

The Texas Commission on Environmental Quality (commission or TCEQ) proposes to amend §§321.31 - 321.47. The commission also proposes to repeal §321.48 and §321.49.

The primary purpose of the proposed amendments is to implement the new federal Concentrated Animal Feeding Operation (CAFO) Regulations and Effluent Guidelines and reauthorize Subchapter B to implement the National Pollutant Discharge Elimination System (NPDES) CAFO Program under the Texas Memorandum of Agreement (MOA) with United States Environmental Protection Agency (EPA) regarding delegation of the federal CAFO program. In addition, the proposed rules will address air and water quality issues and serve to improve air and water quality conditions statewide including within major sole-source impairment zones.

#### **BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES**

The commission adopted this subchapter for NPDES purposes and to make the Texas rules consistent with federal regulations. The rules became effective on September 18, 1999. The commission adopted the current version of the subchapter on March 6, 2002, to implement the requirements of House Bill 2912, 77th Texas Legislature, 2001, regarding permitting requirements for CAFOs located in major sole-source impairment zones (i.e., Bosque River Watershed) and the protection of sole-source drinking water supplies. The EPA adopted changes to the federal CAFO regulations and effluent guidelines that became effective on April 13, 2003, changing the requirements to operate CAFOs under the Clean Water Act. Specifically, the new federal regulations changed which animal feeding operations (AFOs) were defined as CAFOs and what management practices are required for those operations. The effluent

guidelines changed the design standards for new source swine, veal, and poultry operations and added a requirement for nutrient management plans (NMPs).

The EPA recognized in the NPDES delegation MOA with TCEQ that Subchapter B is the authority for the Texas Pollutant Discharge Elimination System (TPDES) CAFO program. The MOA requires that TCEQ adopt federal regulation changes into its state regulations and requirements. In general, the proposed amendments: 1) reorganize and streamline the rules by grouping similar requirements together; 2) maintain most of the existing requirements; 3) delete the option of authorization by registration; 4) identify who among CAFOs is required to obtain an individual permit or general permit; 5) add new federal requirements; 6) specify certain procedures and requirements for dairy CAFOs located in major sole-source impairment zones; 7) update requirements for an air quality standard permit; and 8) clearly state the existing requirements for AFOs that are not defined or designated as CAFOs. The proposed changes will improve the overall readability of the proposed rules. Therefore, amendments to the subchapter are necessary to establish the requirements that will allow TCEQ to continue to authorize CAFOs. General and individual permits, along with permits by rule for certain AFOs, meet all state and federal requirements.

The proposed amendments to Subchapter B would also continue to allow an AFO to obtain an air quality standard permit through the procedures identified in this amended subchapter and do not preclude an AFO from obtaining an air quality standard permit. This standard permit would satisfy the Texas Clean Air Act requirements so that other air quality authorization would not be necessary. The air quality requirements of this subchapter reflect the application of best available control technology

for AFOs, and address the protection of air quality through the implementation of good management practices. If an operator cannot meet the requirements of a permit by rule in 30 TAC Chapter 106, Permit by Rule, or satisfy the air quality criteria of this amended subchapter, then the operator must obtain an individual air quality authorization under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. If the AFO constitutes a major source or major modification as defined in Chapter 116, then an individual air quality permit is required.

The commission has taken into consideration the following state and federal actions in proposing these amendments to Subchapter B: 1) changes to the federal NPDES CAFO Regulations adopted February 13, 2003 under 40 Code of Federal Regulations (CFR) Parts 122 and 412, effective April 13, 2003; 2) EPA Region VI General Permit for CAFOs (March, 1993), which establishes the currently effective technical and procedural requirements for CAFOs necessary to maintain federal authorization to discharge under the NPDES program; 3) former Texas Water Code (TWC), §26.040, under which Subchapter B was originally adopted and which directed that the commission may by rule regulate and set requirements and conditions for discharges of waste whenever the commission determines that requiring individual permits is unnecessarily burdensome both to the waste discharger and to the commission; 4) TWC, §26.040, which allows the TCEQ to authorize the discharge of wastewaters through the issuance of general permits. This statute further specifies that all current rules adopted by the TCEQ under §26.040 as it read prior to the effective date of the statute remain in effect, as they may be amended by the commission from time to time as appropriate, and provides that the commission's authority for subsequent amendments or modifications is not affected by the changes made to the statute; 5) Texas Health and Safety Code, Chapter 382, to authorize an air standard permit

authorization for AFOs to protect air quality; and 6) NPDES MOA between the TCEQ and EPA Region VI (September 14, 1998), which establishes policies, responsibilities, and program commitments to allow for continued assumption of the NPDES program by the TCEQ.

#### SECTION BY SECTION DISCUSSION

Proposed §321.31 changes the title of the section from “Waste and Wastewater Discharge and Air Emission Limitations” to “Manure, Litter, and Wastewater Discharge and Air Emission Limitations.” The proposed amendment keeps the prohibition that there shall be no discharge or disposal of manure, litter, or wastewater from an AFO into or adjacent to waters in the state except in accordance with an individual or general permit or other authorization of the commission. The proposed change to this section moves the effluent guidelines requirements from this section into proposed §321.37 titled “Effluent Limitations.”

The title of §321.32 “Definitions” will remain the same. Many of the definitions remain without change or with slight modifications to enhance understanding and readability. The proposed amendment to §321.32 adds new definitions for area land use map under paragraph (5); beneficial use under paragraph (6); certified nutrient management specialist under paragraph (9); certified water quality management plan under paragraph (11); comprehensive nutrient management plan (CNMP) under paragraph (12); large, medium, small, and state only CAFO under paragraph (13); crop removal under paragraph (14); crop requirement under paragraph (15); land management unit (LMU) under paragraph (25); letter of consent under paragraph (26); liquid waste handling system under paragraph (28); manure under paragraph (30); new source under paragraph (31); NMP under paragraph (33);

nutrient utilization plan (NUP) under paragraph (34); 100-year, 24-hour rainfall event under paragraph (35); 100-year floodplain under paragraph (36); playa under paragraph (42); production area under paragraph (44); significant CAFO expansion under paragraph (48); sludge under paragraph (49); soil plant air water (SPA)W) filed pond technology under paragraph (50); technical service provider under paragraph (52); and 25-year, ten-day rainfall event under paragraph (53), which are common terms used in the proposed amendments to this subchapter. The following terms are no longer used in the proposed amendments, and therefore, have been deleted from this section: animal unit; CAFO general permit; flushwater handling system; new CAFO; no discharge; process wastewater; and qualified groundwater scientist.

Proposed §321.33 adds “and Required Authorizations” to the section’s current title “Applicability.”

The proposed amendment to this section clearly establishes which CAFOs are required to obtain authorization, what authorization they must obtain, and the schedule for when the CAFO authorization must be obtained. Individual permits are required for CAFOs under state law, rules of the commission, or as designated by the executive director. General permits provide flexibility for coverage for any CAFO not required to obtain authorization under an individual permit. The proposed amendment also prohibits dual coverage under both types of authorization.

If an application for an individual permit is filed before July 27, 2004, proposed §321.33 allows CAFOs to continue to operate under the terms and conditions of an existing permit by rule or individual permit until the commission acts on the application for an individual permit or the CAFO is authorized under the CAFO general permit. This section references that proposed §321.47 provides authorization

for the operation of AFOs not defined or designated as CAFOs. The proposed amendment will authorize runoffs from LMUs that have been properly managed according to the requirements under this rule. The proposed amendment limits the term of any CAFO authorization issued pursuant to this rule to five years, as required by the federal Clean Water Act and NPDES.

Proposed §321.34 changes the current title “Procedures for Making Application for Individual Permit” to “Permit Applications.” The proposed amendment maintains the basic notice, public participation process, and application requirements for individual permits as currently required in this section. However, the proposed section streamlines the existing procedural requirements by referencing applicable provisions in 30 TAC Chapters 281 and 305. The proposed amendment incorporates the new federal permit application requirements in 40 CFR §122.21(i)(1). For general permit purposes, new or expanding CAFO facilities must comply with proposed §321.34(b)(3) that requires an applicant to comply with the public participation processes to be set forth in a general permit. The commission believes that the public participation process would assist agency staff and the CAFO during the CAFO authorization process. The proposed rules note that expansions which are not considered significant only require CAFO owners or operators to amend a pollution prevention plan (PPP) and meet all the technical requirements of this subchapter and the permit or authorization.

Proposed §321.35 changes the current title “Procedures for Making Application for Registration” to “Fees.” The proposed amendment deletes references to the registration process and establishes the fee requirements for CAFO individual permits. Specifically, the proposed amendment deletes the registration option as a type of CAFO authorization because the agency will transition to the use of

general permits and individual permits to authorize certain CAFOs. The commission will utilize the authority under TWC, §26.040 to issue general permits to authorize similar types of discharges from CAFOs and to efficiently use agency resources while providing an adequate level of environmental protection. The proposed requirements for submittal of an application fee and annual assessment fee will be consistent with existing requirements for individual permits.

Proposed §321.36 amends the current title “Notice Requirements” to “Texas Pollutant Discharge Elimination System (TPDES) General Requirements for Concentrated Animal Feeding Operations (CAFOs).” This section now establishes the minimum requirements for TPDES authorizations under either a general or individual permit. The proposed amendment will maintain many of the existing TPDES requirements currently in §321.39, Pollution Prevention Plans. In addition, the proposed amendment adds new federal NPDES requirements in 40 CFR Parts 122 and 412 such as NMPs, sinkhole buffers, itemize inspection frequency, annual reports, and closure of retention control structures (RCSs). The most significant federal change requires all CAFOs to implement and operate according to a NMP developed and certified in accordance with the Natural Resource Conservation Service’s (NRCS) 590 Practice Standard, by December 31, 2006.

The proposed amendment also moves into this section the requirement for manure and wastewater sampling and logging of manure transport from §321.39 to specify that this is a requirement for TPDES authorization. The proposed amendment also establishes a new requirement for a 100-foot buffer around sinkholes, along with the option for a variance, as allowed in the federal CAFO rules. This requirement is necessary to prevent manure, litter, and wastewater from being applied too close to

sinkholes, which could potentially contribute to the degradation of water quality. The proposed amendment also moves the requirement for soil sampling and testing, annual sampling, sampling procedures, and laboratory analysis from §321.39 into this section to specify that these are requirements for TPDES authorization. The amendment will add a requirement to collect soil samples according to procedures in the agency's publication "Soil Sampling for Nutrient Utilization Plans" and establish specific procedures for collecting representative soil samples. This requirement is necessary to instruct operators on methodologies to collect representative and statistically valid soil samples representative of the concentration of nutrients in the LMU. The proposed amendment also includes requirements from the federal CAFO rule for visual inspections of the CAFOs control facility and land application equipment, on a daily and weekly basis, respectively, to verify that the CAFO is operating correctly. The proposed amendment will require CAFO operators to conduct a daily inspection of all water lines, including drinking water and cooling water lines, located within the drainage area of the RCS. The CAFO operator must also conduct a weekly inspection of all control facilities and equipment used for the land application of manure, litter, or wastewater. An inspection must be made of all storm water diversion devices, runoff diversion structures, and devices channeling contaminated storm water to each RCS. These requirements are necessary to ensure that the control facility is in working order for daily routine operations that assure the CAFO is operated to protect water quality.

The proposed amendment also describes the records that must be kept and incorporate the requirement from the federal CAFO rules into Subchapter B to keep records in the PPPs for a five-year period. This amendment is necessary to update Subchapter B to be consistent with new federal requirements. The proposed amendment also establishes the requirement for CAFOs to submit an annual report to

summarize the waste management activities at the CAFO during the previous year. This requirement is from the federal CAFO rule and incorporates specific elements of the annual report from the federal rule into Subchapter B to make it consistent with federal requirements. The proposed amendment also moves the depth marker requirement from §321.39 to this section.

The proposed amendment to dispose of carcasses within 24 hours of death in accordance with state laws and regulations was added to support the existing requirement for carcass disposal, which is from §321.40, Best Management Practices. This requirement is necessary to establish that carcasses must be collected within 24 hours and does not allow them to remain unattended for more than three days before disposal is required. The proposed amendment also includes the federal CAFO rule language prohibiting the disposal of carcasses into a liquid manure system. This requirement is necessary to assure that the liquid manure system is not used as a disposal method. The proposed amendment also requires the CAFO to develop a closure plan and to perform proper closure whenever a single RCS is taken out of service or in the event the entire CAFO ceases operation. The amendment also proposes that the CAFO comply with the proper operation and maintenance requirements of this subchapter until closure is complete, at which time the CAFO may terminate the authorization. This requirement is necessary for Subchapter B to be consistent with federal requirements and to assure that RCSs and other components of the control facility are not abandoned until proper removal and disposal of waste has occurred.

Proposed §321.37 changes the title “Actions On Applications for Registrations” to “Effluent Limitations for Discharges from Concentrated Animal Feeding Operation (CAFO) Production Areas”

since the existing content of the section is no longer needed because the registration process will no longer be a form of authorization. The proposed amendment maintains many of the existing TPDES requirements in §321.39. The amendment proposes to replace existing registration requirements with the requirements to meet the effluent limitation guidelines for discharges from production areas of CAFO operations. The amendment also proposes to allow cattle and dairy CAFOs to request alternative performance standards in lieu of the established effluent limitations guidelines in the federal CAFO rules for traditional discharges from cattle or dairy operations. The proposed amendment also allows similar variance requests from swine, poultry, and veal CAFO operations for voluntary superior environmental performance standards. This amendment is necessary to update Subchapter B to be consistent with the new federal requirements.

Proposed §321.38 changes the title “Proper Operations and Maintenance” to “Control Facility Design Requirements.” The proposed amendment moves the well buffer requirements from §321.39 into this section and incorporates a new 100-foot buffer requirement for agricultural irrigation wells. This amendment is necessary to minimize the potential of waste applied on the surface in the vicinity of agricultural irrigation wells to affect water quality and to update Subchapter B with federal requirements. The proposed amendment also allows a variance from the buffer requirements for existing facilities that operate according to a recharge feature certification plan in order to provide flexibility to existing facilities constructed prior to the buffer requirements. This variance is necessary to allow existing CAFOs authorized under this rule before the buffer requirements were adopted to continue to operate without the economic hardship of retrofitting the CAFO. The amendment proposes to move the requirement that control facilities and RCSs be located outside the 100-year floodplain from

§321.39 to this section. The proposed amendment also moves the specifications, location and design requirements for the RCS from §321.39 to this section. The proposed amendment also establishes a new requirement for new source swine, veal, and poultry operations to design, construct, and operate a RCS to meet the 100-year, 24-hour design as required by the new federal CAFO regulations. The proposed amendment also moves the requirements for systems using irrigation, evaporation systems, dewatering systems, and embankment and liner design from §321.39 to this section. The proposed amendment to the embankment design provision includes specifications on the distances required to be maintained above and below the spillway depending on the type of system. The proposed amendment also moves the manure storage capacity requirement from §321.39 into this section. The proposed rule requires manure areas to be located within the drainage area of the RCS and accounted for in design calculations of the RCS if manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in case of the design rainfall event.

Proposed §321.39 changes the title of the section from “Pollution Prevention Plans” to “Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)” to better reflect the description of operational requirements in the section. The provisions regarding RCS operation and maintenance, storage of waste, and sludge are currently located within this section. The proposed amendment adds a provision regarding imminent overflow as a result of chronic or catastrophic rainfall or catastrophic conditions to require the operator to irrigate wastewater to LMUs as a management practice that will minimize pollutant loads to receiving waters. The amendment would also require the operator to report the activity to the regional office within 24 hours. The proposed amendment regarding sludge volumes updates the existing rule to require CAFOs to remove

accumulated sludge in accordance with the RCS design sludge level instead of only when 50% of the treatment volume has been exceeded. The proposed change that requires a CAFO to develop written procedures for spill prevention and recovery would move it from §321.40 into this section. The proposed amendment establishes a new requirement that waste stored for more than 30 days will be considered as permanent storage and states that agency permits will require proper containment to prevent contaminated runoff from leaving the CAFO. The proposed rule requires manure areas to be located within the drainage area of the RCS and accounted for in design calculations of the RCS if manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in case of the design rainfall event. The proposed amendment also allows for composting at the CAFO without separate authorization, provided it is conducted in accordance with the agency's composting rules and regulations. The proposed amendment restricting livestock from coming into contact with water in the state was moved from §321.40 into this section. A proposed change adds a specific provision identifying an existing requirement that a CAFO must maintain vegetation in pastures where animals from the CAFO are grazing.

Proposed §321.40 changes the title of the section from "Best Management Practices" to "Concentrated Animal Feeding Operation (CAFO) Land Application Requirements" because many of the best management practices were moved to other sections of the rules directly related to that specific management activity. The proposed amendment moves the existing requirements for land application from §321.39 to this section. The provisions regarding buffer requirements are currently in §321.40. The proposed amendment will establish new requirements that CAFOs install additional protective measures in any new LMUs to prevent pollutants from entering an irrigation well. The amendment also

proposes to establish what protective measures can be utilized by the CAFO to meet this requirement. The proposed amendment also adds a new requirement for CAFO operators to install backflow prevention devices in accordance with 16 TAC Chapter 76, Water Well Drillers and Water Pump Installers, if wastewater or chemicals are introduced to wellheads. The proposed amendment will require all CAFO operators to develop and implement a NMP to satisfy the new federal requirements for proper land application. Further, the proposed amendment will require land application to be based on total nutrient concentration instead of the §321.39 requirement for nitrogen concentration in the manure, litter, or wastewater. Land application rates shall not exceed nutrients necessary to meet the planned crop requirement as stated in this proposal. The proposed amendment also moves the NUP requirements from §321.39 into this section.

