient specialist may be in the range of \$5,000 - \$10,000 per year per facility.

The proposed amendments would implement SB 1339 exemptions for certain poultry operations that operate under TSSWCB certified water quality management plans from CAFO permitting requirements. No fiscal implications are anticipated to the agency or other units of state or local government to implement these provisions.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from the enforcement and compliance with these proposed amendments will be the increased protection of public drinking water supplies.

There may be significant fiscal implications for businesses or individuals seeking to obtain individual permits for CAFOs under the proposed amendments if there are contested case hearings.

The proposed amendments implement certain provisions in HB 2912, SB 2, and SB 1339, 77th Legislature, 2001. The proposed amendments would implement SB 2 provisions which would require individual permits for CAFOs within the protection zone of a sole-source surface drinking water supply. These proposed amendments will affect all CAFOs within the watershed of a sole-source surface drinking water supply that is within two miles of a sole-source drinking water supply reservoir or within two miles of that part of a perennial stream that is a tributary of a sole-source drinking water supply; and within three linear miles upstream of a sole-source drinking water supply reservoir or within two miles of a sole-source surface drinking water supply river, extending three linear miles upstream from the sole-source water supply intake point. These proposed amendments will affect all CAFOs in the state which are near sole-source surface drinking water supplies.

The proposed amendments would provide new requirements for the regulation of certain dairy CAFOs in major sole-source impairment zones as required by HB 2912. These proposed amendments will affect the dairy CAFOs in the Bosque River watershed. The proposed amendments would require individual permits for the construction or operation of a new dairy CAFO, or an increase in the number of dairy animals confined under an existing operation, in major sole-source impairment zones. A major sole-source impairment zone means a watershed that contains a reservoir: 1.) that is used by a municipality as a sole-source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and 2.) at least half of the water flowing into which is from a source that is on the list of impaired state waters adopted by the commission: A.) at least in part because of concerns regarding pathogens and phosphorus; and B.) for which the commission, at some time, has prepared and submitted a total maximum daily load standard.

Finally, the proposed amendments would implement SB 1339 exemptions for certain poultry operations that operate under TSSWCB certified water quality management plans from CAFO permitting the requirements. No fiscal implications are anticipated to individuals or businesses to implement the SB 1339 provisions.

Owners or operators of new or expanding dairy CAFOs in the Bosque River watershed would be required to obtain a new or amended individual permit as required by HB 2912. The proposed permit requirements would include provisions for waste management, soil testing, and nutrient utilization plans. Facilities would be required to provide soil sampling results showing levels of phosphorus. If the phosphorus levels meet certain thresholds, a nutrient utilization plan must be developed and implemented.

In order to meet the HB 2912 requirements for individual permits, dairy CAFOs in the Bosque River watershed may be subject to contested case hearings. Out of the approximately 64 CAFOs in the Bosque River watershed, it is estimated that a total of 50 CAFOs will require individual permits due to new or expanding operations. In order to meet the SB 2 requirements for individual permits, CAFOs determined to be within protection zones of sole-source drinking water supplies may be subject to contested case hearings. Out of the estimated 600 permitted or registered CAFOs in the state, it is estimated that approximately 70 additional CAFOs will require individual permits. Costs for those seeking permit applications may include consultant and/or engineering fees, permit fees, and potential costs associated with facility design and construction. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, no significant costs

are anticipated to obtain an individual permit unless a request for a contested case hearing is granted. If a contested case hearing is granted, estimated costs to the applicant may reach \$50,000 for attorney and other fees. The amount of these fees would vary depending on the complexity of the issues involved and the length of the hearing.

The proposed permit requirements for the Bosque River watershed would also include provisions for waste management, soil testing, and nutrient utilization plans. Estimated costs to meet the proposed manure handling provisions are not considered significant due to the joint program conducted with TNRCC and the TSSWCB in the Bosque River watershed which reimburses manure haulers to transport manure to a composting facility. This grant program is funded with 60% federal funds and 40% matching state funds. It is assumed funding will continue to be available for the next two years and possibly for the next five years. However, if funding is not available, costs to approximately 70 owners and operators could be significant. Costs to transport manure would vary widely and depend upon the number of animals, the distance from a compost facility, and many other factors. The TSSWCB has reimbursed approximately \$1.2 million this year for costs to transport manure. In addition, the legislature appropriated \$565,863 each year of the 2002 - 2003 biennium to the TSSWCB to be used for payments to transport manure. The TxDOT has expended approximately \$600,000 in federal grant funds and \$400,000 in state funds for costs associated with using dairy compost for roadside revegetation and erosion control projects using a pass-through grant from TNRCC.