Proposed §321.41 changes the title “Other Requirements” to “Special Requirements For Discharges to a Playa.” The proposed amendment sets forth the requirements for playas currently in §321.40. The proposed amendment contains the requirements associated with TWC, §26.048, and the circumstances under which an AFO may utilize a playa as an RCS.

Proposed §321.42 changes the title “Monitoring & Reporting” to “Requirements Applicable to the Major Sole-Source Impairment Zone.” Most of the requirements in proposed §321.42 are new provisions included to improve water quality conditions in a major sole-source impairment zone. Some of the new provisions were consensus recommendations of the technical standards committee that developed the Bosque River Watershed White Papers. The monitoring and reporting requirements in §321.42 have been moved to proposed §321.44, Notification. The proposed amendment applies to

operators of dairy CAFOs in the major sole-source impairment zone and specify that these requirements supercede any other requirements applicable to CAFOs in general, if they conflict with a requirement in this section. The proposed amendment further requires dairy CAFOs in the major sole-source impairment zone to operate and maintain a margin of safety volume consistent with the SPAW Field Pond Hydrology model or a 25-year, ten-day rainfall event. The SPAW model is an NRCS tool that will enable a consultant to analyze the management, operation, and sizing of the RCS to determine its suitability to protect water quality. Using the SPAW model, a consultant must ensure that the data shows that the probability of an overflow from the RCS will be less than once in 25 years.

Alternatively, a consultant can design an RCS to contain wastewater from a 25-year, ten-day rainfall event to meet the required margin of safety to protect water quality. The proposed margin of safety exceeds NPDES requirements for the design rainfall event and has been included due to the water quality in impaired segments of the Bosque River Watershed. The proposed amendment also requires that the margin of safety must be maintained and shown on the depth marker. This new provision is proposed to manage storage capacity to minimize overflows of wastewater from RCSs. The proposed amendment also contains a requirement for dairy CAFOs to add one-foot graduations to the depth marker to identify the distance, using one-foot graduations, between the required minimum treatment volume level and the spillway which includes the margin of safety. The proposed amendment also requires the dairy operator to monitor daily the wastewater levels and to maintain a log to assist with RCS management and compliance purposes.

The proposed amendment also requires dairy operators in major sole-source impairment zones to develop and implement an RCS management plan which will establish the appropriate wastewater

management levels according to the RCS design and the requirements in this section. The dairy operator is also required to operate the RCSs according to the plan and maintain wastewater levels at or below the expected end of month projected level. This provision will improve RCS management and minimize conditions that lead to overflows. In addition, agency staff will be able to review the plans and records of management to document compliance with the requirements of this subchapter. The proposed amendment also moves the management and disposal practices from §321.48, Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs), to this section to consolidate special requirements for major sole-source impairment zones in one section.

The proposed amendment adds a new provision to require permits for existing dairy CAFOs in the major sole-source impairment zone that are not expanding may allow the operator to provide manure, litter, and wastewater to operators of third-party fields that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. Specifically, the amendment requires: 1) a written contract between the dairy operator and the recipient; 2) dairy operators to not deliver manure, litter, or wastewater to a third party once the soil test phosphorus analysis shows a level equal to or greater than 200 parts per million, or the operator is not in compliance with this subchapter or the contract; 3) annual samples of third-party fields by a nutrient management specialist; and 4) submittal of records to the appropriate regional office quarterly. This provision was added to allow effective utilization of nutrients on deficient soils throughout the watershed and will reduce additional land application to LMUs at the CAFO. This is intended to reduce the potential for phosphorus runoff from the CAFO LMUs.

The proposed amendment moves certain soil sampling and testing requirements from §321.49, Dairy Waste Application Field Soil Sampling and Testing, to this section to consolidate special requirements for major sole-source impairment zones in one section. The proposed amendment requires the dairy operator to assure that those samples are analyzed according to the sampling and analysis requirements of the PPP. The proposed amendment requires the dairy operator to which this section applies to notify the appropriate TCEQ regional office in writing of the date, time, and location where soil samples will be taken ten working days before collecting soil samples. The proposed amendment was included to allow agency staff to verify the appropriateness of the sampling protocol and other requirements of this subchapter. The proposed amendment requires dairy operators to suspend land application between midnight and 4:00 a.m. and to prevent discharges from the irrigation system. The proposed amendment states that the executive director may require an automatic emergency shutdown device to be installed if an unauthorized discharge occurs. This provision is included to assure that the operator supervises irrigation practices and to prevent unauthorized discharges when the operator is not present.

The proposed amendment requires all dairy CAFOs in a major sole-source impairment zone to develop and implement a CNMP certified by the Texas State Soil and Water Conservation Board no later than December 31, 2006. The proposed amendment requires CNMPs to assure that dairies utilize NRCS technical expertise and program financial assistance in order to improve water quality by establishing a conservation plan for management of manure, litter, and wastewater.

The proposed amendment requires that a dairy operator notify the TCEQ regional office orally within one hour of discovery of a discharge. This proposal enables agency staff to quickly investigate and

document discharges that may adversely affect water quality and assure that operators comply with appropriate measures to minimize any potential impact. The proposed amendment requires the dairy CAFO operator to submit a report to the regional office after a discharge to substantiate that the overflow was beyond the operator's control. This provision is proposed to allow agency staff to review the documentation and circumstances which caused the overflow and to assure that the operator was in compliance with the requirements of this subchapter.

The proposed amendment requires dairy operators who use the SPAW certification method for the margin of safety to meet the 25-year, ten-day rainfall standard if an unauthorized discharge occurs. This provision is included to require maximum storage capacity if the dairy operator fails to correctly manage the system according to the SPAW model.

The proposed amendment also requires the dairy CAFO operator to report a discharge from an RCS or LMU and submit a report to the appropriate regional office showing the facility records that substantiates that the overflow was a result of cumulative rainfall that exceeded the volume of safety storage capacity without the opportunity for dewatering, and was beyond the control of the operator. After review of the report, if required by the executive director, the operator shall have an engineering evaluation. This provision was added to provide more information to the commission for a thorough evaluation of the circumstances and conditions which contributed to the discharge.

Proposed §321.43 changes the title "Notification" to "Air Standard Permit for Animal Feeding Operations (AFOs)." The proposed amendment to this section would allow AFOs to obtain an air

quality standard permit authorization by meeting the requirements contained in this subsection. This authorization may be obtained in conjunction with a pending water quality authorization, or, if a water quality application is not pending, a separate request made in writing may be used to obtain the air standard permit. Formal registration for authorization to operate under the air standard permit is not required. Any AFO that does not qualify for a permit by rule under Chapter 106, or that cannot satisfy the air quality criteria of this amended subchapter must obtain an individual air quality authorization under Chapter 116. Any AFO that is a new major source or major modification as defined in Chapter 116 must obtain an air quality permit under Chapter 116.

Regardless of any water quality authorization granted under the amended subchapter, AFOs must comply with any applicable federal air quality regulations, including, but not limited to, National Emission Standards for Hazardous Air Pollutants (NESHAPs) and New Source Performance Standards (NSPS). Any AFO that constitutes a major source as defined in 30 TAC Chapter 122 must obtain a federal operating permit under that chapter. Additionally, any AFO must meet the requirements of 30 TAC Chapter 111. The air standard permit for AFOs and authorizations thereunder are subject to applicable rules of Chapter 116, including §116.110, Applicability, and Chapter 116, Subchapter F, Standard Permits.

The amended rule as proposed consolidates the requirements for an air standard permit into one section. There have been no changes to the types of facilities that are eligible for the air standard permit. Some specific housekeeping and operational procedures reduce the potential for nuisance conditions from these facilities are already be in place at existing facilities and are necessary to maintain compliance

with Chapter 111. For consistency purposes, specified controls have been added for facilities that operate a feedmill on-site. Controls for feedmilling equipment are the same as those required in Chapter 106 for a feedmill making changes under a permit by rule. The amended rule identifies the buffer requirements and alternatives for meeting those requirements. No substantive changes to the buffer requirements, which were previously located in a separate section, are proposed. In addition, details regarding the buffer requirements have been included to indicate when the buffers must be met, when written consent may be used to locate a permanent odor source within the buffer, how the buffer is measured, and what information the area land use map must provide. New written consent is not required upon encroachment by a third party into the buffer zone after the AFO has started construction unless the AFO expands beyond the scope of the initial construction or beyond the written consent. The proposed amendment also allows for the use of innovative technology in the treatment of wastewater while continuing to qualify for the air standard permit. The proposed amendment still allows the implementation of the odor control plan to reduce or eliminate the required buffer. Because emissions from AFOs must be controlled to protect public health, in accordance with §116.605(d)(1) these amendments to the air standard permit for AFOs would be effective upon the effective date of the rule. Once effective, the amendments will apply to new facilities and to existing facilities operating under the air standard permit.

Proposed §321.44 changes the title “Dairy Outreach Program Areas” to “Notification.” The information for “Dairy Outreach Program Areas” is contained in proposed §321.32. The proposed amendment moves the existing discharge notification and monitoring requirements to this section. The proposed amendment adds additional monitoring parameters from the new federal CAFO rules and

stakeholder input to now require a CAFO operator to monitor for total coliform, nitrate, total phosphorus, and total dissolved solids. The proposed amendment also requires notification to TCEQ prior to beginning operations at a new CAFO. This is to assure agency field staff is aware of the operation of newly constructed facilities.

Proposed §321.45 changes the title “Effects of Conflict or Invalidity of Rule” to “ Concentrated Animal Feeding Operation (CAFO) Training Requirements.” The proposed amendment moves the existing training requirements from §321.41, Other Requirements, to this section.

Proposed §321.46 changes the title “Air Standard Permit Authorization” to “Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting.” The existing air standard permits authorization requirements are proposed to be located in §321.43. The proposed amendment describes the current requirements for the CAFO operator to develop and implement a PPP. The proposed requirements were moved from §321.39 into this section. The proposed amendment requires that management documentation be maintained in the CAFO PPP. These requirements consolidated in PPP assist the CAFO operators in quickly identifying the PPP measures required for successful implementation of the PPP. The management documentation shall consist of a copy of the administratively and technically complete permit application, notice of intent seeking coverage under a general permit or the written authorization issued by the commission or executive director for the CAFO; the RCS management plan, if applicable; a copy of the approved recharge feature certification; the groundwater monitoring plan, if required; a copy of the NMP or NUP; site-specific documentation that no hydrologic connection exists between the contained

wastewater and water in the state; and any written agreements with landowners which document the allowance for nighttime irrigation, the odor control plan, documentation of employee training, including dates when training occurred, and for daily outreach program area training verification, the dates, time of attendance, and completion of training.

The proposed amendment also requires a site evaluation by a professional engineer or geoscientist to perform a complete site evaluation of structural controls, review liner documentation, and certify a report of the findings. This requirement was moved into this section from §321.39. The proposed amendment also requires the CAFO operator to inspect the control facility and LMUs annually and develop a report of the findings. This proposed requirement is moved from §321.42, Monitoring and Reporting Requirement, into this section.

The proposed amendment also requires the CAFO operator to keep records for a five-year period to implement the federal CAFO rule requirements pertaining to recordkeeping. The proposed amendment adds a requirement to furnish those records within five days of a written request from the executive director. The records required to be kept by the CAFO operator include: a list of any significant spills of potential pollutants at the CAFO; a log of wastewater, manure, litter, and sludge removal that shows the dates, times, and location of application or disposal; a log of all daily measurable rainfall events, including the measured rainfall; documentation of liner maintenance by a NRCS engineer, licensed professional engineer, or licensed geoscientist; groundwater monitoring records, if required by §321.41; records showing that the control facilities have been inspected for structural integrity and maintenance, including the date of each inspection and a description of the findings; and the records of

all manure, litter, and wastewater either used at the facility or removed from the facility, updated at least monthly. In addition, the log should include all weekly wastewater levels observed in the RCS or daily wastewater levels in a major sole-source impairment zone. These requirements are moved from §321.39 into this section.

To implement the new federal CAFO regulations, the proposed amendment requires the CAFO operator to keep records where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the CAFO owner or operator, such records must include the following information: date of manure, litter, or wastewater application to each field; location of the specific LMU and the volume applied during each application event; acreage of each individual crop on which manure, litter, or wastewater is applied; basis for and the total amount of nitrogen and phosphorus applied per acre to each field, including sources of nutrients other than manure, litter, or wastewater on a dry basis, and the percent moisture content of the manure; and actual annual yield of each harvested crop, and weather conditions during the land application and 24 hours before and after the land application.

The proposed amendment requires the CAFO operator to keep records of: annual nutrient analysis for at least one representative sample of irrigation wastewater and one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium; the results of initial and annual soil analysis reports as required by this subchapter; monthly records describing disposal and storage of toxic pollutants, including pesticide containers; and copies of all notifications to the executive director, including any made to a regional office, as required by this subchapter, or by a permit or authorization. These requirements were included to implement the new federal CAFO regulations.

The proposed amendment requires that the CAFO operators submit all required reports and soil testing analysis of samples to the regional office and central office within 60 days of the date the sample was taken. This requirement was moved from §321.42 to this section.

Proposed §321.47 changes the title “Initial Texas Pollutant Discharge Elimination System Authorization” to “Requirements For Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs).” The TPDES authorization section is no longer needed because all pre-existing CAFOs subject to the TPDES initial authorization requirements should have obtained coverage within the past five years.

Agricultural Stakeholders Committee and other interested persons commented that this section is not necessary because the state regulations allow small AFOs to seek technical assistance from the Soil and Water Conservation Board to minimize agricultural nonpoint source pollution. The TCEQ solicits public comments on whether very small AFOs, based on size and type of operation, should be subject to proposed §321.47 requirements.

The proposed amendment moves existing requirements for AFOs not defined or designated as CAFOs from §321.39 and §321.40 into this section. The proposed rule creates a new “applicability” subsection to specify that AFOs that have control facilities to manage manure, litter, or wastewater must comply with all the provisions of this subsection. In addition, the new subsection states that AFOs that do not use such control facilities only are required to protect water quality and prevent odors and nuisance conditions. The proposed general requirements were moved without any substantial change. The

proposed requirements for control facilities moved with a change being to require design and construction of any new or modified RCS to be certified by a Texas licensed professional engineer. The proposed amendment detailing operation and maintenance of an AFO was also moved from §321.39 to this section with additional language to require a rain gauge capable of containing the design rainfall event. The gauge shall be kept on site and properly maintained. The proposed amendment also includes the existing requirement for the permanent marker, but adds a new requirement that an indicator level identify the 100-year, 24-hour rainfall event as required for any new source swine, veal, or poultry operation.

The proposed amendment detailing the land application requirements for AFOs was moved from §321.39 and §321.40 to this section with the only change being to allow the AFO to utilize a NMP in lieu of a NUP if one is developed and implemented. The proposed amendment includes the designation of storage piles of waste as temporary if stored less than 30 days, and the requirement for dairy operations in the major sole-source impairment zone to adhere to waste management and disposal requirements consistent with other dairies in the watershed according to proposed §321.42. The proposed provisions were added to specify the applicability of these requirements to AFOs.

The proposed amendment requires AFO operators to restrict animals from coming in direct contact with surface water and for the operator to maintain vegetation in areas where animals are kept in pastures. This new provision was added to establish water quality protection measures for AFOs that maintain animals outside the confinement areas.

The proposed amendment moved existing soil sampling and testing requirements from §321.39 to this section with a new requirement that the operator is not required to collect the annual sample from LMU where wastewater or waste was not applied in the preceding year.

The proposed amendment moved the recordkeeping requirements from §321.39 to this section with a new requirement for AFOs to keep records for five years. The proposed amendment moved the requirements for documentation of liner maintenance, groundwater monitoring, inspections, and notification from §321.39 to this section without changes to the requirements. The proposed amendment also adds a new requirement that AFO operators must properly close their AFO and/or individual RCSs within one year of inactivity or ceasing operation in accordance with Texas Cooperative Extension/United States Department Of Agriculture - Natural Resource Conservation Service technical guidance publication #B-6122. This provision was added to assure that AFOs protect water quality by closing the facility when the AFO stops operating.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jan Washburn, Program Specialist in the Strategic Planning and Federal Grants Management Section, determined that for the first five-year period the proposed amendments are in effect, there will be significant fiscal implications for the commission but none for other units of state government.