Facilities that choose to beneficially land apply the manure on land that has had manure applications since 1995, or otherwise have high levels of phosphorus in soil samples, would be required to develop

and implement nutrient utilization plans. Soil testing costs are not considered significant. The proposed amendments would require the use of a certified nutrient management specialist to develop the nutrient utilization plans. Estimated costs to employ a certified nutrient management specialist may be in the range of \$5,000 - \$10,000 per year per facility.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There are adverse fiscal implications to small or micro-businesses required to obtain individual permits for certain CAFOs in the Bosque River watershed or within protection zones of sole-source drinking water supplies which may be significant as a result of the proposed rulemaking.

The proposed amendments implement certain provisions in HB 2912, SB 2, and SB 1339, 77th Legislature, 2001. The proposed amendments would implement SB 2 provisions which would require individual permits for CAFOs within the protection zone of a sole-source surface drinking water supply. These proposed amendments will affect all CAFOs within the watershed of a sole-source surface drinking water supply that is within two miles of a sole-source drinking water supply reservoir or within two miles of that part of a perennial stream that is a tributary of a sole-source drinking water supply; and within three linear miles upstream of a sole-source drinking water supply reservoir or within two miles of a sole-source surface drinking water supply river, extending three linear miles upstream from the sole-source water supply intake point. These proposed amendments will affect all CAFOs in the state which are near sole-source surface drinking water supplies.

The proposed amendments would provide new requirements for the regulation of certain dairy CAFOs in watersheds that are classified as major sole-source impairment zones as required by HB 2912. These proposed amendments will affect the dairy CAFOs in the Bosque River watershed. The proposed amendments would require individual permits for the construction or operation of a new dairy CAFO, or an increase in the number of dairy animals confined under an existing operation, in major sole-source impairment zones. A major sole-source impairment zone means a watershed that contains a reservoir: 1.) that is used by a municipality as a sole-source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and 2.) at least half of the water flowing into which is from a source that is on the list of impaired state waters adopted by the commission: A.) at least in part because of concerns regarding pathogens and phosphorus; and B.) for which the commission, at some time, has prepared and submitted a total maximum daily load standard.

Owners or operators of new or expanding dairy CAFOs in the Bosque River watershed would be required to obtain a new or amended individual permit as required by HB 2912. The proposed permit requirements would include provisions for waste management, soil testing, and nutrient utilization plans. Facilities would be required to provide soil sampling results showing levels of phosphorus. If the phosphorus levels meet certain thresholds then a nutrient utilization plan must be developed and implemented.

In order to meet the requirements for individual permits in HB 2912, dairy CAFOs in the Bosque River watershed may be subject to contested case hearings. Out of the approximately 64 CAFOs in the Bosque River watershed, it is estimated that a total of 50 CAFOs will require individual permits due to

new or expanding operations. It is not known how many of these facilities are small or micro-businesses, but it could be assumed that many of these facilities would meet the definition of a small or micro-business as they may have 100 employees or less and less than \$1 million in annual gross receipts. In order to meet the requirements for individual permits in SB 2, CAFOs determined to be within protection zones of sole-source drinking water supplies is anticipated to affect an additional total of approximately 70 of the estimated 600 permitted or registered CAFOs in the state. Those determined to be within protection zones will be required to obtain individual permits. It is not known how many of these facilities are small or micro-businesses. These facilities would include feedlots, dairies, hog farms, or other livestock operations that meet the definition of a CAFO.

Costs for those seeking permit applications may include consultant and/or engineering fees, permit fees, and potential costs associated with facility design and construction. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, no significant costs are anticipated to obtain an individual permit unless a request for a contested case hearing is granted. If a contested case hearing is granted, estimated costs to the applicant may reach \$50,000 for attorney and other fees. The amount of these fees would vary depending on the complexity of the issues involved and the length of the hearing.

The proposed permit requirements for the Bosque River watershed would also include provisions for waste disposal and management, soil testing, and nutrient utilization plans. Estimated costs to meet the proposed manure handling provisions are not considered significant due to the joint program conducted with TNRCC and the TSSWCB in the Bosque River watershed which reimburses manure haulers to

transport manure to a composting facility. This grant program is funded with 60% federal funds and 40% matching state funds. It is assumed funding will continue to be available for the next two years and possibly for the next five years. However, if funding is not available, costs to approximately 70 owners and operators could be significant. Costs to transport manure would vary widely and depend upon the number of animals, the distance from a compost facility, and many other factors. The TSSWCB has reimbursed approximately \$1.2 million this year for costs to transport manure. In addition, the legislature appropriated \$565,863 each year of the 2002 - 2003 biennium to the TSSWCB to be used for payments to transport manure. The TxDOT has expended approximately \$600,000 in federal grant funds and \$400,000 in state funds for costs associated with using dairy compost for roadside revegetation and erosion control projects using a pass through grant from TNRCC.

Facilities that choose to use land applications to beneficially use the manure on land that has had manure applications since 1995, or otherwise have high levels of phosphorus in soil samples, would be required to develop and use nutrient utilization plans. Soil testing costs are not considered significant. The proposed amendments would require the use of a certified nutrient management specialist to develop the nutrient utilization plans. Estimated costs to employ a certified nutrient specialist may be in the range of \$5,000 - \$10,000 per year per facility.

The following is an analysis of the potential cost per employee for small or micro-businesses affected by the proposed amendments. A small business is defined as having 100 or fewer employees. A small business that is required to have a contested case hearing would incur costs of \$50,000 or \$500 per employee. Small businesses that must develop nutrient utilization plans would incur yearly costs of

\$5,000 - \$10,000 or \$50 - \$100 per employee. A micro-business is defined as having 20 or fewer employees. Micro-businesses that have contested case hearings would incur costs of \$50,000 or \$2,500 per employee. Micro-businesses that must develop nutrient utilization plans would incur yearly costs of \$5,000 - \$10,000 or \$250 - \$500 per employee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. The proposal does not meet the definition of “major environmental rule” for several reasons. First, these proposed rules are primarily procedural in nature, dealing largely with application requirements for CAFOs, and requiring certain CAFOs to obtain individual permits. It should be noted that the commission’s rules currently allow the ED to require a CAFO to apply for an individual permit if the operation is located near surface water resources. Therefore, the requirement to apply for an individual permit is not a new requirement, and thus the proposed rules do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state. Finally, because the proposed rules deal primarily with application requirements,

they are procedural in nature and would not adversely affect the environment, or the public health and safety of the state or a sector of the state. One aspect of the proposed rules which is not an application requirement is the soil sampling and testing portion, which does not represent a significant burden so as to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state.

In addition, these proposed rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not exceed a standard set by federal law because there are no such corresponding federal standards. This proposal does not exceed an express requirement of state law because it is specifically required by TWC, Chapter 26, Subchapter L, §26.0286; and by SB 1339. This proposal does not 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 because the September 14, 1998 “Memorandum of Understanding between the United States Environmental Protection Agency and the TNRCC” authorizing the commission to implement the NPDES permitting program in Texas, requires CAFOs, as defined in the federal Clean Water Act, to obtain Texas Pollutant Discharge Elimination System authorization but does not specify whether the authorization must be through an individual permit, registration under a permit-by-rule, or through a general permit. This proposal does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., TWC, §26.0286, which requires the commission to use certain procedures for processing applications for certain CAFOs).

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The purposes of the proposed rules are to implement the requirements of TWC, Chapter 26, Subchapter L, which regulates certain CAFO wastes and sets forth waste application field soil sampling and testing requirements; TWC, §26.0286, which establishes the requirement for an individual permit for any CAFO located in the protection zone of a sole-source surface drinking water supply; and SB 1339, which basically exempts poultry operations from the commission's CAFO rules. The proposed rules would substantially advance this stated purpose by requiring certain CAFOs in a major sole-source impairment zone to obtain an individual permit, to manage and beneficially use waste in a specified manner, and to sample and test the soil on their waste application fields; by defining protection zone and sole-source surface drinking water supply and by requiring an individual permit for any CAFO located in the protection zone of a sole-source surface drinking water supply; and by exempting poultry operations from the commission's CAFO rules.

Promulgation and enforcement of these proposed rules will not affect private real property which is the subject of the rules primarily because these proposed rules are primarily procedural in nature. For example, a CAFO facility located within the protection zone would still be able to operate, but only after obtaining an individual permit rather than another form of authorization such as a registration. These proposed rules are not anticipated to affect private real property because they do not prohibit or restrict a CAFO from operating within a protection zone. They simply require the facility to follow different procedures for obtaining authorization to construct or operate. Furthermore, CAFOs located

near surface water resources are already required to prevent the likelihood of inadvertent discharges and to ensure that permitted discharges do not degrade water quality. One aspect of the proposed rules which is not procedural in nature is the soil sampling and testing portion, which does not represent a significant burden. Therefore, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with regulations of the Coastal Coordination Council and determined that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the proposed rules include the protection, restoration and enhancement of the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRA) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include the following: 1.) discharges shall comply with water-quality-based effluent limits; 2.) discharges that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development; and 3.) to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas. Promulgation and enforcement of these proposed rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because any new proposed CAFO located within one mile of a CNRA will be required to pursue an individual permit which will allow the commission to consider the

effects of such a facility on the CNRA; establish effluent limits, if necessary, on any discharges from the proposed facility to maintain applicable water quality standards; and allow opportunity for notice, public comment, and public hearing.