The commission is proposing these revisions to the rules to meet requirements of 40 CFR §123.62(e). In addition to adopting the required EPA rules, the proposed amendments will add additional requirements for dairy CAFOs in the major sole-source impairment zone. These proposed rules are

geared to provide additional protection against discharges during chronic or catastrophic weather events. The rules continue to require CAFOs to be designed to prevent discharges of waste or wastewater by designing control structures that are able to contain runoff and precipitation from a storm with a catastrophic intensity that has a duration of 24 hours. The amount of these rainfall events is estimated for specific geographic regions by the National Weather Service. CAFOs that are required to have RCS, and that are located outside of the major sole-source impairment zone must have a control structure designed to withstand a 25-year rainfall event with a duration of 24 hours. Within the major sole-source impairment zone, RCSs must be designed to accommodate the 25-year rainfall event with a duration of ten days. For new source swine, veal, or poultry operations statewide, the RCS must have a capacity to contain the runoff from a 100-year rainfall event with a duration of 24 hours. Additionally, the proposed amendments seek to enhance certain aspects of CAFO operations to further minimize the potential of discharges.

The proposed amendments will be discussed in terms of those that arise from federal requirements, then those that arise from state requirements. Within these categories, the financial impact of these proposed rules will be further refined and discussed as one-time or ongoing costs.

The commission only has information on those AFOs that are currently registered or permitted. Therefore, estimating the total costs for implementing these proposed amendments is difficult. Costs to implement certain provisions of the amendments have been identified, individually, on the basis of cost per requirement. For those requirements where the number of operations that must comply with the requirement can be estimated, a statewide cost is calculated.

*Federal Requirements*

One-time costs

The proposed federal requirements include increased permitting and planning requirements, control structure enhancements, and recordkeeping changes for CAFOs. There is no significant one-time financial impact to state government. There are no financial implications for local governments as a result of these proposed amendments.

Ongoing costs

The primary costs to state government center around the increased workload associated with the increase in the number of authorized operations. The federal regulations for the NPDES establish the requirement for all CAFOs to apply for a permit. There are about 500 CAFOs that are currently registered and slightly under 100 more operating under individual permits.

Another change that resulted from EPA's rule change is to now include poultry producers that are 'dry litter' operations, i.e., those not having RCSs, as CAFOs. It is estimated that there are between 1,300 and 1,800 of these producers. Dry litter poultry CAFOs existing on the effective date of the rules would need to apply for a general permit by December 31, 2006. The commission intends to provide a general permit for these producers.

With the requirements to authorize these dry litter poultry operations, the commission's workload will also increase. Currently the Soil and Water Conservation Board inspects a percentage of these operations each year. Once the operations are authorized, the Soil and Water Conservation Board may

no longer perform these inspections. These inspections will then be conducted by TCEQ regional staff. Additionally, with potentially 1,800 more operations to authorize, it is anticipated that the number of enforcement actions might also increase. It is estimated that two full-time equivalents will be needed to accommodate the increase in workload from the existing 600 CAFO operations to perhaps 2,400 operations in the future. The average cost of this level of staff is \$69,000 per year, or a total \$138,000 inclusive of benefits. These positions will not be needed until mid-Fiscal Year 2007, or for half of the first five years that the rules are in effect, making the total cost to the commission \$345,000.

To offset these costs, the commission will receive increased fee revenue as a result of the permitting change for the estimated 1,300 to 1,800 dry litter poultry operations. Assuming these operations can be covered under a general permit, the commission's fee revenue will increase \$130,000 to \$180,000 in Fiscal Year 2007, depending upon the number of operations that are authorized and that seek a general permit. In addition to the general permit fee, these poultry operators will also be required to pay the consolidated water quality fee that other permitted CAFOs pay annually. Currently, these fees are \$800 per permit holder. The commission could see an increase in these fee revenues from \$2 million to \$2.8 million for two of the first five years that the proposed rules are in effect. Current practice is to bill this fee in the fall of the year, so if these operations are not permitted until December, 2006, they should not be billed until Fiscal Year 2008 for this water quality fee. The total potential increase in permit and fee revenue would be from \$2.1 million to \$2.9 million for the first five years that the proposed rules are in effect.

#### PUBLIC BENEFITS AND COSTS

Ms. Washburn determined that the public benefit from these proposed rules will be increased assurances in the protection of the state's water quality. The amendments to these rules will protect water in the state from degradation potentially caused by unusually heavy rainfall events. CAFOs also have the potential to impact air quality. These proposed rules specify requirements to protect the air quality and reduce the potential for nuisance conditions, odors, and emissions of particulate matter. Ms. Washburn also determined that there will be substantial costs to CAFOs as a result of these proposed amendments.

#### *Federal Requirements*

##### One-time costs

Federal changes will require all CAFOs to have an NMP by 2006. This plan contains provisions similar to the currently required PPP. These plans can be prepared by various entities and their cost will vary depending upon the size of the operation, the number of fields, and the soil types. The estimated cost for this plan is \$5,000 per operation. It is estimated that 542 CAFOs will need an NMP, exclusive of the dairy CAFOs in the major sole-source impairment zone, which are required to have an even more comprehensive plan than the NMP. This estimated one-time cost for NMPs for all operators is \$2.7 million.

Additionally, required by the federal regulations is a correctly sized RCS. If a CAFO operator has the design drawings showing correct construction, those are sufficient to satisfy the requirements in the rules. However, if the operator does not have suitable documentation, an engineer must certify that the RCS provides equivalent protection as requirements of these rules. These as-built certifications must be

maintained at the facility. It is estimated that these as-built certifications could cost \$2,500 per operation. However, the number of operations needing to obtain these certifications cannot be estimated.

The proposed amendments contain a requirement for closure plans in the event that a CAFO ceases operation. It is estimated that a closure plan could cost from \$3,000 to \$5,000 per operation. However, the number of closures is impossible to predict.

#### Ongoing Costs

Costs to the public as a result of implementing the federal requirements include those permitting changes previously discussed. The additional fee revenue to the state is of course a cost to the regulated community. The total potential increase in costs to the CAFOs would be from \$2.1 million to \$3 million for the first five years that the proposed rules are in effect. The apportionment between small and micro-businesses and all other operators is very difficult to estimate. These costs will apply to all businesses, including small and micro-businesses.

The EPA rules require CAFOs to add to their recordkeeping and reporting requirements. The proposed amendments will require CAFOs to submit an annual report to the TCEQ. Additionally, CAFOs will need to keep more data on RCS levels and removal of wastewater, litter, sludge, and manure, and dates and times of disposal or application. The most significant of these recordkeeping activities is compiling the annual report. It is estimated that this new task may take five days to complete, for a total cost for all CAFOs of \$1.2 million for the first five years that the rules are in effect.

### *State Costs*

#### One-time costs

The state changes will require dairies in the major sole-source impairment zone areas to have several new components. These dairies need to have a CNMP. These plans are similar to the NMPs, but are significantly more comprehensive as they pertain to the entire operation. The cost of these plans is estimated to be \$14,000 per plan. Also required are graduated pond markers for lagoons at a cost of \$250 each, for a total of \$14,500 for all operations. Lastly, dairies in this area may be required to add additional storage capacity to their RCSs. These costs are very difficult to project, but may be \$5,000 to \$6,000 per acre-foot of capacity needed. It is estimated that three CAFOs (5% of the dairy CAFOs in major sole-source impairment zones) will need to add two acre-feet to their RCSs. These estimated costs to increase capacity would range from \$30,000 to \$36,000 for these three operators combined over the first five years that the proposed rules are in effect.

#### Ongoing costs

There are no significant ongoing costs arising from the state portion of the proposed amendments.

#### Total Costs

The total estimated cost to businesses of all sizes to implement these proposed changes ranges from \$7 million to \$7.9 million for five years. Of these costs, adopting the federal amendments represents from \$6.2 million to \$7 million of the total. There is a potential for operators to apply for cost share funds from the NRCS to pay for some of these requirements. The eligible costs could potentially include the NMPs and the additional storage for certain RCSs. The NRCS has assisted some operators in the

development of their CNMPs to date. There is a potential that the NRCS could assist in funding up to \$3.5 million of the costs of these proposed amendments. If operators had access to these funds, the overall costs to operators, for implementation of these amendments, could decrease and range from \$3.5 million to \$4.4 million.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Ms. Washburn determined that there could be significant fiscal implications to small or micro-businesses as a result of implementation of the proposed amendments for the first five years that they are in effect. However, as the commission has no information on exactly which CAFOs are small or micro-businesses, the costs for small businesses will be the same on a per requirement basis, as for other businesses.

#### *Determination of the number of impacted small and micro-businesses*

The commission must assess the impact the proposed amendments will have on small and micro-businesses. These are defined and therefore tested, as businesses with less than \$1 million in gross sales, or having fewer than 100 employees for small businesses and fewer than 21 employees for a micro-business. Because of the nature of most agricultural operations, if the number of employees is the only the test used, then almost every permittee will be a micro-business, and certainly a small business. For example, the Texas Poultry Federation estimated that even the largest poultry operations in Texas would not have more than 20 employees. If this test is not applicable, then the test of sales more than \$1 million a year in gross revenue will be applied to determine the number of affected small and micro-businesses. Very little information is available as to the number of employees or the gross

sales of these operations, making it difficult to assess the impact on small and micro-businesses.

Therefore, this number was estimated from two approaches. First, the business type from the commission's information was queried to determine how many CAFO permittees were classed as "individual" or "private ownership" in an attempt to estimate the number of small businesses that could be affected by this rule change. Additionally, to estimate gross sales, state-wide production statistics supplied by the Animal Health Commission, the United States Department of Agriculture Market Administrator's Office, and the Texas Poultry Federation were used.

It was determined that approximately 53% (280) of the operators were listed as either individuals or private owners, while approximately 45% were identified as corporations or partnerships. These figures will only be used to estimate the potential number of small and micro-businesses that might be affected by these proposed changes, realizing that a corporation's annual sales can be less than \$1 million.

Gross sales were estimated for a dairy using information from the United States Department of Agriculture Market Administrator's Office. In Texas, the average production of milk per cow in 2002 was 17,152 pounds, at an average sales price of \$.1253 per pound. This yields an average gross revenue of \$2,150 per cow and potential gross sales for a herd with 200 cows at \$429,800, less than the \$1 million test for a small business. Dairies in the dairy outreach program areas must be permitted with a herd size of 200. In other areas, the break point for permits is 700 cows, with potential gross sales of \$1.5 million per year. Therefore, dairies outside of the dairy outreach program area are not as likely to pass the small business test. According to the United States Department of Agriculture Market

Administrator's Office, there are 815 dairies operating in Texas. Conversely, the number of CAFOs, of all types, permitted is approximately 640.

Similar rationale can be applied to swine operations. According to the Texas Pork Producers Association, its membership (not the universe of producers), includes three operations of more than 250,000 head, one operation with 5,000 - 10,000 head, one operation of 10,000 - 50,000 head, and 324 producers with less than 1,000 head. Swine operations outside of the dairy outreach program area must be permitted at 2,500 swine weighing more than 55 pounds or 10,000 weighing less than 55 pounds. Again, because of the breakpoint in the number of animals required to be a registered or permitted CAFO, exclusive of those in the dairy outreach program area, generally only larger operations will be affected by these proposed amendments.

#### *Estimated Costs*

The maximum cost an existing permittee might incur if all the requirements in the proposed rules were needed by an operation in the dairy outreach program area is estimated to be \$24,750. These costs can also be extrapolated out on a per employee basis using 20 employees, resulting in a per employee cost of approximately \$1,300. As it has been established that very few operations will have as many as 20 employees, using from five to ten employees provides a more relevant estimate. Thus, these estimates are increased to approximately \$2,500 per employee with ten employees to \$5,000 per employee for an operation with five employees. Again, the NRCS has funds available to assist operators in complying with regulations.

A group that will be affected are poultry dry litter operations that will need to apply for permits as a result of EPA changes. The commission currently has no data on these operations. The Texas Poultry Federation estimates that there are approximately 1,300 dry litter operations that will be affected by these changes and it is estimated that the vast majority of these operations will be considered small businesses. Commission staff estimates that 1,800 of these operations exist and the ranges between both these estimates are incorporated in this fiscal note. These operators will incur the cost of a general permit, \$100, and be assessed the yearly water quality fee that other CAFO permittees must pay. Currently, this fee is \$800 a year. As previously discussed, these producers would in all likelihood not be assessed these fees until late 2007, the year after these operations are to be initially permitted. Currently, CAFO permit language requires the permit applicant to obtain a geological assessment. This requirement generally pertains to operations that land apply manure or litter. According to the Texas Poultry Federation, these dry litter operations do not land apply their litter, but contract to have it hauled off. If permits are not altered to provide for operations where no waste is land applied by the permittee, then these dry litter operations will also be responsible for a one-time geologic assessment at a cost of \$5,000 - \$6,000 per operation. This brings the total impact for the first year a permit is required to \$5,100 - \$6,100 for each operation.

According to the Texas Poultry Federation, there could also be seven to ten turkey operations in the dairy outreach program area that might possibly be affected by these proposed amendments, bringing the total number of potentially affected businesses to a maximum of 1,810 operations.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do 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 requirement of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225. The proposed amendments do not meet the definition of a “major environmental rule” as defined in the act, and the rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b) because it does not meet any of the four applicability requirements listed in §2001.0225(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. The proposed amendments, which are intended to protect the environment and reduce risks to human health, will not have a material adverse effect on the economy or sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed changes incorporate new federal requirements. The proposed amendments implement the requirements of its NPDES program, thereby allowing CAFOs to comply with federal requirements while obtaining one permit for both federal and state authorization. Also, because all states are required to implement

programs equivalent to the federal regulations, Texas CAFOs will not be competitively disadvantaged by adoption of these regulations. The proposed amendments will not have a material adverse effect on the environment or public health and safety of the state or a sector of the state because they will not make any of the technical requirements for operating a CAFO less stringent and, in fact, incorporate more protective federal requirements.

Additionally, this rulemaking does not meet any of the four applicability criteria for a major environmental rule. The proposed amendments include the following: reorganize existing requirements; incorporate changes from the new federal CAFO regulations (40 CFR Parts 122 and 412) published in the February 12, 2003 issue of the *Federal Register*, including dry poultry operations; specify TPDES general requirements for CAFOs; specify requirements applicable to dairy CAFOs in a major sole-source impairment zone; amend the air standard permit for AFOs; specify applicable requirements for AFOs that are not defined or designated as CAFOs; include applicable recommendations from the standards committee that developed the Bosque River Watershed White Papers and from the Implementation Plan for Total Maximum Daily Load of the North Bosque River Watershed; delete the registration process and references to Chapter 321, Subchapter K; and update the name of the agency. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

Copies of the Bosque River White Papers and North Bosque River Watershed Total Maximum Daily Load Implementation Plan may be obtained by contacting the TCEQs Agriculture Team at (512) 239-

1000 or TCEQs Web site <http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/agrigroup.html>.

The commission invites public comment regarding the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

Texas Government Code, §2007.003, specifies that certain governmental actions are exempted from coverage of the §2007.003 and, therefore, exempt from the requirement to perform a takings impact assessment. These include an action that is reasonably taken to fulfill an obligation mandated by federal law. This rulemaking is exempt because it incorporates the new federal requirements into existing state requirements.

Notwithstanding the determination that this rulemaking is exempt from the requirements of §2007.043, the commission in preparing a takings impact assessment determined that this action does not constitute either a constitutional or a statutory taking.

The specific purpose of the amendments is to allow the commission to continue to fully implement the NPDES CAFO program in Texas by revising the existing Subchapter B rules to incorporate the new federal CAFO requirements in 40 CFR Parts 122 and 412. The proposed changes will allow the commission to continue to administer one permitting program for both NPDES and state permits, plus continue to authorize small AFOs under a permit by rule.

The proposed rules reorganize existing requirements in Subchapter B; specify TPDES general requirements for CAFOs; specify requirements applicable to dairy CAFOs in a major sole-source

impairment zone; incorporate an air standard permit for AFOs; specify applicable requirements for AFOs that are not defined or designated as CAFOs; include applicable recommendations from the standards committee that developed the Bosque River Watershed White Papers and from the Implementation Plan for Total Maximum Daily Load of the North Bosque River Watershed; delete the registration process and references to Chapter 321, Subchapter K; and update the name of the agency.

The proposed amendments would substantially advance their stated purpose by incorporating the new federal requirements into existing state requirements and facilitating the transition from registrations to individual and general permits for CAFOs.

Promulgation and enforcement of these proposed amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed amendments do not affect a landowner's rights in private real property because they do not place restrictions on the use of private real property that would take the real property in a manner that requires compensation under the constitution. Neither does this rulemaking restrict or limit an owner's right to property in a manner that reduces the property value by 25%.

In addition, Texas Government Code, Chapter 2007, does not apply to these proposed amendments because there is no reasonably alternative to this action which is being taken to fulfill an obligation under federal law. Specifically, the commission regulates federal CAFO facilities based on the delegation of the NPDES permitting authority from the EPA to the commission in 1998. Federal law

requires a state with NPDES authority to incorporate new federal regulations such as 40 CFR Parts 122 and 412 into the state requirements.

For these reasons, if this rulemaking were subject to the requirements to perform a takings impact assessment, the proposed rules would not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §33.201 *et. seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a preliminary consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and 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 that discharges shall comply with water-quality-based effluent limits; 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 to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas.