ANNOUNCEMENT OF HEARINGS

Public hearings on this proposal will be held in Austin on October 23, 2001 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle; and in Waco on October 25, 2001, at 7:00 p.m., McLennan Community College, 1400 College Drive, HPE Building, Room 101 (McLennan Drive). The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-041-321-WT. Comments must be received by 5:00

p.m., October 29, 2001. For further information or questions concerning this proposal, please contact Ray Henry Austin, Policy and Regulations Division, (512) 239-6814.

STATUTORY AUTHORITY

The amendments and new sections are proposed under TWC, §26.0286, which requires that the TNRCC process an application for authorization to construct or operate a CAFO located in the protection zone of a sole-source surface drinking water supply as an application for an individual permit; TWC, Chapter 26, Subchapter L, which requires that the TNRCC authorize the construction or operation of a new or expanded dairy CAFO located within a major sole-source impairment zone through an individual permit which must contain specific requirements for the management and beneficial use of animal waste, and sets forth waste application field soil sampling and testing requirements that apply to all dairy CAFOs within a major sole source impairment zone; and Section 3 of SB 1339, 77th Legislature, 2001, which states that a poultry operation may not be designated as a point source of pollution unless the poultry operation meets the requirements for designation as a point source under TWC, Chapter 26 or 30 TAC §§321.31 - 321.37. The amendments and new sections are also proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.013, which establishes the commission's authority over various statutory programs; §26.011, which establishes the commission's authority over water quality in the state; and §26.028, which establishes the commission's authority to approve certain applications for wastewater discharge; and Texas Government Code,

§2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendments and new sections implement TWC, §26.0286 and Chapter 26, Subchapter L; and Section 3 of SB 1339, 77th Legislature, 2001.

SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS

§§321.32, 321.33, 321.34, 321.35, 321.39, 321.48, 321.49

§321.32. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (15) (No change.)

(16) **Historical waste application field** - An area of land located in a major sole-source impairment zone, as defined in this section, that at any time since January 1, 1995, has been owned or controlled by an operator of a concentrated animal feeding operation (CAFO) on which agricultural waste from a CAFO has been applied.

(17) [(16)] **Hydrologic connection** - The interflow and exchange between control facilities or surface impoundments and waters in the state through an underground corridor or connection.

(18) [(17)] **Lagoon** - An earthen structure for the biological treatment for liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in series to produce a higher quality effluent.

(19) [(18)] **Land application** - The removal of wastewater and waste solids from a control facility and distribution to, or incorporation into the soil mantle primarily for beneficial reuse purposes.

(20) [(19)] **Liner** - Any barrier in the form of a layer, membrane or blanket, naturally existing, constructed or installed to prevent a significant hydrologic connection between liquids contained in retention structures and waters in the state.

(21) Major sole-source impairment zone - A watershed that contains a reservoir:

(A) that is used by a municipality as a sole source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and

(B) at least half of the water flowing into which is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended:

(i) at least in part because of concerns regarding pathogens and phosphorus; and

(ii) for which the commission, at some time, has prepared and submitted a total maximum daily load standard.

(22) [(20)] **Natural Resources Conservation Service (NRCS)** [{"NRCS"}] - An agency of the United States Department of Agriculture which includes the agency formerly known as the Soil Conservation Service (SCS) [{"SCS"}].

(23) [(21)] **New CAFO** - A CAFO which was not authorized under a rule, order, or permit of the commission in effect on August 19, 1998. For the purposes of §321.48 of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs), new CAFO means a proposed CAFO, any part of which is located on property not previously authorized by the state to be operated as a CAFO.

(24) [(22)] **No discharge** - The absence of flow of waste, process generated wastewater, contaminated rainfall runoff or other wastewater from the premises of the animal feeding operation, except for overflows which result from chronic or catastrophic rainfall events.