These proposed rules are consistent with CMP goals and policies because these proposed rules do not allow a discharge or allow a disposal of manure, litter, or wastewater from AFOs into or adjacent to water in the state, except in accordance with an individual permit issued by the commission, or a CAFO general permit issued or other authorization by the commission. Further, these proposed rules require that manure, litter, and wastewater generated by an AFO under these proposed rules be retained and used in an appropriate and beneficial manner as provided by commission rules, orders, authorizations, CAFO general permits, or individual permits.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies. These rules do not create or have a direct or significant adverse effect on any coastal natural resource areas because the proposed rules have been developed to reduce the possibility of discharge into coastal waters by ensuring that AFOs in all regions of the state, including coastal areas, are properly designed, constructed, operated, and maintained to protect all water bodies, including coastal waters.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### ANNOUNCEMENT OF HEARING

Public hearings on this proposal will be held in Stephenville on April 1, 2004 at 7:00 p.m., Texas Agricultural Experiment Station, 1229 North U.S. Highway 281; in Amarillo on April 6, 2004 at 7:00 p.m., at the Region 16 Education Service Center, Panhandle Conference Center, 5800 Bell Street; and in Austin on April 13, 2004 at 1:00 p.m., at the commission's central office located at 12100 Park 35 Circle, Building E, Room 201S. Individuals may present oral or written 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 Joyce Spencer, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-026-321-WT. Comments must be received by 5:00 p.m., April 13, 2004. For further information, please contact Kathy Ramirez, Regulation Development Section, at (512) 239-6757.

## **SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS**

### **§§321.31 - 321.47**

#### **STATUTORY AUTHORITY**

The amendments are proposed under TWC, §5.102, which provides the commission with the general authority necessary to carry out its duties and general powers under its jurisdiction; TWC, §5.103, which provides the commission with the general authority to adopt rules; TWC, §5.105, which is the commission's authority to set policy by rule; and TWC, §5.013, which states the commission's authority over various statutory programs.

These amendments are also proposed under TWC, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.028, which provides the commission's authority to approve certain applications for wastewater discharge; and TWC, §26.0286, which requires the commission to 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.

These amendments are also proposed under TWC, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment by HB 1542 in 1997, in order to continue to regulate small AFOs under a permit by rule. In addition, §26.040 authorizes the commission to approve a general permit to authorize the discharge of waste into or adjacent to water in the state by a category of dischargers that engage in the same or substantially similar types of operations.

These amendments are also proposed under TWC, §26.041, which allows the commission to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health; and §26.048, which allows the commission to propose rules to prohibit the discharge into a playa or use of it as a wastewater retention facility. In addition, these amendments are proposed under TWC, §26.121, which prohibits the discharge of waste into or adjacent to any water in the state except as authorized with a commission permit or other authorization.

These amendments are also proposed under TWC, Chapter 26, Subchapter L, which requires the commission to authorize the construction or operation of a new or expanded dairy CAFO located in 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.

These amendments are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

Finally, these amendments are also proposed under Texas Health and Safety Code, §382.011, which provides the commission the authority to control the quality of the state's air; §382.017, which authorizes the commission to propose rules consistent with the policy and purposes of the Texas Clean Air Act and to propose rules that differentiate among particular conditions, particular sources, and

particular areas of the state; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and §382.051, which provides the commission the authority to issue air standard permits. These amendments are also proposed under Texas Health and Safety Code, §382.05195, which authorizes the commission to issue and amend air standard permits for new or existing similar facilities, and to propose rules to implement and administer the issuance, amendment, renewal, and revocation of authorizations to use standard permits.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 26.011, 26.028, 26.040, 26.041, 26.048, 26.121, and 26.0286.

In addition, the proposed amendments implement TWC, Chapter 26, Subchapter L; Texas Government Code, §2001.006; and Texas Health and Safety Code, §§382.011, 382.012, 382.017, 382.051, and 382.05195.

**§321.31. Manure, Litter, and Wastewater Discharge and Air Emission Limitations.**

(a) There shall be no discharge or disposal of manure, litter, or wastewater from an animal feeding operation (AFO) into or adjacent to waters in the state, except in accordance with an individual water quality permit issued by the commission, or a concentrated animal feeding operation (CAFO) general permit or other authorization issued by the commission. Manure, litter, and wastewater generated by an AFO under this subchapter shall be retained and utilized in an appropriate and

beneficial manner as provided by commission rules, orders, authorizations, CAFO general permits, or individual water quality permits.

(b) AFOs shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Texas Health and Safety Code, Chapter 341 and Chapter 382.

**[§321.31. Waste and Wastewater Discharge and Air Emission Limitations.]**

[(a) Pursuant to §305.1 of this title (relating to Scope and Applicability), it is the policy of the Texas Natural Resource Conservation Commission that there shall be no discharge or disposal of waste or wastewater from animal feeding operations into or adjacent to waters in the state, except in accordance with subsection (b) of this section, any individual permits issued by the commission prior to the effective date of these rules, or a CAFO general permit issued or adopted by the commission. Waste and wastewater generated by a CAFO under this subchapter shall be retained and utilized in an appropriate and beneficial manner as provided by commission rules, orders, registrations, authorizations, CAFO general permits, or individual permits.]

[(b) Wastewater may be discharged to waters in the state from CAFOs authorized to operate under this subchapter whenever rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed, and properly operated to contain process generated wastewaters plus the runoff (storm water) from a 25-year, 24-hour rainfall event for the location of the facility authorized under this subchapter. There shall be no effluent limitations on

discharges from retention structures constructed, operated, and maintained to contain the 25-year, 24-hour storm event if the discharge is the result of a rainfall event which exceeds the design capacity, and the retention structure has been properly operated and maintained. Retention structures shall be designed in accordance with §321.39 of this title (relating to Pollution Prevention Plans). Facilities authorized under this rule shall comply with §305.125 of this title (relating to Standard Permit Conditions) and all applicable permit conditions contained in TNRCC rules.]

[(c) Facilities shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Texas Health and Safety Code, Chapters 341 and 382.]

**§321.32. Definitions.**

All definitions in Texas Water Code (TWC), Chapter 26 and Chapter 3 and Chapter 305 of this title (relating to Definitions and Consolidated Permits) shall apply to this subchapter and are incorporated by reference. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Agronomic rates** - The land application of manure, litter, or wastewater at rates of application in accordance with a plan for nutrient management designed to enhance soil productivity and provide the crop or forage growth with needed nutrients for optimum health and growth.

(2) **Air contaminant** - Particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor or any combination thereof produced by processes other than natural. Water vapor is not an air contaminant.

(3) **Animal feeding operation (AFO)** - A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season over any portion of the lot or facility. Two or more AFOs under common ownership are a single AFO if they adjoin each other, or if they use a common area or system for beneficial use of wastes. A land management unit is not part of an AFO.

(4) **Aquifer** - A saturated permeable geologic unit that can transmit, store, and yield to a well, the quality and quantities of groundwater sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels, permeable sedimentary rocks such as sandstones and limestones, and/or heavily fractured volcanic and crystalline rocks. Groundwater within an aquifer can be confined, unconfined, or perched.

(5) **Area land use map** - A map that identifies property lines, permanent odor sources, and distances and direction to any occupied residence or business structure, school (including associated recreational areas), place of worship, or public park within a one-mile radius of the permanent odor

sources at the AFO. The map shall include the north arrow, scale of map, buffer distances, and date that the map was generated and the date that the distances were verified.

(6) **Beneficial use** – Application of manure, litter, or wastewater to land in a manner that does not exceed the agronomic need or rate for a cover crop. Application of manure or wastewater on the land at a rate below or equal to the optimal agronomic rate is considered a beneficial use.

(7) **Best management practices (BMPs)** - The schedule of activities, prohibitions of practices, maintenance procedures, and other management and conservation practices to prevent or reduce the pollution of water in the state. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, land application, or drainage from raw material storage.

(8) **Catastrophic conditions** - Conditions that cause structural or mechanical damage to the facility from natural events including high winds, tornados, hurricanes, or other natural disasters, other than rainfall events.

(9) **Certified nutrient management specialist** - An individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service recognized certification program or organization.

(10) Chronic or catastrophic rainfall event - A series of rainfall events that do not provide opportunity for dewatering a retention control structure and that are equivalent to or greater than the design rainfall event or any single rainfall event that is equivalent to or greater than the design rainfall event.

(11) Certified water quality management plan - A site-specific plan for agricultural or silvicultural lands that includes appropriate land treatment practices, production practices, management measures, technologies, or combinations thereof that when implemented, will achieve a level of pollution prevention or abatement determined by the Texas State Soil and Water Conservation Board, in consultation with the local Soil and Water Conservation District, to be consistent with state water quality standards.

(12) Comprehensive Nutrient Management Plan - A resource management plan containing a grouping of conservation practices and management activities that, when combined into a conservation system, will help ensure that both agricultural production goals are achieved, and natural resource concerns dealing with nutrient and organic by-products and their adverse impacts on water quality are minimized.

(13) Concentrated animal feeding operation (CAFO) - Any animal feeding operation (AFO) defined as follows:

(A) Large CAFO - Any AFO that stables or confines and feeds or maintains for a total of 45 days or more in any 12-month period equal to or more than the numbers of animals specified in any of the following categories:

(i) 1,000 cattle other than mature dairy cattle or veal calves. Cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(ii) 1,000 veal calves;

(iii) 700 mature dairy cattle (whether milkers or dry cows);

(iv) 2,500 swine weighing more than 55 pounds or 10,000 swine weighing less than 55 pounds;

(v) 500 horses;

(vi) 10,000 sheep or lambs;

(vii) 55,000 turkeys;

(viii) 125,000 chickens (other than laying hens, if the operation does not use a liquid waste handling system);

(ix) 30,000 laying hens or broilers (if a liquid manure handling system), or 82,000 laying hens (if the operation does not use a liquid manure handling system); or

(x) 5,000 ducks (a liquid manure handling system), or 30,000 ducks (if the operation does not use a liquid manure handling system);

(B) Medium CAFO - Any AFO with the following number of animals that discharge pollutants into water in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into water in the state that originates outside of and passes over, across, or through the facility or otherwise comes into direct contact with animals confined in the operation:

(i) 300 to 999 cattle other than mature dairy cattle or veal calves.

Cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(ii) 200 to 699 mature dairy cattle (whether milking or dry cows);

(iii) 300 to 999 veal calves;

(iv) 750 to 2,499 swine each weighing 55 pounds or more, or 3,000 to 9,999 swine each weighing less than 55 pounds;

(v) 150 to 499 horses;

(vi) 3,000 to 9,999 sheep or lambs;

(vii) 16,500 to 54,999 turkeys;

(viii) 37,500 to 124,999 chickens (other than laying hens and other than a liquid manure handling system);

(ix) 9,000 to 29,999 laying hens or broilers (if a liquid manure handling system), or 25,000 to 81,999 laying hens (if other than a liquid manure handling system); or

(x) 1,500 to 4,999 ducks (if a liquid manure handling system), or 10,000 to 29,999 ducks (if other than a liquid manure handling system).

(C) **Small CAFO** - An AFO that is designated by the executive director as a CAFO because it is a significant contributor of pollutants into or adjacent to water in the state and is not a large or medium CAFO.

(D) **State-only CAFO** - An AFO that falls within the range of animals in subparagraph (B) of this paragraph and that is either located in the dairy outreach program areas or

designated by the executive director as a CAFO because it is a significant contributor of pollutants into water in the state. A state-only CAFO is authorized under state law.

(14) **Control facility** - Any system used for the collection and retention of manure, litter, or wastewater on the premises until their ultimate use or disposal. This includes all collection ditches, conduits, and swales for the collection of runoff and wastewater, and all retention control structures.

(15) **Crop removal** - The amount of nutrients contained in and removed by harvest of the previous year's crop.

(16) **Crop requirement** - The amount of nutrients that must be present in the soil in order to ensure that the crop nutrient needs are met, while accounting for nutrients that may become unavailable to the crop due to adsorption to soil particles or other natural causes.

(17) **Dairy outreach program areas** - The area including all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood, and Rains.

(18) **Edwards Aquifer** - As defined in §213.3 of this title (relating to Definitions).

(19) **Edwards Aquifer recharge zone** - As defined in §213.3 of this title (relating to Definitions).

(20) **Groundwater** - Subsurface water that occurs below the water table in saturated soils and geologic formations, and is other than underflow of a stream or an underground stream.

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

(22) **Hydrologic connection** - The connection and exchange between surface water and groundwater.

(23) **Lagoon** - A retention control structure used for the biological treatment of liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in a series to produce a higher quality effluent. Treatment volume must be included in the lagoon design.

(24) **Land application** - The removal of manure, litter, or wastewater associated with the animal feeding operation including distribution to, or incorporation into, the soil mantle primarily for beneficial use purposes.

(25) **Land management unit (LMU)** - An area of land owned, operated, controlled, rented, or leased by an animal feeding operation (AFO) owner or operator to which manure, litter, or

wastewater from the AFO is or may be applied. This includes land associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used. LMUs include historical waste application fields. The term "land management unit" does not apply to any lands not owned, operated, controlled, rented, or leased by the AFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for land application.

(26) **Letter of consent** - A document signed by the owner or the authorized legal representative of the owner(s) of an occupied residence or business structure, school (including associated recreational areas), place of worship, or public park specifically consenting to location and operation of permanent odor sources of an animal feeding operation within the minimum buffer distance required under §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFO)).

(27) **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 control structures and water in the state.

(28) **Liquid waste handling system** - A system in which freshwater or wastewater is recycled and used in transporting waste.

(29) **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) which at least half of the water flowing into 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, prepared and submitted a total maximum daily load standard.

(30) **Manure** - Feces and/or urine excreted by animals. Manure includes manure, bedding, compost, feed, and other raw materials commingled with feces and/or urine.

(31) **New source** - As defined in §305.2 of this title (relating to Definitions). The criteria for new source determination are located in §305.534(b) of this title (relating to New Sources and Dischargers).

(32) **Nuisance** - Any discharge of air contaminant(s) including, but not limited to, odors of sufficient concentration and duration that are or may tend to be injurious to or that adversely

affects human health or welfare, animal life, vegetation, or property, or that interferes with the normal use and enjoyment of animal life, vegetation, or property.

(33) **Nutrient management plan (NMP)** - The Natural Resources Conservation Service Practice Standard 590 plan. A plan to address the amount, source, placement, form, and timing of the application of all nutrients and soil amendments.

(34) **Nutrient utilization plan (NUP)** - A plan developed to evaluate and address site-specific characteristics of a land management unit to ensure that the beneficial use of manure, litter, or wastewater is conducted in a manner to prevent adverse impacts on water quality.

(35) **One-hundred-year, 24-hour rainfall event** - The maximum rainfall event with a probable recurrence interval of once in 100 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.

(36) **One-hundred-year flood plain** - Any land area that would be inundated by the one-hundred-year, 24-hour rainfall event.

(37) **Open lot** - Pens or similar confinement areas with dirt, concrete, or other paved or hard surfaces wherein livestock 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 and that do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season. 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.

(38) **Operator** - The owner or person responsible for the overall operation of a facility or part of a facility, subject to the provisions of this subchapter.

(39) **Permanent odor sources** - Those odor sources that 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 control structures, 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 management units.

(40) **Permittee** - Any person issued an individual permit or order or authorized under a general permit.

(41) **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.

(42) **Playa** - A flat-floored, clayey bottom of an undrained basin that is located in an arid or semi-arid part of the state, that is naturally dry most of the year, and that collects runoff from rain but is subject to rapid evaporation.

(43) **Process-generated wastewater** - Any water directly or indirectly used or generated by the operation of an animal feeding operation, including spillage or overflow from animal or poultry watering systems that comes in contact with waste; water used or generated by washing, cleaning, or flushing pens, barns, and manure pits; direct contact swimming, washing, or spray cooling of animals; dust control; and water used in or resulting from the production of animals or poultry or direct products (e.g., milk, meat, or eggs).

(44) **Production area** - That part of an animal feeding operation that includes, but is not limited to, the animal confinement area, manure storage area, raw materials storage area, and control facilities.

(45) **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.

(46) **Recharge feature** - Those natural or artificial features either on or beneath the ground surface at the site under evaluation that provide or create a significant pathway between the ground surface and the underlying groundwater within an aquifer. Significant artificial pathways include, but are not limited to, wells and excavation or material pits. Significant natural pathways include, but are not limited to: faults, fractures, sinkholes, or other macro pores that allow direct surface infiltration; a permeable or shallow soil material that overlies an aquifer; exposed geologic formations that are identified as an aquifer; or a water course bisecting an aquifer.

(47) **Retention control structure (RCS)** - Any basins, ponds, pits, tanks, conveyances, and lagoons used to store and/or treat manure, litter, wastewater, and sludge. This RCS

does not include conveyance systems such as irrigation piping or ditches that are designed and maintained to convey but not store any manure, litter, or water.

(48) **Significant concentrated animal feeding operation (CAFO) expansion** – Any change to a CAFO that increases the waste production at the CAFO by more than 25%.

(49) **Sludge** - Solid, semi-solid, or liquid waste generated during the treatment of and/or storage of any wastewater. The term includes material resulting from treatment, coagulation, or sedimentation of waste in a retention control structure.

(50) **Soil Plant Air and Water (SPAW) Field Pond Hydrology** - SPAW is a Natural Resources Conservation Service (NRCS) water budgeting tool for farm fields, ponds, and inundated wetlands. The SPAW model may be used to perform daily hydrologic water budgeting using the NRCS Runoff Curve Number method.

(51) **Sole-source surface drinking water supply** - A body of surface water that is identified as a public water supply in §307.10 of this title (relating to Appendices A - E) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(52) **Technical service provider** - An individual, entity, or public agency certified and placed on an approved list by the Natural Resources Conservation Service (NRCS) to provide technical services to program participants or the NRCS.

(53) **Twenty-five-year, ten-day rainfall event** - The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of ten days, 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.

(54) **Twenty-five-year, 24-hour rainfall 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.

(55) **United States Department of Agriculture - Natural Resources Conservation Service** - An agency of the United States Department of Agriculture that provides assistance to agricultural producers for planning and installation of conservation practices through conservation and technical programs.

(56) **Waste** - Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

(57) **Wastewater** - Any water, including process-generated wastewater and precipitation, that comes into contact with any manure, litter, bedding, or any 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).

(58) Water in the state - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, 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.

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

(B) an 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) an excavation designed for the injection or placement of 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) an excavation designed to lower a water or liquid surface below the land surface either temporarily or permanently for any reason.

[The following words and terms, when used in this subchapter, have the following meanings.]

[(1) **Agronomic rates** - The land application of animal wastes or wastewater at rates of application which will enhance soil productivity and provide the crop or forage growth with needed nutrients for optimum health and growth.]

[(2) **Air contaminant** - Particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor or any combination thereof produced by processes other than natural. Water vapor is not an air contaminant.]

[(3) **Animal feeding operation** - A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season. Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other, or if they use a common area or system for the beneficial use of wastes.]

[(4) **Animal unit** - A unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle and dairy heifers multiplied

by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of weaned swine weighing 55 pounds or less multiplied by 0.1, plus the number of sheep multiplied by 0.1, plus the number of horses/mules multiplied by 2.0.]

[(5) **Aquifer** - A saturated permeable geologic unit that can transmit, store, and yield to a well, the quality and quantities of groundwater sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels, permeable sedimentary rocks such as sandstones and limestones, and/or heavily fractured volcanic and crystalline rocks. Groundwater within an aquifer can be confined, unconfined, or perched.]

[(6) **Best management practices (BMPs)** - The schedules of activities, prohibitions of practices, maintenance procedures, and other management and conservation practices to prevent or reduce the pollution of waters in the state. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, land application, or drainage from raw material storage.]

[(7) **CAFO general permit** - A general permit issued or adopted by the commission in accordance with Chapter 26 of the Texas Water Code for the express purpose to regulate discharges from CAFOs on a statewide or geographic basis.]

[(8) **Chronic or catastrophic rainfall event** - For the purposes of these rules, these terms shall mean a series of rainfall events which would not provide opportunity for dewatering and which would be equivalent to or greater than the 25-year, 24-hour storm event or any single event which would be equivalent to or greater than the 25-year, 24-hour storm event. Catastrophic conditions could include tornados, hurricanes, or other catastrophic conditions which could cause overflow due to the high winds or mechanical damage.]

[(9) **Concentrated animal feeding operation (CAFO)** - Any animal feeding operation which the executive director designates as a significant contributor of pollution or any animal feeding operation defined as follows:]

[(A) any new and existing operations which stable and confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in any of the following categories:]

[(i) 1,000 slaughter or feeder cattle;]

[(ii) 700 mature dairy cattle (whether milkers or dry cows);]

[(iii) 2,500 swine weighing over 55 pounds or 10,000 weaned swine weighing 55 pounds or less;]

[(iv) 500 horses;]

[(v) 10,000 sheep;]

[(vi) 55,000 turkeys;]

[(vii) 100,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;]

[(viii) 30,000 laying hens or broilers when facility has a liquid waste handling system;]

[(ix) 5,000 ducks; or]

[(x) 1,000 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds, and sheep;]

[(B) any new and existing operations covered under this subchapter which discharge pollutants into waters in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into the waters in the state, and which stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers or types of animals in the following categories:]

[(i) 300 slaughter or feeder cattle;]

[(ii) 200 mature dairy cattle (whether milkers or dry cows);]

[(iii) 750 swine weighing over 55 pounds or 3,000 weaned swine weighing 55 pounds or less;]

[(iv) 150 horses;]

[(v) 3,000 sheep;]

[(vi) 16,000 turkeys;]

[(vii) 30,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;]

[(viii) 9,000 laying hens or broilers when facility has a liquid waste handling system;]

[(ix) 1,500 ducks; or]

[(x) 300 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds, and sheep;]

[(C) poultry facilities that have no discharge to waters in the state normally are not considered a CAFO. However, poultry facilities that use a liquid waste handling system or stockpile litter near watercourses or dispose of litter on land such that stormwater runoff will be transported into surface water or groundwater may be considered a CAFO.]

[(10) **Control facility** - Any system used for the retention of wastes on the premises until their ultimate use or disposal. This includes the collection and retention of manure, liquid waste, process wastewater, and runoff from the feedlot area.]

[(11) **Dairy Outreach Program areas** - The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood, and Rains.]

[(12) **Edwards Aquifer** - That portion of an arcuate belt of porous, waterbearing predominantly carbonate rocks known as the Edwards (Balcones Fault Zone) Aquifer trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis, and Williamson Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devils River Limestone, Person Formation, Kainer Formation, Edwards Group, and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose

Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.]

[(13) **Edwards Aquifer recharge zone** - Generally, that area where the stratigraphic units constituting the Edwards Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area delineated as such on official maps located in the appropriate regional office and groundwater conservation districts.]

[(14) **Flushwater waste handling system** - A system in which fresh water or wastewater is recycled or used in transporting waste.]

[(15) **Groundwater** - Subsurface water that occurs below the water table in soils and geologic formations that are saturated, and is other than underflow of a stream or an underground stream.]

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

[(18) **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) **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) **Licensed professional geoscientist** - A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.]

[(21) **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.]

[(22) **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.]

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

[(24) **New concentrated animal feeding operation (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.]

[(25) **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.]

[(26) **Nuisance** - Any discharge of air contaminant(s) including, but not limited to, 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.]

[(27) **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.]

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

[(29) **Permanent odor sources** - 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.]

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

[(31) **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.]

[(32) **Process wastewater** - Any process generated wastewater directly or indirectly used in the operation of a concentrated animal feeding operation (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).]

[(33) **Process generated wastewater** - Any water directly or indirectly used in the operation of a concentrated animal feeding operation (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.]

[(34) **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.]

[(35) **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) **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) **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.]

[(38) **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.]

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

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

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

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

**§321.33. Applicability and Required Authorizations.**

(a) Permit required. All concentrated animal feeding operations (CAFOs) are point sources that require owners and operators to seek and obtain authorization under a water quality general permit or individual permit. CAFO owners and operators have a duty to seek coverage as described in this section.

(b) Individual permit required. A discharge from the following CAFOs may be authorized only under an individual water quality permit in accordance with §321.34 of this title (relating to Permit Applications). Except as provided by subsections (e) and (f) of this section, any operator who is required to obtain an individual water quality permit under this subsection may not commence physical

construction and/or operation of any control facilities until an individual water quality permit is issued for that CAFO, or unless otherwise authorized by the commission in accordance with Texas Water Code (TWC), §26.027(c).

(1) Any CAFO located within one mile of coastal natural resource areas as defined by Texas Natural Resources Code, §33.203, unless the CAFO was authorized by the commission prior to January 10, 1997.

(2) Any dairy CAFO located in a major sole-source impairment zone.

(3) Any CAFO where, on the date the executive director determines that the application is administratively complete, any part of the production area of the CAFO is located or proposed to be located within the protection zone of a sole-source surface drinking water supply, in accordance with TWC, §26.0286.

(4) Any CAFO where any part of the production area or land management units is located in a watershed of a segment listed on the current United States Environmental Protection Agency-approved 303(d) list of impaired water bodies, as required by 33 United States Code, §1313(d), and where a total maximum daily load implementation plan has been adopted by the commission that established additional water quality protection measures for CAFOs that are not required by the CAFO general permit.

(5) Any AFO that the executive director designates and requires to be authorized by an individual water quality permit to achieve the policies and purposes enumerated in TWC, §5.120 and §26.003; Texas Health and Safety Code, Chapters 341, 361, or 382; or §321.31 of this title (relating to Manure, Litter, and Wastewater Discharge and Air Emission Limitations). Cases for which the executive director may require an animal feeding operation (AFO) to obtain an individual water quality permit include, but are not limited to, the following:

(A) the operation is located near surface or groundwater resources;

(B) compliance with standards in addition to those listed in this subchapter is necessary in order to protect water in the state from pollution;

(C) the operation is not or has not been in substantial compliance with the standards of this subchapter;

(D) the operation is under a formal commission enforcement order or has been referred to the commission for enforcement action by the Texas State Soil and Water Conservation Board;

(E) the operation does not qualify for a CAFO general permit under §205.4 of this title (relating to Authorizations and Notices of Intent); or

(F) the executive director determines that an individual water quality permit is appropriate considering other pertinent factors.

(c) Individual permit or general permit required. A discharge from any other CAFO shall be authorized either by an individual water quality permit or an applicable CAFO general permit. Except as provided by either subsection (e) or (f) of this section, any operator required to obtain an individual water quality permit or authorization under a CAFO general permit according to this subsection may not begin physical construction or operation of any control facility until the CAFO operator receives an individual water quality permit or authorization under a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(d) New or expanding AFO. After the effective date of this subchapter, no person may commence construction or operation of a new CAFO or alter any existing AFO such that it becomes classified as a CAFO without prior authorization through an individual water quality permit or a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(e) Newly defined CAFO. An AFO that becomes classified as a CAFO after the effective date of this subchapter may not begin physical construction or operation of any new control facility until the CAFO operator receives authorization through an individual water quality permit or a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(f) Dry litter poultry operations. Existing dry litter poultry operations must obtain authorization by an individual water quality permit or a CAFO general permit in accordance with subsection (a), (b), or (c) of this section not later than April 13, 2006.

(g) Facilities operating under an existing authorization. A CAFO currently authorized by registration must apply for an individual water quality permit before July 27, 2004 in order to continue to operate. An application for renewal of a registration will be considered an application for an individual permit, so long as the application fee for an individual permit is paid. If such an application is timely filed, operation of the CAFO under the terms and conditions of the existing permit by rule will continue to be authorized, and authorization under the existing permit by rule does not expire, until final commission action on the permit application or until the CAFO qualifies for coverage under a general permit.

(h) Expansion or modification requirements. A CAFO operator authorized under an individual water quality permit shall comply with §305.62 of this title (relating to Amendment). Before the permittee begins physical construction or operation of any new control facility, the operator must obtain commission authorization. Changes for which a permit amendment is required include, but are not limited to:

(1) increasing the maximum number of animals authorized for confinement;

(2) increasing the wastewater storage volume; and

(3) adding land management units.

(i) AFOs that are not defined or designated as CAFOs. Discharges of manure, litter, or wastewater from an AFO that is not a CAFO as defined in this subchapter are authorized under this subchapter. Requirements applicable to these AFOs are described in §321.47 of this title (relating to Requirements for Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs)).

(j) Runoff from a land management unit.

(1) The runoff of manure, litter, or wastewater to water in the state from a CAFO as the result of the proper land application of that manure, litter, or wastewater to land management units under the operator's control is subject to the requirements of this subchapter in accordance with paragraph (2) of this subsection.

(2) Where manure, litter, or wastewater is applied in accordance with a site-specific nutrient management plan that complies with §321.36(d) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)) or when the land application conforms to §321.40 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements), precipitation-related runoff from land management units under the control of a CAFO operator is authorized as:

(A) a pollutant discharge if the source is land associated with a CAFO in a major sole-source impairment zone; or

(B) an agricultural storm water discharge for all other sources.

(k) Edwards Aquifer. New CAFOs are prohibited on the Edwards Aquifer recharge zone.

(l) Permit term. Individual and general permits issued under this subchapter shall be effective for a term not to exceed five years from the date the permit is issued. Any previously issued individual water quality permit or authorization by rule that did not include an expiration date shall expire 180 days after the effective date of this subchapter. The permittee shall comply with the requirements of subsection (g) of this section.

(m) Dual authorization. No person may concurrently hold both an individual water quality permit and authorization under a CAFO general permit for the same CAFO.

(n) Additional requirements. Authorization under this subchapter, a general permit, or an individual permit does not release the operator from any responsibilities or requirements under other federal, state, or local statutes or regulations.

(o) State-only authorizations. Any AFO that is a state-only CAFO, as defined by §321.32(13)(D) of this title (relating to Definitions) shall be authorized in accordance with subsection (a) or (b) of this section.

[(a) Any concentrated animal feeding operation (CAFO) operating under currently effective authorization granted under state law only by the Texas Natural Resource Conservation Commission (agency) or under federal law by EPA prior to the effective date of these amended rules as published in the July 23, 1999, issue of the *Texas Register* (24 TexReg 5721) shall submit to the executive director written notice as required in §321.47 of this title (relating to Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization) or do one of the following.]

[(1) Within 60 days of the effective date of these amended (1999) rules, the facility owner or operator shall apply for authorization under this amended subchapter (1999) in accordance with the provisions of either §321.34 or §321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). If such application is filed within the 60-day period, and is administratively and technically complete, the applicant shall continue to operate the facility under the terms of the expired authorization until final disposition of the application in accordance with this subchapter.]

[(2) Any facility holding an authorization from the agency and which is not required under federal law to obtain National Pollutant Discharge Elimination System (NPDES) authorization shall continue to operate under the terms of its existing agency authorization until expiration,

amendment, or termination. All such agency authorizations shall expire five years from the effective date of the amendments (1999) to these rules, unless such authorization specifies an earlier expiration date.]

[(3) Any facility holding an authorization from the agency under state law only and which under federal law is required to, but does not, hold a current NPDES authorization, shall file an application in accordance with provisions of this subchapter within 60 days of the effective date of these amended (1999) rules.]

[(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, 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) the operation is located near surface and/or groundwater resources;]

[(2) compliance with standards in addition to those listed in this subchapter is necessary in order to protect waters in the state from pollution;]

[(3) the operation is not in compliance with the standards of this subchapter;]

[(4) the operation is under formal commission enforcement or has been referred to the commission for enforcement by the Texas State Soil and Water Conservation Board; or]

[(5) the owner and/or operator has submitted an application for registration or for a major amendment to a registration which does not comply with the requirements for administrative and technical completeness in §321.36(a)(1) of this title (relating to Notice of Application for Registration).]

[(c) New CAFOs are prohibited on the Edwards Aquifer recharge zone.]

[(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) Operators of animal feeding operations not required to submit an application for either a registration or an individual permit under this subchapter or authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit must locate, construct, and manage waste control facilities and land application areas to protect surface and groundwaters and prevent nuisance conditions and minimize odor conditions in accordance with the technical requirements

of §§321.38 - 321.40 of this title (relating to Proper CAFO Operation and Maintenance; Pollution Prevention Plan; and Best Management Practices).]

[(f) Any existing, new, or expanding CAFO which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of such general permit or authorized under subsection (a) or (b) of this section and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in the definition of CAFO in §321.32(9)(A) of this title (relating to Definitions) shall apply for registration in accordance with §321.35 of this title or individual permit in accordance with §321.34 of this title.]

[(g) Any existing, new, or expanding animal feeding operation which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of such general permit nor authorized under subsection (a) or (b) of this section, which is located in areas specified in the definition of Dairy Outreach Program areas in §321.32(11) of this title, and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the number of animals specified in the definition of CAFO in §321.32(9)(B) of this title, but less than or equal to the number of animals specified in the definition of CAFO in §321.32(9)(A) of this title shall apply for registration in accordance with §321.35 of this title or individual permit in accordance with §321.34 of this title.]

[(h) Any CAFO authorized under this subchapter must develop and implement a pollution prevention plan in accordance with the provisions of this subchapter.]

[(i) Any existing, new, or expanding CAFO, which is required to submit an application for registration or an application for an individual permit in accordance with this subchapter, may not commence operation of any waste management facilities or the construction of any facility that has the potential to emit air contaminants without first receiving authorization in accordance with this subchapter or in accordance with a commission order.]

[(j) Any CAFO which has existing authority under the Texas Clean Air Act (TCAA) does not have to meet the air quality criteria of this subchapter. Upon request, under the TCAA, §382.051, any CAFO which files an application, meets the requirements of §321.46 of this title (relating to Air Standard Permit Authorization), and obtains approval of such application in accordance with the provisions of this subchapter is hereby entitled to an air quality standard permit authorization under this subchapter in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Those CAFOs which would otherwise be required to obtain an air quality permit under Chapter 116 of this title, and which do not satisfy all of the requirements of this subchapter, shall apply for and obtain an air quality permit under Chapter 116 of this title in addition to any authorization required under this subchapter. Those animal feeding operations which are not required to obtain authorization under this subchapter may be subject to requirements under Chapter 116 of this title. Any change in conditions such that a person is no longer eligible for authorization under this section requires authorization under Chapter 116 of this title. No person may concurrently hold an air quality permit issued under Chapter 116 of this title and an authorization with air quality provisions under this subchapter for the same site. Any

application for a permit renewal, amendment, or transfer for any permit issued under the TCAA shall be reviewed and/or issued under the provisions of Chapter 116 of this title.]