(25) [(23)] **Nuisance** - Any discharge of air contaminant(s)[,] including₂ but not limited to₂ odors[,] of sufficient concentration and duration that are or may tend to be injurious to or which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

(26) [(24)] **Open lot** - Pens or similar confinement areas with dirt, concrete, or other paved or hard surfaces wherein animals or poultry are substantially or entirely exposed to the outside environment except for small portions of the total confinement area affording protection by windbreaks

or small shed-type shade areas. For the purposes of this subchapter, the term open lot is synonymous with the terms dirt lot, or dry lot, for livestock or poultry, as these terms are commonly used in the agricultural industry.

(27) [(25)] **Operator** - The owner or one who is responsible for the management of a CAFO [concentrated animal feeding operation] or an animal feeding operation subject to the provisions of this subchapter.

(28) [(26)] **Permanent odor sources** - Those [those] odor sources which may emit odors 24 hours per day. For the purposes of this subchapter, permanent odor sources include, but are not limited to, pens, confinement buildings, lagoons, retention facilities, manure stockpile areas, and solid separators. For the purposes of this subchapter, permanent odor sources shall not include any feed handling facilities, land application equipment, or land application areas.

(29) [(27)] **Permittee** - Any person issued or covered by an individual permit or order, permit-by-rule, or granted authorization under the requirements of this subchapter.

(30) [(28)] **Pesticide** - A substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest, or any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

(31) [(29)] **Process wastewater** - Any process generated wastewater directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste[]); washing, cleaning, or flushing pens, barns, manure pits; [,] direct contact swimming, washing, or spray cooling of animals; and dust control), and precipitation which comes into contact with any manure or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk, meat, or eggs).

(32) [(30)] **Process generated wastewater** - Any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste; washing, cleaning, or flushing pens, barns, manure pits; [,] direct contact swimming, washing, or spray cooling of animals; and dust control) which is produced as wastewater.

(33) Protection zone - The area within the watershed of a sole-source surface drinking water supply that is:

(A) within two miles of the normal pool elevation, as shown on a United States Geological Survey (USGS) 7 1/2-minute quadrangle topographic map, of a sole-source drinking water supply reservoir;

(B) within two miles of that part of a perennial stream that is:

(i) a tributary of a sole-source drinking water supply; and

(ii) within three linear miles upstream of the normal pool elevation, as shown on a USGS 7 1/2-minute quadrangle topographic map, of a sole-source drinking water supply reservoir; or

(C) within two miles of a sole-source surface drinking water supply river, extending three linear miles upstream from the sole-source water supply intake point.

(34) [(31)] **Qualified groundwater scientist** - A scientist or engineer who has received a baccalaureate or post-graduate degree in natural sciences or engineering and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certification, or completion of accredited university programs that enable that individual to make sound professional judgements regarding groundwater monitoring, contamination fate and transport, and corrective action.

(35) [(32)] **Recharge feature** - Those natural or artificial features either on or beneath the ground surface at the site under evaluation which, due to their existence, provide or create a significant pathway between the ground surface and the underlying groundwater within an aquifer. Examples include, but are not limited to: a permeable and porous soil material that directly overlies a weakly cemented or fractured limestone, sandstone, or similar type aquifer; fractured or karstified

limestone or similar type formation that crops out on the surface, especially near a water course; or wells.

(36) [(33)] **Retention facility or retention structure** - All collection ditches, conduits, and swales for the collection of runoff and wastewater, and all basins, ponds, pits, tanks, and lagoons used to store wastes, wastewaters, and manures.

(37) [(34)] **25-Year, 24-Hour rainfall event/25-Year event** - The maximum rainfall event with a probable recurrence interval of once in 25 [-]years, with a duration of 24 hours, as defined by the National Weather Service in Technical Paper Number 40, "Rainfall Frequency Atlas of the United States," May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed therefrom.

(38) Sole-source surface drinking water supply - A body of surface water that is identified as a public water supply in §307.10, Appendix A of Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(39) [(35)] **Waste** - Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

(40) [(36)] **Wastewater** - Water containing waste or contaminated by waste contact, including process-generated and contaminated rainfall runoff.

(41) [(37)] **Waters in the state** - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(42) [(38)] **Well** - Any artificial excavation into and/or below the surface of the earth whether in use, unused, abandoned, capped, or plugged that may be further described as one or more of the following:

(A) excavation [Excavation] designed to explore for, produce, capture, recharge, or recover water, any mineral, compound, gas, or oil from beneath the land surface;

(B) excavation [Excavation] designed for the purpose of monitoring any of the physical or chemical properties of water, minerals, geology, or geothermal properties that exist or may exist below the land surface;

(C) excavation [Excavation] designed to inject or place any liquid, solid, gas, vapor, or any combination of liquid, solid, gas, or vapor into any soil or geologic formation below the land surface; or

(D) excavation [Excavation] designed to lower a water or liquid surface below the land surface either temporarily or permanently for any reason.