[(k) Any animal feeding operation authorized under this subchapter which is a new major source, or major modification as defined in Chapter 116 of this title shall obtain a permit under Chapter 116 of this title.]

[(l) By written request to the executive director, the owner or operator of any facility described in subsection (a)(2) of this section may request a transfer of its authorization from an individual permit granted by the commission to a registration. Such transfer shall be processed in accordance with the provisions of §§321.35 - 321.37 of this title (relating to Procedures for Making Application for Registration; Notice of Application for Registration; and Actions on Applications for Registration). If approved, such transfer under this subsection shall include all special conditions or provisions from the existing individual permit, and in addition, shall not impose any additional conditions or other requirements unless there is substantial modification to the facility constituting a major amendment as defined by §305.62 of this title (relating to Amendment) or to address compliance problems with the facility or its operations in accordance with a commission order or amendment. If approved, transfer of authorization under this subsection will require compliance with the appropriate provisions of §§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). If approved, such transfer shall not require any changes to existing structural

measures which are documented to meet design and construction standards in effect at the time of installation.]

[(m) No person may concurrently hold both an individual permit or approved registration under this subchapter and an authorization under a CAFO general permit in accordance with the notice of intent requirements of the general permit for the same site.]

[(n) Any new CAFO located within one mile of Coastal Natural Resource Areas as defined by §33.203(1) of the Texas Natural Resources Code shall apply for and obtain an individual permit in accordance with §321.34 of this title. Any owner/operator who is required to obtain an individual permit under this subsection may not commence physical construction and/or operation of any waste management facilities without first having submitted an application and received a final effective permit.]

[(o) By written request to the executive director, the owner or operator of any facility described in §321.33(a)(2) of this title (relating to Applicability) and holding an unexpired authorization granted under Subchapter K of this chapter (relating to Concentrated Animal Feeding Operations) may request a transfer of their authorization to a registration under this subchapter. Written request shall be on the same form as required under §321.47 of this title and continued authorization shall be in accordance with the terms of §321.47 of this title. A Subchapter K authorization that has been specifically set aside by court order shall not be eligible for transfer under this subsection.]

[(p) Any owner or operator holding a current authorization issued at any time under this subchapter shall obtain an amendment under §321.34 or §321.35 of this title prior to any increase in the number of animals authorized for confinement or to making any modification to the facility which would cause a substantial change to the site plan or in the buffer distance determination as specified in §321.46 of this title. Nonsubstantial modifications may be made to the site plan or the pollution prevention plan submitted with the approved application without prior authorization from the commission. Substantial modifications are those that result in an increase in the number of animals authorized to be confined, a change in the required buffer zone or required lagoon capacity, a change in boundaries of the site plan, or a violation of any management practice or physical or operational requirement of this subchapter.]

[(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 located 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; and ]

[(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. Permit Applications.**

(a) Any operator of an animal feeding operation (AFO) who is required to operate under an individual water quality permit by the Texas Water Code, the executive director, or this subchapter shall submit an application in accordance with Chapter 281 of this title (relating to Applications Processing) and Chapter 305 of this title (relating to Consolidated Permits). The applicant shall provide such additional information in support of the application as may be necessary for the executive director to carry out an adequate administrative and technical review of the application.

(b) Applicants shall comply with §§305.41, 305.43, 305.44, and 305.47 of this title (relating to Applicability; Who Applies; Signatories to Applications; and Retention of Application Data) and §1.5(d) of this title (relating to Records of the Agency). Except as provided in subsection (c) of this section, §§305.61 - 305.68 of this title (relating to Applicability; Amendment; 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) apply to applications for water quality permits. Notice, public comment, and contested case hearings on applications shall be conducted in accordance with commission rules governing applicable individual water quality permit applications.

(1) Any permittee with an issued and effective individual water quality permit shall submit an application for renewal of the permit in accordance with the requirements of Chapter 281 and

Chapter 305 of this title, or shall submit a notice of intent (NOI) for a concentrated animal feeding operation general permit in accordance with the requirements of the CAFO general permit.

(2) If an individual water quality permit application or an NOI for a CAFO general permit has been submitted before the expiration date of the existing authorization, the terms and conditions of the existing permit continues in effect until final commission action on the permit application or until the CAFO qualifies for authorization under a CAFO general permit.

(3) A CAFO owner or operator who submits an NOI for a CAFO general permit for a new operation or significant CAFO expansion as defined by §321.32(48) of this title (relating to Definitions) shall comply with the public participation process detailed in the CAFO general permit. Expansions which are not considered significant only require the CAFO owner or operator to amend the pollution prevention plan and meet all the technical requirements of this subchapter and the permit or authorization.

(4) The executive director may renew an application for an individual water quality permit for a state-only CAFO without public notice or opportunity for public comment, public meeting, or contested case hearing if the application does not propose any change that constitutes a major amendment as defined in Chapter 305 of this title (relating to Consolidated Permits) or if the operation is not a major source as defined under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Renewal under this paragraph is allowed only if there

has been no related formal enforcement action against the facility during the last 36 months of the term of the individual water quality permit in which the commission determined that:

(A) a violation occurred that contributed to pollution of surface or groundwater, or an unauthorized discharge occurred, or a violation of §101.4 of this title (relating to Nuisance) occurred, or any violation of an applicable state or federal air quality control requirement occurred;

(B) such discharge or air emission was within the reasonable control of the permittee; and

(C) such discharge or air emission could have been reasonably foreseen by the permittee.

(5) For any application for renewal within an area specified in §321.32(17) of this title (relating to Definitions), the executive director will conduct an annual compliance inspection within 12 months of the date the executive director declares the application administratively complete.

(c) An operator shall submit a complete application within 90 days of notification from the executive director that an individual water quality permit is required under §321.33(b)(5) of this title (relating to Applicability and Required Authorizations).

(d) Permittees may amend their individual water quality permits in accordance with §305.62 of this title and §321.33(h) of this title (relating to Applicability and Required Authorizations), and must include all requested changes to the individual water quality permit application. The executive director will process a permit amendment application in accordance with all applicable requirements in Chapter 281 and Chapter 305 of this title.

(e) Any operator of an AFO who files an application for an individual water quality permit under this subchapter, or an amendment in accordance with §321.33(h) of this title, shall submit a complete application to the executive director, according to the provisions of this section including any other information as the executive director or the commission may require.

(f) Applications for an individual water quality permit under this section shall be made on forms prescribed by the executive director. The applicant shall submit an original completed application with attachments to the executive director at the commission headquarters in Austin, and one additional copy of the application with attachments to the appropriate commission regional office. At a minimum, the executive director will require the following information to be submitted, as it is applicable to the facility:

(1) information specified in §305.45 of this title (relating to Contents of Application for Permit);

(2) information specified in 40 Code of Federal Regulations (CFR) §122.21(i)(1), relating to application for a permit for a CAFO;

(3) a recharge feature certification, signed and sealed by a licensed Texas professional engineer, or a licensed Texas professional geoscientist, documenting the absence or presence of any natural or artificial recharge features identified on any tracts of land owned, operated, controlled, rented, or leased by the applicant and to be used as a part of a CAFO or land management unit.

(A) Documentation by the certifying party shall identify:

(i) the sources and methods used to identify the presence or absence of recharge features; and

(ii) the method or approach to be used to identify previously unidentified and undocumented recharge features that may be discovered during the time of construction;

(B) In preparing the recharge feature certification, the licensed Texas professional engineer or Texas professional geoscientist must conduct an on-site inspection and must review all pertinent records and maps maintained by the following entities or persons to locate any artificial recharge feature:

(i) Railroad Commission of Texas;

(ii) a Groundwater Conservation District, if applicable;

(iii) Texas Water Development Board;

(iv) the commission;

(v) Natural Resources Conservation Service (NRCS) and;

(vi) previous owner of site, if available.

(4) where the applicant documents the presence of recharge features on the tracts for which an application is being filed, the applicant shall submit a plan, signed and sealed by a, licensed Texas professional engineer, or licensed Texas professional geoscientist, that will prevent impacts to an aquifer from any recharge features present. The plan must include at least one of the following:

(A) provisions for the installation of the necessary and appropriate protective measures for each located recharge feature, including impervious cover, berms, buffer zones, or other equivalent protective measures, on the production area and land management units; or

(B) except as specified in §321.41 of this title (relating to Special Requirements for Discharges to a Playa), submission of a detailed groundwater monitoring plan covering all affected facilities and land application areas. At a minimum, the groundwater monitoring plan shall specify procedures to annually collect a groundwater sample from representative wells, have each sample analyzed for chlorides, nitrates, and total dissolved solids, and compare those values with background values for each well; or

(C) provisions for any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature and approved by the commission; and

(5) any information required by §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)) to document compliance with the air standard permit.

**[§321.34. Procedures for Making Application for an Individual Permit.]**

[(a) A concentrated animal feeding operation (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) 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) of this title. 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) All applications for permit renewal must be administratively and technically complete, meet all applicable technical requirements of this subchapter, and be in accordance with one of the following.]

[(1) An application to renew an individual permit for an animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of land application.]

[(2) Except as provided by §305.63(a)(3) of this title (relating to Renewals), an application for a renewal of an individual permit for a facility as described in §321.33(a)(2) of this title (relating to Applicability) may be granted by the executive director without public notice if it does not propose any change which constitutes a major amendment as defined in Chapter 305 of this title (relating to Consolidated Permits) or a major source as defined under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the permit in which the commission has determined that:]

[(A) a violation occurred that contributed to pollution of surface or groundwater, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating to Nuisance) has occurred or any violation of an applicable state or federal air quality control requirement has occurred; and ]

[(B) that such discharge or air emission violation was within the reasonable control of the permittee; and]

[(C) such discharge or air emission violation could have been reasonably foreseen by the permittee. In addition to the provisions of subparagraphs (A) - (C) of this paragraph, for any application for renewal of a permit within an area specified in the definition of Dairy Outreach Program areas in §321.32(11) of this title (relating to Definitions), an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.]

[(3) If the application for renewal does not meet all of the criteria in this subsection, then an application for renewal shall be filed in accordance with subsection (a) of this section.]

[(c) Each applicant shall pay an application fee as required by §305.53 of this title.]

[(d) A permittee submitting an application for renewal satisfying the criteria in subsection (b)(2) of this section will automatically be issued a notice of renewal for the existing permit by the executive director.]

[(e) Any permittee with an issued and effective individual permit shall submit an application for renewal at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall provide the permittee notice of deadline for the application for renewal at least 240 days before the permit expiration date. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.]

[(f) Notice provided by the executive director under subsection (e) of this section shall be sent by certified mail, return receipt requested.]

[(g) A facility owner or operator shall submit a complete application within 90 days of notification from the executive director that an individual permit is required.]

[(h) If an application requests an amendment as defined by §321.33(p) of this title of an existing individual permit, the application shall be filed and processed under this section.]

[(i) If a renewal application has been filed before the individual permit expiration date, the existing individual permit will remain in full force and effect and will not expire until action on the application for renewal is final.]

**§321.35. Fees.**

(a) Application fee. Each applicant for an individual water quality permit shall pay an application fee as required by §305.53 of this title (relating to Application Fee).

(b) Annual assessment fees. Each permittee shall pay a consolidated annual fee as required by Chapter 21 of this title (relating to Water Quality Fees).

**[§321.35. Procedures for Making Application for Registration.]**

[(a) A concentrated animal feeding operation (CAFO) that is not authorized under a rule, order, or permit of the commission 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) shall apply for and receive registration under this section or shall apply for an individual permit in accordance with the provisions of §321.34 of this title (relating to Procedures for Making Application for an Individual Permit). A person who requests a registration or renewal of such registration granted under this subchapter, or an amendment as defined in §321.33(p) of this title (relating to Applicability), shall submit a complete and accurate application to the executive director, according to the provisions of this section.]

[(b) Applicants shall comply with the applicable provisions of §§305.43, 305.44, and 305.47 of this title (relating to Who Applies; Signatories to Applications; and Retention of Application Data).]

[(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 and §321.48 of this title (relating to Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs)), a facility that 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 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 regional office. The completed application must be submitted to the executive director signed and notarized and with the following information:]

[(1) the verified legal status of the applicant;]

[(2) the payment of applicable fees;]

[(3) the signature of the applicant, in accordance with subsection (b) of this section;]

[(4) the maximum number of animals for which the facilities have been designed;]

[(5) a proposed site plan for the facility showing the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, the locations of all pens, lots, ponds, on-site and off-site land application areas, and any other types of control or retention facilities, and all adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site land application areas, including their name and address. As used in this subchapter, the term "land application area" does not apply to any lands not owned, operated, or controlled by the CAFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for land application;]

[(6) a county general highway map (with graphic scale clearly shown) to identify the relative location of the CAFO and at least a one-mile area surrounding the facility;]

[(7) one original (remainder in copies) United States Geological Survey 7 1/2-minute quadrangle topographic map or an equivalent high quality copy showing the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots, and control facilities, the location of all private water wells (abandoned or in use) and public wells and all springs, lakes, or ponds within one mile of the outer boundary of the retention facility and downstream of the facility;]

[(8) sections of the pollution prevention plan to be designated by the executive director. Prior to using wastewater retention facilities, documentation of liner certifications, signed, sealed, and dated by a licensed professional engineer or licensed professional geoscientist, shall be submitted (if applicable);]

[(9) a copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner/operator of any lands to be utilized under the proposed CAFO. This requirement does not apply to any lands not owned, operated, or controlled by the applicant for the purpose of off-site land application of manure wherein the manure is given or sold to others for beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure;]

[(10) a certification by a Natural Resources Conservation Service (NRCS) engineer, licensed professional engineer, or licensed professional geoscientist documenting the absence or presence of any recharge features identified on any tracts of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO. Documentation by the certifying party must identify the sources and/or methods used to identify the presence or absence of recharge features. The documentation must include the method or approach to be used to identify previously unidentified and/or undocumented recharge features that may be discovered during the time of construction. At a minimum, the records and/or maps of the following entities/agencies must be reviewed to locate any artificial recharge features:]

[(A) Railroad Commission;]

[(B) Groundwater District, if applicable;]

[(C) Texas Water Development Board;]

[(D) Texas Commission on Environmental Quality;]

[(E) NRCS;]

[(F) previous owner of site, if available; and]

[(G) on-site inspection of site with an NRCS engineer, licensed professional engineer, or licensed professional geoscientist;]

[(11) where the applicant cannot document the absence of recharge features on the tracts for which an application is being filed, the proposed site plan must also indicate the specific location of any and all recharge features found on any property owned, operated, or controlled by the applicant under the application as certified by an NRCS engineer, licensed professional engineer, or licensed professional geoscientist. The applicant shall also submit a plan, developed by an NRCS engineer or licensed professional engineer, to prevent impacts on any located recharge feature and associated groundwater formation. The plan may include the following:]

[(A) installation of the necessary and appropriate protective measures for each located recharge feature such as impervious cover, berms, or other equivalent protective measures covering all affected facilities and land application areas; or]

[(B) submission of a detailed groundwater monitoring plan prepared, certified, signed, sealed, and dated by a licensed professional geoscientist or licensed professional engineer covering all affected facilities and land application areas. At a minimum, the groundwater monitoring plan must specify procedures to annually collect a groundwater sample from representative wells, have each sample analyzed for chlorides, nitrates, and total dissolved solids, and compare those values with background values for each well; or]

[(C) any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature;]

[(12) area land use map (air quality only). This map shall identify the property line, the permanent odor sources and the distance and direction to any residences, animal feeding operations, businesses, public parks, or occupied structures within a one-mile radius of the permanent odor sources to show compliance with §321.46 of this title (relating to Air Standard Permit Authorization). The map shall include the north arrow and scale of map;]

[(13) the applicant shall indicate in the application the location and times where the application may be inspected by the public. Within 48 hours of receiving notice of administrative and

technical completeness, the applicant shall make a copy of the application and the entire pollution prevention plan available for public inspection at the applicant's place of business during normal business hours, Monday through Friday, and at a public place within the county where the proposed facility is to be located so that the copy may be made available for inspection at a public place during normal business hours. For the purposes of this section, normal business hours shall be at a minimum of: 9:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday allowing for the observance of state and/or federal holidays. Such places may include, but are not limited to, public libraries; district, county, or municipal offices; community recreation centers; or public schools;]

[(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; and]

[(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) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fee). An annual waste treatment inspection fee is also required of each registrant as required by §305.43 and §305.44 of this title. An annual Clean Rivers Program fee is also required as required under §21.3 of this title (relating to Fee Assessment). No fees under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) shall be required of an applicant for an authorization issued under this section.]

[(e) Each registrant shall comply with and is subject to the provisions of §§305.61, 305.64, and 305.33 - 305.68 of this title (relating to Applicability; Transfer of Permits; Permit Denial, Suspension, and Revocation; Revocation and Suspension upon Request or Consent; Action and Notice on Petition for Revocation or Suspension).]

[(f) Registrations approved under this subchapter shall be effective for a term not to exceed five years.]

[(g) (Air quality only). To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title.]

[(h) Registrations issued under §321.37 or §321.47 of this title (relating to Actions on Applications for Registration or Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization) shall expire five years after the effective date of these amendments (1999), and no new registrations shall be issued after that date. However, if the commission proposes to amend or readopt these rules prior to such expiration date, all registrations shall remain in effect until final commission action on the proposed amendment or readoption. An application for renewal of a registration under this section must be administratively and technically complete, meet all applicable technical requirements of this subchapter, and, except as otherwise provided in paragraphs (1) - (5) of this subsection, be processed according to §321.36 of this title (relating to Notice of Application for Registration) and §321.37 of this title. A registration for a facility described in §321.33(a)(2) of this title may be renewed, according to the following procedures.]

[(1) Except as provided by §305.63(a)(3) of this title (relating to Renewals), an administratively and technically complete application may be granted by the executive director without public notice if it does not propose any other change to the registration as approved. Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the registration in which the commission has determined that:]

[(A) a violation occurred that contributed to pollution of surface or groundwater, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating

to Nuisance) has occurred, or any violation of an applicable state or federal air quality control requirement has occurred; and]

[ (B) that such discharge or air emission violation was within the reasonable control of the registrant; and]

[ (C) such discharge or air emission violation could have been reasonably foreseen by the registrant. In addition to the provisions of subparagraphs (A) - (C) of this paragraph, for any application for renewal of a registration within an area specified in the definition of Dairy Outreach Program areas in §321.32(11) of this title, an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.]

[(2) Each applicant shall pay an application fee as required by §305.53 of this title.]

[(3) A registrant submitting an application for renewal of a registration satisfying the criteria in paragraph (1) of this subsection will automatically be issued a renewal for the existing registration by the executive director.]

[(4) If the application for renewal of a registration cannot meet all of the criteria in paragraph (1) of this subsection, then an application for renewal of the registration shall be filed in

accordance with subsection (a) of this section and processed in accordance with §321.36 and §321.37 of this title.]

[(5) Any registrant with an effective registration shall submit an application for renewal at least 180 days before the expiration date of the effective registration, unless permission for a later date has been granted by the executive director. The executive director shall provide the registrant notice of deadline for the application for renewal by certified mail, return receipt requested, at least 240 days before the registration expiration date. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing registration.]

**§321.36. Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs).**

(a) Applicability. These requirements apply to a concentrated animal feeding operation (CAFO) general permit, individual water quality permit, or other authorization issued by the commission for a large CAFO, medium CAFO, and small CAFO subject to the requirements of the Texas Pollutant Discharge Elimination System.

(b) Permits. A CAFO shall comply with §305.125 of this title (relating to Standard Permit Conditions) and all applicable permit conditions contained in commission rules. Requirements to provide for and ensure compliance with standards set by the rules of the commission and the laws of Texas shall be determined and included in an individual water quality permit on a case-by-case basis to

reflect the best method for attaining such compliance. Each permit shall contain terms and conditions as the commission determines necessary to protect human health and safety, and the environment.

(c) Control facility. A CAFO shall ensure that the control facility is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from the design rainfall event as described in §321.37 of this title (relating to Effluent Limitations for Discharges from Production Areas).

(d) Nutrient management plan (NMP).

(1) On or before December 31, 2006, the operator of a CAFO shall develop and implement a NMP certified in accordance with the Natural Resources Conservation Service 590 Practice Standard. The plan shall include site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients in the manure, litter, or wastewater.

(2) The CAFO operator shall create, maintain for five years, and make available to the executive director, upon request, a copy of the site-specific NMP and documentation of the implementation.

(3) Compliance with the requirements of this section and applicable requirements for the design and operation of a control facility, as described in §321.38 and §321.39 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations

(CAFOs) and Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)) constitute compliance with the provisions of 40 Code of Federal Regulations (CFR) §122.42(e)(1)(i) - (ix).

(e) Manure, litter, and wastewater management.

(1) At least one representative sample of wastewater and one representative sample of manure/litter shall be collected and analyzed each year for total nitrogen, total phosphorus, and total potassium. The results of these analyses shall be used in determining application rates for manure in conjunction with analysis of wastewater.

(2) If manure, litter, or wastewater is sold or given to other persons for off-site land application or disposal, the CAFO operator shall maintain a log of:

(A) the date of removal from the CAFO;

(B) the name and address of the recipient; and

(C) the amount, in wet tons, dry tons, or cubic yards of manure, litter, or wastewater.

(3) A single pickup truck load need not be recorded.

(4) The operator shall make the most recent nutrient analysis available to any recipient of manure, litter, or wastewater.

(f) Buffers for land management units (LMUs). A sinkhole shall be protected with a 100-foot buffer from manure, litter, and wastewater application. Alternatively, the CAFO may substitute a 35-foot wide vegetative buffer around a sinkhole where alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent to or better than the reductions that would be achieved by the 100-foot buffer.

(g) Soil sampling and testing.

(1) Initial sampling. Before commencing wastewater irrigation or manure/litter application on land owned, operated, controlled, rented, or leased by the CAFO operator, the operator shall collect and analyze at least one representative soil sample from each of the LMUs according to the following procedures. The CAFO operator is not required to collect soil samples or report on LMUs where manure, litter, or wastewater has not been applied during the preceding year. The CAFO operator must comply with the initial sampling requirement before resuming land application to such LMUs.

(2) Annual sampling. The CAFO operator shall annually collect soil samples for each LMU owned, operated, controlled, rented, or leased by the CAFO operator where manure, litter, or wastewater was applied during the preceding year.

(3) Sampling procedures. The operator shall employ sampling procedures using accepted techniques of soil science for obtaining representative samples and analytical results.

(A) Samples shall be collected using approved procedures described in the agency's publication "Soil Sampling for Nutrient Utilization Plans (RG-408)."

(B) Samples shall be collected by the operator or its designee and analyzed by a soil testing laboratory within the same 45-day time frame each year, except when crop rotations or inclement weather require a change in the sampling time frame.

(C) One composite sample shall be obtained for each soil depth zone per uniform soil type (soils with the same characteristics and texture) within each LMU.

(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores obtained from each of the following soil depth zones:

(i) Zone 1: zero to six inches (for an LMU where the manure is incorporated directly into the soil) or zero to two inches (for an LMU where the manure is not incorporated into the soil). Wastewater is considered to be incorporated. If a zero to two inch sample is required under this subsection, then an additional sample from the two to six inch soil depth zone shall be obtained in accordance with the provisions of this section; and

(ii) Zone 2: six to 24 inches.

(4) Laboratory analysis. The CAFO operator shall have a laboratory analysis of the soil samples performed for physical and chemical parameters to include: nitrate as nitrogen, extractable phosphorus (using - Mehlich III), potassium (extractable, parts per million (ppm)); sodium (extractable, ppm); magnesium (extractable, ppm); calcium (extractable, ppm); soluble salts/electrical conductivity (deciSiemens/meter (dS/m)) - determined from extract of 2:1 volume to volume (v/v) water/soil mixture; and soil water pH.

(h) Required inspections. The CAFO operator shall perform the routine inspections described in paragraphs (1) and (2) of this subsection to determine preventive maintenance and repair needs. Inspections shall include visual inspections and equipment testing to determine conditions that could cause breakdowns or failures resulting in discharge of pollutants to water in the state or the creation of a nuisance condition.

(1) CAFO operators shall conduct a daily inspection of all water lines, including drinking water and cooling water lines, located within the drainage area of the retention control structure (RCS).

(2) CAFO operators shall conduct a weekly inspection of all control facilities and equipment used during that week for land application of manure, litter, or wastewater. An inspection must include all storm water diversion devices, runoff diversion structures, and devices channeling

contaminated storm water to each RCS. The weekly inspection will note the level of liquid in each RCS as indicated by the depth marker required by subsection (k) of this section.

(i) Recordkeeping.

(1) The CAFO operator shall draft and maintain a report for five years in the pollution prevention plan to document the inspections and to report that appropriate action has been taken in response to deficiencies identified during any inspection required by subsection (h) of this section. A CAFO operator shall correct all the deficiencies within 30 days or shall document the factors preventing immediate correction.

(2) The CAFO operator shall maintain records describing mortality management practices implemented in accordance with subsection (l) of this section.

(3) The CAFO operator shall maintain documentation describing the sources of information, assumptions, and calculations used in determining the appropriate volume capacity and structural features of each RCS, including embankments and liners.

(4) The CAFO operator shall maintain documentation describing a discharge into water in the state including the date, time, volume of overflow, a copy of the notification(s) provided to the regional office, and sample analysis results associated with an RCS discharge.

(5) The CAFO operator shall must comply with the land application area recordkeeping requirements identified in 40 CFR §412.37 and §412.47. Compliance with §321.46 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting) constitutes compliance with this requirement.

(j) Annual report required. An annual report shall be submitted to the executive director's Office of Compliance and Enforcement, Enforcement Division, by February 15 of each year (for the reporting period of January 1 to December 31 of the previous year) from each CAFO authorized under a CAFO general permit or through an individual water quality permit in accordance with this subchapter. The report shall be submitted on forms prescribed by the executive director and shall include, but is not limited to, the following information:

(1) number and type of animals, whether in open confinement or housed under roof;

(2) estimated total manure, litter, and wastewater generated during the reporting period;

(3) total manure, litter, and wastewater land applied during the reporting period;

(4) total manure, litter, and wastewater transferred to other persons during the reporting period;

(5) total number of acres for land application under the control of the CAFO operator, including both the acres included in the NMP for the CAFO and the total number of acres used during the reporting period for land application;

(6) summary of discharges of manure, litter, or wastewater from the production area that occurred during the reporting period including dates, times, and approximate volume;

(7) a statement indicating that the NMP under which the CAFO is operating was developed and approved by a certified nutrient management specialist;

(8) a copy of the original soil analysis for each LMU, regardless of whether manure, litter, or wastewater has been applied;

(9) soil monitoring reports of all soil samples collected in accordance with the requirements of this subchapter;

(10) groundwater monitoring reports; and

(11) any other information requested by the executive director.

(k) Depth marker. A permanent depth marker that identifies the level of the design rainfall event shall be installed and maintained in the RCS. The marker shall be visible from the top of the levee.

(l) Carcass disposal. Carcasses shall be collected within 24 hours of death and properly disposed of within three days of death in accordance with Texas Water Code, Chapter 26; Texas Health and Safety Code, Chapter 361; and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) unless otherwise provided for by the commission. Animals must not be disposed of in any liquid manure or process wastewater system. Disposal of diseased animals shall also be conducted in a manner that prevents a public health hazard in accordance with Texas Agriculture Code, §161.004, and 4 TAC §31.3 and §58.31(b).

(m) Closure required. A closure plan must be developed by a CAFO operator when an RCS will no longer be used and when the CAFO ceases or plans to cease operation. For closure of a CAFO, a closure plan must be developed and submitted to the executive director when operation of the CAFO or an individual RCS terminates. The closure plan for the RCS must be developed using standards contained in the NRCS Practice Standard 360 (Closures of Waste Impoundments), as amended, and using the guidelines contained in the Texas Cooperative Extension / NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures), as amended. A CAFO shall maintain or renew its existing authorization and maintain compliance with the requirements of this subchapter until the facility has been closed.

**[\§321.36. Notice of Application for Registration.]**

[(a) Administrative and technical review.]

[(1) Applications for registration or major amendments to such registrations under this subchapter shall be reviewed by the executive director for administrative and technical completeness within 30 working days of receipt of the application by the executive director. Upon determination that the application contains the information and attachments required under this subchapter, the executive director shall declare that the application is administratively and technically complete.]

[(2) Within five working days of declaration of administrative and technical completeness, the executive director shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative and technical completeness which is suitable for publishing or mailing, under the requirements of subsection (c) of this section, and shall forward that statement to the applicant.]

[(b) Notice of application. The notice of application for registration and administrative and technical completeness shall contain the following information:]

[(1) the identifying number given the application for registration by the commission;]

[(2) the type of authorization being sought under the application;]

[(3) the name and address of the applicant;]

[(4) the date on which the application for registration was submitted;]

[(5) a brief summary of the information included in the application for registration, including, but not limited to, the general location of facilities and land application areas associated with the application, the proposed size of the facility, a description of the receiving water for any discharge, and the location where a copy of the application for registration may be reviewed by interested persons;]

[(6) the format for submission of a comment in accordance with this subchapter to the executive director regarding the application for registration; and]

[(7) the date, time, and place where all comments are to be received by the executive director in relation to the numbered application for registration, such comment period shall be 30 days from the actual date of publication.]

[(c) Publication.]

[(1) The applicant shall cause the notice of application for registration and administrative/technical completeness approved by the executive director to be published once in a newspaper regularly published, and generally circulated within the county and area wherein the

proposed facility is to be located, and within an adjoining county wherein any potential affected person may reside.]

[(2) The date of publication for notice of application for registration and administrative/technical completeness shall not be later than the date set by the chief clerk.]

[(3) The applicant is responsible for the cost of publication. The applicant shall notify the chief clerk verbally or by facsimile within 24 hours of the first available working day after the publication of the notice, and shall provide the chief clerk a certified copy of the publication, within 20 calendar days of the date established by the chief clerk for publication. If the applicant does not provide the chief clerk with the appropriate publisher's affidavit within 20 days of the date established by the executive director, the executive director shall cease processing and return the application.]

[(d) Application returned. If an application for registration is received which is not administratively/technically complete, the executive director shall notify the applicant of the deficiencies prior to expiration of the review period (30 working days) by certified mail return receipt requested. If the additional requested information is received within 30 days of receipt of the deficiency notice, the executive director will evaluate the information within eight working days and, where applicable, shall prepare a statement of receipt of the application for registration and declaration of administrative/technical completeness in accordance with subsection (a) of this section. If the requested information is not submitted by the applicant within 30 days of the date of receipt of the deficiency notice, the executive director shall return the incomplete application to the applicant.]

[(e) Notice by mail.]

[(1) The chief clerk will transmit the notice of application for registration and administrative/technical completeness by first-class mail to persons listed in paragraph (2) of this subsection and to other persons who, in the judgment of the executive director, may be affected. The applicant is responsible for the cost of required notice. A record on file with the chief clerk which includes the list of persons to whom notice was mailed and the date of mailing, signed by a person with personal knowledge that the mailout occurred, shall create a presumption that notice was mailed in accordance with this section.]

[(2) the notice shall be mailed by the chief clerk to the following:]

[(A) the potentially affected landowners named on the site plan submitted with the application;]

[(B) the mayor and health officials of the city or town in which the facility is or will be located or in which waste is or will be disposed of;]

[(C) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;]

[(D) the Texas Department of Health;]

[(E) the Texas Parks and Wildlife Department;]

[(F) the applicant;]

[(G) persons who request to be put on the mailing list, including participants in past commission proceedings for the facility who have submitted a written request to be put on the mailing list;]

[(H) state and federal agencies for which notice is required in 40 Code of Federal Regulations §124.10(c);]

[(I) for applications regarding operations located in an area specified in the definition of Dairy Outreach Program Areas in §321.32 of this title (relating to Definitions), notice shall be mailed to the river authority whose jurisdictional watershed includes that location; and]

[(J) for applications regarding operations located in an area within the jurisdiction of a groundwater district, notice shall be mailed to such district.]

[(3) the date of mailing for a notice of application for registration and administrative/technical completeness shall be established by the chief clerk.]

[(4) The notice shall include instructions regarding the requirements contained in §321.37(a) of this title (relating to Public Comment on Applications for Registration) providing the manner and timeframe for the submission of comments to the proposed application for registration.]

**§321.37. Effluent Limitations for Discharges from Production Areas.**

(a) The following requirements will be applied in a permit or authorization issued by the commission, as applicable to animal feeding operations.

(b) The effluent limitations promulgated by the United States Environmental Protection Agency applicable to duck concentrated animal feeding operations (CAFOs), including 40 Code of Federal Regulations (CFR) §§412.20 - 412.26, as amended, are adopted by reference.

(c) Except as provided by this section, there shall be no discharge of manure, litter, or wastewater from a poultry (chickens and turkeys), swine, or veal calf CAFO production area that is subject to the new source performance standards in 40 CFR §412.46. The operator of a poultry (chickens and turkeys), swine, or veal calf CAFO subject to the new source performance standards in 40 CFR §412.46 shall design, construct, operate, and maintain retention control structures (RCSs) to contain all wastewater including the runoff and direct precipitation from the 100-year, 24-hour rainfall event for the location of the facility as required by the federal effluent guidelines.

(d) Except as provided by this section, for all other CAFOs, there shall be no discharge of manure, litter, or wastewater from a CAFO production area. The operator of the CAFO shall design, construct, operate, and maintain RCSs to contain all wastewater including the runoff and direct precipitation from the 25-year, 24-hour rainfall event for the location of the facility.

(e) A discharge that is the result of a chronic or catastrophic rainfall event, or the result of catastrophic conditions, from an RCS that has been properly designed, constructed, operated, and maintained is allowed.

(f) Voluntary alternative performance standards may be established in an individual water quality permit for a cattle (other than veal calves) or dairy CAFO, when requested by a permit applicant. These standards may be established as effluent limitations in lieu of the requirements of subsection (d) of this section, so long as they are not in conflict with other requirements of this subchapter or other requirements of the commission. Voluntary alternative performance standards shall be consistent with the requirements of 40 CFR §412.31(a)(2).