§321.33. Applicability.

(a) (No change.)

(b) The executive director may designate any animal feeding operation as a CAFO and require it to comply with any of the requirements of this subchapter, including those to apply for, receive, and comply with an individual permit under §321.34 of this title [(relating to Procedures for Making Application for an Individual Permit)], in order to achieve the policy and purposes enumerated in the Texas Water Code (TWC), [§]§5.120 and §26.003; the Texas Health and Safety Code, Chapters 341, 361, and 382; and §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emission Limitations). Cases for which an individual permit may be required include, but are not limited to, situations where:

(1) - (5) (No change.)

(c) (No change.)

(d) Any facility, including all poultry operations as described in TWC, §26.302, which qualifies for, obtains, and is operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board is not a CAFO for purposes of this subchapter and is not covered by the provisions of this subchapter, unless referred to the commission in accordance with the Texas Agriculture Code, §201.026.

(e) - (p) (No change.)

(q) Section 321.48 of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs) and §321.49 of this title (relating to Dairy Waste Application Field Soil Sampling and Testing) apply to a feeding operation confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole-source impairment zone, as defined in §321.32 of this title.

(r) Subject to the requirements of subsection (s) of this section, the following requirements apply to any CAFO with any part of any pen, lot, pond, or other type of control or retention facility or structure of the CAFO located or proposed to be within the protection zone of a sole-source surface drinking water supply, as defined in §321.32 of this title:

(1) for a proposed CAFO, the owner or operator shall obtain authorization to construct and operate the CAFO through the individual permit process prior to construction or operation;

(2) for an existing registered or permitted CAFO:

(A) the owner or operator shall obtain an individual permit or an amended individual permit prior to making any changes which would require a major amendment;

(B) the owner or operator shall file an individual permit application for any renewal in accordance with the applicable requirements under §321.34 of this title; and

(C) if the CAFO is permitted, the permit authorization cannot be transferred to a registration.

(s) The commission shall process an application for authorization to construct or operate a CAFO as an individual permit under TWC, §26.028, relating to Action on Application, subject to the procedures provided by TWC, Chapter 5, Subchapter M, relating to Environmental Permitting Procedures, if, on the date the executive director determines that the application is administratively complete, any part of any pen, lot, pond, or other type of control or retention facility or structure of the CAFO is located or proposed to be located within the protection zone of a sole-source surface drinking water supply, as defined in §321.32 of this title.

§321.34. Procedures for Making Application for an Individual Permit.

(a) A CAFO that was not authorized under a rule, order, or permit issued or adopted by the commission and in effect at the time of the adoption of these amended rules as published in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5721) [(1999)] shall apply for an individual permit in accordance with the provisions of this section or shall apply for registration in accordance with the provisions of §321.35 of this title (relating to Procedures for Making Application for Registration). Application for an individual permit shall be made on forms provided by the executive director. The applicant shall provide such additional information in support of the application as may be necessary for an adequate technical review of the application. A facility which is not required under federal law to obtain National Pollutant Discharge Elimination System authorization may apply for a state-only individual permit, for a term of five years, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event. At a minimum, the application shall demonstrate compliance with the technical requirements set forth in §§321.38 - 321.42 of this title (relating to Proper CAFO Operation and Maintenance; [,] Pollution Prevention Plans; [,] Best Management Practices; [,] Other Requirements; [,] and Monitoring and Reporting Requirements) and shall demonstrate compliance with the requirements specified in §321.35(c) [§321.35(c)(1)-(13)] of this title [(relating to Procedures for Making Application for Registration)]. Applicants shall comply with §§305.41, 305.43, 305.44, 305.46, and 305.47 of this title (relating to Applicability; [,] Who Applies; [,] Signatories to Applications; [,] Designation of Material as Confidential; [,] and Retention of Application Data). Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste

treatment inspection fee is also required of each permittee as required by §305.503 and §305.504 of this title (relating to Fee Assessments and Fee Payments). An annual Clean Rivers Program fee is also required as required under §220.21(d) of this title (relating to Water Quality Assessment Fees). Except as provided in subsections (b) - (e) of this section, each permittee shall comply with §§305.61 and 305.63 - 305.68 of this title (relating to Applicability; [,] Renewal; [,] Transfer of Permits; [,] Permit Denial; [,] Suspension and Revocation; Revocation and Suspension Upon Request or Consent; and Action and Notice on Petition for Revocation or Suspension). Notice, public comment, and hearing on applications shall be conducted in accordance with commission rules governing individual permits issued under Chapter 26 of the Texas Water Code. Each permittee shall comply with §305.125 of this title (relating to Standard Permit Conditions). Individual permits granted under this subchapter shall be effective for a term not to exceed five years. To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title (relating to Air Standard Permit Authorization).

(b) - (i) (No change.)

§321.35. Procedures for Making Application for Registration.

(a) - (b) (No change.)

(c) Application for registration under this section shall be made on forms prescribed by the executive director. Except as provided in §321.33(r) of this title (relating to Applicability) and §321.48

of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs)), a [A] facility which is not required under federal law to obtain National Pollutant Discharge Elimination System authorization may apply for a state-only registration, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event, or may transfer from an individual permit to such a registration in accordance with §321.33(l) of this title. The applicant shall submit an original completed application with attachments and one copy of the application with attachments to the executive director at the headquarters in Austin, Texas, and one additional copy of the application with attachments to the appropriate commission [Texas Natural Resource Conservation Commission] regional office. The completed application shall be submitted to the executive director signed and notarized and with the following information:

(1) - (13) (No change.)

(14) For an application for a feeding operation confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, documentation showing whether or not the facility is located in a major sole-source impairment zone, as defined in §321.32 of this title (relating to Definitions), if the application is for authorization to:

(A) construct or operate a new dairy CAFO, as defined in §321.32 of this title;

or

(B) increase the number of dairy animals confined under an existing operation.

(15) For applications for CAFOs located in the watershed of a sole-source surface drinking water supply,” as defined in §321.32 of this title, documentation showing whether or not any part of any pen, lot, pond, or other type of control or retention facility or structure of the CAFO is located or proposed to be located within the protection zone of a sole-source surface drinking water supply, as defined in §321.32 of this title.

(d) - (h) (No change.)

§321.39. Pollution Prevention Plans.

(a) - (e) (No change.)

(f) The plan shall include, at a minimum, the following items.

(1) - (27) (No change.)

(28) Prior to commencing wastewater irrigation or waste application on land owned or operated by the operator, and annually thereafter, the operator shall collect and analyze representative soil samples of the wastewater and waste application sites according to the following procedures.

(A) - (F) (No change.)

(G) When results of the annual soil analysis for extractable phosphorus in subparagraph (F) of this paragraph indicate [indicates] a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular waste or wastewater land application field or if ordered by the commission to do so in order to protect the quality of waters in the state, then the operator shall not apply any waste or wastewater to the affected area unless the waste or wastewater application is implemented in accordance with a detailed nutrient utilization plan developed by an employee of the NRCS, a nutrient management specialist certified by the NRCS, the Texas State Soil and Water Conservation Board, Texas Cooperative Extension, an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas, or a professional agronomist or soil scientist certified by the American Society of Agronomy (ASA), after approval by the executive director based on a determination by the executive director that another person or entity identified in this subparagraph cannot develop the plan in a timely manner. The executive director will issue technical guidance to assist in the development of complete and effective nutrient utilization plans. No land application under an approved nutrient utilization plan shall cause or contribute to a violation of water quality standards or create a nuisance. Land application under the terms of the Nutrient Utilization Plan may commence 30 days after the plan is filed with the executive director, unless prior to that time the executive director has returned the plan for failure to comply with all the requirements of this subsection. The nutrient utilization plan shall, at a minimum, evaluate and address the following factors to assure that the beneficial use of manure is conducted in a manner that prevents phosphorus impacts to water quality:

(i) - (vii) (No change.)

(29) - (31) (No change.)

§321.48. Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs).

(a) This section applies to new dairy CAFOs and to dairy CAFOs increasing the number of animals confined under an existing operation that are feeding operations confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole-source impairment zone, as defined in §321.32 of this title (relating to Definitions).

(b) The owner or operator shall submit a permit application and obtain a new or amended individual permit prior to:

(1) constructing or operating a new dairy CAFO, as defined in §321.32 of this title; or

(2) increasing the number of dairy animals confined under an existing operation.

(c) Nothing in this section limits the commission's authority to include in an individual or general permit under this subchapter provisions necessary to protect a water resource in this state.

(d) Any permit to which this section applies must, at a minimum:

(1) provide for management and beneficial use of waste in accordance with this subchapter; and

(2) require that 100% of the collectible manure produced by the additional animals in confinement at an expanded operation or all of the animals in confinement at a new operation must be:

(A) beneficially used outside of the watershed;

(B) delivered to a composting facility approved by the executive director;

(C) put to another beneficial use approved by the executive director; or

(D) applied in any of the following ways:

(i) in accordance with the pollution prevention plan requirements of §321.39 of this title (relating to Pollution Prevention Plans) and §321.40 of this title (relating to Best Management Practices) to a waste application field owned or controlled by the owner of the CAFO, if the field is not a historical waste application field, as defined in §321.32 of this title;

(ii) in accordance with the pollution prevention plan requirements of §321.39 and §321.40 of this title, to a historical waste application field that is owned or operated by the owner or operator of the CAFO, if results of representative composite soil sampling conducted at the waste application field and submitted to the executive director show that the waste application field contains 200 or fewer parts per million (ppm) of extractable phosphorus (reported as P) in the Zone 1 (0 - 6 inch) depth; or

(iii) in accordance with a detailed nutrient utilization plan approved by the executive director which, at a minimum, meets the requirements of §321.39(f)(28)(G) of this title, to a historical waste application field that is owned or operated by the owner or operator of the CAFO, if results of representative composite soil sampling conducted at the waste application field and submitted to the executive director show that the waste application field contains greater than 200 ppm of extractable phosphorus (reported as P) in the Zone 1 (0 - 6 inch) depth.

(e) The detailed nutrient utilization plan required under subsection (d)(2)(D)(iii) of this section must be developed by:

(1) an employee of the United States Department of Agriculture's Natural Resources Conservation Service (NRCS);

(2) a nutrient management specialist certified by the United States Department of Agriculture's NRCS;

(3) the State Soil and Water Conservation Board;

(4) the Texas Cooperative Extension;

(5) an agronomist or soil scientist on the full-time staff of an accredited university located in this state; or

(6) a professional agronomist or soil scientist certified by the American Society of Agronomy, after approval by the executive director based on a determination by the executive director that another person or entity listed in paragraphs (1) - (5) of this subsection cannot develop the plan in a timely manner.

§321.49. Dairy Waste Application Field Soil Sampling and Testing.

(a) This section applies to dairy CAFOs that are feeding operations confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole-source impairment zone, as defined in §321.32 of this title (relating to Definitions).

(b) For new dairy CAFOs or dairy CAFOs increasing the number of animals, the requirements of this section must be implemented concurrent with the next required annual soil sampling date established in the pollution prevention plan.

(c) For existing dairy CAFOs not increasing the number of animals, the requirements of this section must be implemented not later than than September 1, 2003.

(d) The CAFO operator shall:

(1) contract with a person described in §321.48(e) of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs)) and approved by the executive director to collect one or more representative composite soil samples from each waste application field;
and

(2) sample under this section in accordance with the pollution prevention plan requirements of §321.39 of this title (relating to Pollution Prevention Plans) and not less often than once every 12 months, in accordance with the procedures in §321.39(f)(28)(A) - (D) of this title.

(e) Each sample collected under subsection (d)(2) of this section shall be tested in accordance with the applicable requirements of §321.39(f)(28)(A) - (F) of this title and shall be tested for any other nutrient designated by the executive director.

(f) The analysis results from the testing performed under subsection (e) of this section must be submitted to the executive director and a copy must be submitted to the appropriate commission regional office and the operator of the CAFO within 60 days of the sampling.

(g) If the samples tested under subsection (e) of this section show a phosphorus level in the soil of more than 500 parts per million (ppm) in Zone 1 (0 - 6 inch) depth, the operator shall file with the executive director a new or amended nutrient utilization plan with a phosphorus reduction component that is certified as acceptable by a person described in §321.48(e) of this title.

(h) If the samples tested under subsection (e) of this section show a phosphorus level in the soil of more than 200 ppm but not more than 500 ppm in Zone 1 (0 - 6 inch) depth, the operator shall:

(1) file with the executive director a new or amended nutrient utilization plan with a phosphorus reduction component that is certified as acceptable by a person described in §321.48(e) of this title; or

(2) show that the level is supported by a nutrient utilization plan certified as acceptable by a person described under §321.48(e) of this title.

(i) If the owner or operator of a waste application field is required by subsection (g) or (h) of this section to have a nutrient utilization plan with a phosphorus reduction component, and if the results of tests performed on composite soil samples collected 12 months or more after the plan is filed do not show a reduction in phosphorus concentration in Zone 1 (0 - 6 inch) depth, then the owner or operator is subject to enforcement action at the discretion of the executive director. The executive director, in determining whether to take an enforcement action, shall consider any explanation presented by the owner or operator regarding the reasons for the lack of phosphorus reduction, including, but not limited

to, an act of God, meteorologic conditions, diseases, vermin, crop conditions, or variability of soil testing results.