(g) Voluntary superior environmental performance standards may be established in an individual water quality permit for a swine, poultry (chickens and turkeys), or veal calf CAFO, when requested by a permit applicant. These standards may be established as effluent limitations in lieu of the requirements of subsection (c) of this section, so long as they are not in conflict with other requirements of this subchapter or other requirements of the commission. Voluntary superior environmental performance standards shall be consistent with the requirements of 40 CFR §412.46(d).

**[§321.37. Actions on Applications for Registration.]**

[(a) Public comment on applications for registrations. A person may provide the commission with written comments on any application for registration for which notice has been issued under this subchapter. The executive director shall review any written comments received within 30 days of mailing the notice. Only written comments received within the 30-day period must be considered. The written information received will be utilized by the executive director in determining what action to take on the application for registration, pursuant to subsection (b) of this section.]

[(b) The executive director shall, after review of any application for registration, approve or deny it in whole or in part. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for amendment of any existing registration. In considering an application for registration, the executive director will consider all relevant requirements of this subchapter and consider all information pertaining to those requirements timely received by the executive director regarding the application for registration. The executive director may not approve an application for registration by a facility that is required to obtain an individual permit under Texas Water Code, §26.0286. The written determination on any application for registration, including any authorization granted, shall be mailed by the Office of Chief Clerk to the applicant upon the decision of the executive director. At the same time the executive director's decision is mailed to the applicant, a copy or copies of this decision shall also be mailed by the Office of Chief Clerk to all persons who timely submitted written information on the application, as described in

subsection (a) of this section. The written determination of the executive director shall include a response to all significant comments received during the 30-day comment period.]

[(c) Motion for reconsideration. The applicant or any person submitting comments in accordance with subsection (a) of this section may file with the chief clerk a motion for reconsideration, under the procedures of §50.39(b) - (f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application. Any person who was entitled to but not given proper notice of an application and who subsequently did not submit comments within the 30-day comment period may file a motion for reconsideration.]

**§321.38. Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).**

(a) Purpose. The purpose of this section is to describe the control facility design requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations under this subchapter.

(b) Well buffers. Except as provided by subsection (c) of this section, the control facility of an animal feeding operation (AFO) shall be separated from a well by ensuring a minimum buffer zone, as described in this subsection. An AFO shall not locate a new retention control structure (RCS) or holding pen within the required well buffer zones:

(1) public drinking water supply wells - 500 feet;

(2) drinking water wells used for private water supply - 150 feet; or

(3) water wells used exclusively for agriculture irrigation - 100 feet.

(c) Buffer variance. A CAFO operating under an existing authorization may continue the operation and use of any existing holding pens and RCSs located within the required well buffer zones provided they are in accordance with the recharge feature evaluation and certification required under §321.34(f)(3) of this title (relating to Permit Applications). Documentation supporting variances of the

buffer zones that were previously authorized shall be kept on site and made available to agency personnel upon request.

(d) 100-year flood plain. All control facilities, including holding pens and RCSs, shall be located outside of the 100-year flood plain, as defined in Chapter 301 of this title (relating to Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements), unless the facility is protected from inundation and damage from a 100-year, 24-hour rainfall event.

(e) RCS design. The following design requirements apply to any AFO, including any CAFO.

(1) The design of a control facility shall include measures that will be used to minimize entry of uncontaminated runoff into RCSs.

(2) Any AFO constructing a new, or modifying an existing, RCS shall ensure that the design specifications and completed construction specifications are certified by a licensed Texas professional engineer. The failure to obtain the certifications or to maintain records verifying the certifications is a violation of this subchapter.

(3) Except as provided in this subsection, each RCS, at a minimum, shall be designed and constructed in accordance with the technical standards developed by the Natural Resources Conservation Service (NRCS), American Society of Agricultural Engineers, American Society of Civil Engineers, or American Society of Testing Materials that are in effect at the time of construction.

Where site-specific variations are warranted, a licensed Texas professional engineer shall document these variations and their appropriateness to the design.

(4) Any existing RCS that has been properly maintained and has no apparent structural problems or leakage is considered to be properly designed and constructed, provided that any required documentation was completed in accordance with the requirements at the time of construction. If no documentation exists, the ability of the RCS to provide protection equivalent to that required under this section must be certified by a licensed Texas professional engineer.

(5) Any RCS demonstrated to have been built in accordance with site-specific NRCS plans and specifications is considered to be in compliance with the design and capacity requirements of this subchapter provided that:

(A) the site-specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.); and

(B) the RCS is operated and maintained in accordance with NRCS requirements.

(6) The production area of a new or expanding AFO shall not be constructed in any stream, river, lake, wetland, or playa, except as provided in §321.41 of this title (relating to Special Requirements for Discharges to a Playa).

(7) The design plan must include documentation of the sources of information, assumptions, and calculations used in determining the appropriate volume capacity of the retention control structures (RCSs). The volume must include design rainfall event runoff and normal operating capacity requirements in accordance with subparagraphs (A) and (B) of this paragraph or design rainfall event runoff and evaporation systems in accordance with subparagraphs (A) and (C) of this paragraph.

(A) Design rainfall event runoff.

(i) New source swine, veal, or poultry (chickens and turkeys) CAFOs.

Any swine, veal, or poultry (chickens and turkeys) CAFO subject to the new source performance standards in 40 Code of Federal Regulations §412.46 shall have an RCS designed and constructed to meet or exceed the capacity required to contain the runoff and direct precipitation from the 100-year, 24-hour rainfall event.

(ii) All other AFOs. All other AFOs shall have an RCS designed and constructed to meet or exceed the capacity required to contain the runoff and direct precipitation from the 25-year, 24-hour rainfall event, except as required by §321.42(c) of this title (relating to Requirements Applicable to the Major Sole-Source Impairment Zone).

(B) Design capacity requirements for systems using irrigation.

(i) The volume capacity of the RCS shall be designed for the authorized number of animals to meet the demands of a hydrologic needs analysis (water balance) that demonstrates the irrigation water requirements for the cropping system maintained on the land management unit(s) (LMU(s)).

(ii) Precipitation inputs to the water balance shall be the average monthly precipitation reported in a National Weather Service current publication.

(iii) The consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the water balance.

(iv) The maximum required storage value calculated by the water balance shall not encroach on the storage volume required under subparagraph (A) of this paragraph.

(v) Wastewater application rates used in the water balance shall not induce uncontrolled runoff or create tailwater that causes a discharge.

(vi) Any other relevant volume needed in the water balance, including any required under the air standard permit in §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)).

(C) Design requirements for evaporation systems. Evaporation systems shall be designed:

(i) to withstand a ten-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic). In any month in which a catastrophic rainfall event occurs, the water balance shall replace such an event with not less than the long-term average rainfall for that month as determined by a water balance; and

(ii) to maintain sufficient volume to contain rainfall and rainfall runoff from the rainfall event as required by subparagraph (A) of this paragraph without overflow. The depth for this volume must be at least one vertical foot allocated within the RCS above the volume required in clause (i) of this subparagraph.

(f) Dewatering system. An irrigation system or other liquid removal system used by an AFO must be designed to ensure that the system is capable of dewatering the RCSs on a regular schedule.

(g) RCS embankment and liner design. A permit or authorization shall identify required design specifications for all new construction and for all structural modifications of RCS embankments.

(1) The design specifications must describe standards for the quality of soils used, lift thickness and density at optimum moisture content, procedures and minimum requirements for liner and embankment compaction testing, and spillway construction.

(2) Each RCS must have a minimum of two vertical feet of materials equivalent to those used at the time of design and construction between the top of the embankment and the structure's spillway. RCSs without spillways must have a minimum of two vertical feet between the top of the embankment and the required storage capacity, including any additional storage required by an alternative standard.

(3) The operator shall ensure site-specific documentation is prepared that shows that no significant hydrologic connection exists between the contained wastewater and water in the state. Where the operator cannot document that no significant hydrologic connection exists, RCSs must have a liner consistent with the requirements of this subsection.

(A) Documentation must show that there will be no significant leakage from the RCS; or that any leakage from the RCS will not migrate to water in the state. A permit or authorization will require documentation of the lack of hydrologic connection certified by a licensed Texas professional engineer or licensed Texas professional geoscientist and must include information on the hydraulic conductivity tested at the optimum moisture content and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.

(B) If no significant leakage would result from the use of in-situ materials is claimed, documentation that leakage will not migrate to waters in the state must, at a minimum, include maps showing groundwater flow paths, or that the leakage enters a confined environment. A permit or authorization will require a written determination by an NRCS engineer, or a licensed Texas

professional engineer or a licensed Texas professional geoscientist that a liner is not needed to prevent a significant hydrologic connection between the contained wastewater and waters in the state will be considered documentation that no significant hydrologic connection exists.

(C) A permit or authorization will allow the consideration of site-specific conditions in the design and construction of liners. However, the permit or authorization will identify that where no site-specific assessment has been done by a licensed Texas professional engineer or licensed Texas professional geoscientist, the liner shall be constructed and documented to have hydraulic conductivities no greater than  $1 \times 10^{-7}$  centimeters per second (cm/sec), with a thickness of 1.5 feet or greater or its equivalency in other materials. Where a liner is installed to prevent hydrologic connection, the permit shall require the operator to maintain the liner to inhibit infiltration of wastewaters.

(D) A permit or authorization shall include provisions whereby the executive director may, upon written notice, require the operator to install a leak detection system or monitoring well(s), based upon a determination that significant potential exists for the contamination of water in the state or drinking water.

(E) Documentation of lack of hydrologic connection, liner and capacity certifications by a licensed Texas professional engineer or licensed Texas professional geoscientist must be completed for each RCS and kept on site.

(h) Manure storage. The AFO operator shall provide manure storage capacity based upon manure and waste production, land availability, and the NRCS Field Office Technical Guide or equivalent standards. When manure is stockpiled, it shall be stored in a well-drained area with no ponding of water, and the top and sides of stockpiles shall be adequately sloped to ensure proper drainage. Runoff from manure storage piles must be retained on site. If the manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the manure areas must be located within the drainage area of the RCS and accounted for in the design calculations of the RCS.

**[§321.38. Proper CAFO Operation and Maintenance.]**

[The facilities covered under this subchapter are required to document all Best Management Practices (BMPS) used to comply with all applicable waste and wastewater discharge and air emission limitations in this subchapter. Such documentation shall be included in the Pollution Prevention Plan (PPP) outlined in this subchapter and shall be made available to the executive director upon request. Where applicable, equivalent and applicable measures contained in a site specific animal waste management plan prepared by the Natural Resource Conservation Service (NRCS), may be substituted for the BMPs and PPP requirements in this subchapter. Where provisions in the NRCS plan are substituted for applicable BMPS or portions of the PPP, the PPP must refer to the appropriate section of the NRCS plan. If the PPP contains reference to the NRCS Plan, a copy of the NRCS plan must be kept on site.]

**§321.39. Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).**

(a) Purpose. The purpose of this section is to describe the control facility operational requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter.

(b) Retention control structure (RCS) operation and maintenance. A CAFO using an RCS for storage and treatment of storm water, sludge, or process-generated wastewater, including liquid manure handling systems, shall ensure that the required capacity in the RCS is available to contain rainfall and rainfall runoff from the required rainfall event.

(1) The operator shall restore such capacity after each rainfall event or accumulation of manure, sludge, or process-generated wastewater that reduces such capacity, when conditions are favorable for irrigation. Favorable conditions shall be when the soil moisture level decreases so that irrigation will not cause runoff.

(2) The normal operating wastewater level in the RCS shall be maintained within the design of the RCS. If the water level in the RCS encroaches into the storage volume reserved for the design rainfall event (25-year or 100-year), the operator must document the conditions that resulted in this occurrence. As soon as irrigation is not prohibited, the CAFO operator shall irrigate until the water level is at or below the design rainfall level.

(3) If an RCS is in danger of imminent overflow from chronic or catastrophic rainfall or catastrophic conditions, then the CAFO operator shall take reasonable steps to irrigate wastewater to land management units (LMUs) only to the extent necessary to prevent overflow from the RCS. If irrigation results in a discharge from an LMU, the CAFO operator shall collect samples from the edge of the LMU where the discharge occurs for the parameters identified in §321.44(b)(1) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Notification Requirements). The operator shall orally notify the appropriate regional office within 24 hours of beginning irrigation under this provision and in writing within 14 working days.

(4) A rain gauge capable of measuring the required rainfall event shall be installed and properly maintained.

(5) The CAFO operator shall ensure liners and embankments are protected from animals by fences or other protective devices. No tree shall be allowed to grow such that the root zone would intrude or compromise the structure of the liner.

(c) Sludge. The CAFO operator shall monitor sludge accumulation and depth in an RCS, as necessary, based upon the design sludge storage volume in the RCS.

(1) Sludge shall be removed from RCSs in accordance with the design schedule for cleanout to prevent the accumulation of sludge from exceeding the designed sludge volume of the structure.

(2) The operator shall provide written notice to the appropriate regional office of the commission as soon as the RCS cleaning is scheduled, but not less than ten days before cleaning. The operator shall also provide written verification of completion to the same regional office within five days after the cleaning has been completed. This paragraph does not apply to cleaning of solid separators or settling basins. Removal of sludge shall be conducted during favorable wind conditions that carry odors away from nearby receptors. Any increase in odors associated with a properly managed cleanout under this subsection will be taken into consideration by the executive director when determining compliance with the provisions of this subchapter.

(d) Spill prevention and recovery. The CAFO operator shall develop written procedures for spill prevention and recovery for all toxic pollutants, including pesticides and herbicides, used at a CAFO. The operator shall prevent the discharge of pesticide- and herbicide-contaminated water into surface water in the state. There shall be no disposal of herbicides, pesticides, solvents, or heavy metals, or of spills or residues from storage or application equipment or containers, into RCSs.

(e) Storage of waste. A permit or authorization will establish requirements for the temporary storage of manure, litter, or sludge not to exceed 30 days, and requirements for permanent storage for more than 30 days. If the manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the manure areas must be located within the drainage area of the RCS and accounted for in the design calculations of the RCS.

(f) Composting. Composting on site at a CAFO shall be performed in accordance with Chapter 332 of this title (relating to Composting). CAFOs may compost waste generated on site, including manure, litter, bedding, feed, and dead animals. In accordance with Chapter 332 of this title, a CAFO operator may add agricultural products to provide an additional carbon source or bulking agent to aid in the composting process. If the compost areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the compost areas must be located within the drainage of the RCS and must be shown on the site plan and accounted for in the design calculations of the RCS.

(g) Maintenance of animals.

(1) Animals confined at the CAFO shall be restricted from coming into direct contact with surface water in the state through the use of fences or other controls.

(2) A CAFO that maintains animals in pastures must maintain crops, vegetation, forage growth, or postharvest residues in the normal growing season, excluding the feed and water trough areas and open lots designated on the site map.

**[§321.39. Pollution Prevention Plans.]**

(a) A pollution prevention plan shall be developed for each concentrated animal feeding operation (CAFO) covered under this subchapter. Pollution prevention plans shall be prepared in

accordance with good engineering practices and shall include measures necessary to limit the discharge of pollutants to waters in the state. The plan shall describe and ensure the implementation of practices which are to be used to assure compliance with the limitations and conditions of this subchapter. The plan shall identify a specific individual(s) at the facility who is responsible for development, implementation, maintenance, and revision of the pollution prevention plan. The activities and responsibilities of the pollution prevention personnel shall address all aspects of the facility's pollution prevention plan.]

[(b) Where a Natural Resources Conservation Service (NRCS) plan has been prepared for the facility, the pollution prevention plan may refer to the NRCS plan when the NRCS plan documentation contains equivalent requirements for the facility. When the operator uses an NRCS plan as partial completion of the pollution plan, the NRCS plan must be kept on site. Design and construction criteria developed by the NRCS can be substituted for the documentation of design capacity and construction requirements (see subsection (f) of this section) of the pollution prevention plan provided the required inspections logs and water level logs in subsection (f)(3) and (11) of this section are kept with the NRCS plan. Waste management plans developed by the NRCS can be substituted for the documentation of application rate calculations in subsection (f)(19) and (24) of this section. NRCS Waste Management Plans which have been prepared since January 1, 1989 are considered by the NRCS to contain adequate management practices. To insure the protection of water quality, the NRCS has determined that NRCS plans prepared prior to 1989 must be submitted for renewal with the NRCS or a waste management professional before December 1995. NRCS has determined that all plans should be reviewed every five years to insure proper management of wastes.]

[(c) The plan shall be signed by the operator or other signatory authority in accordance with §305.44 of this title (relating to Signatories to Applications), and be retained on site. The plan shall be updated as appropriate.]

[(d) Upon completion of a plan review, the executive director may notify the operator at any time that the plan does not meet one or more of the minimum requirements of this subchapter. After such notification from the executive director, the operator shall make changes to the plan within 90 days after such notification unless otherwise provided by the executive director.]

[(e) The operator shall amend the plan prior to any change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters in the state or if the pollution prevention plan proves to be ineffective in achieving the general objectives of controlling pollutants in discharges from CAFOs.]

[(f) The plan must include, at a minimum, the following items.]

[(1) Each plan shall provide a description of potential pollutant sources. Potential pollutant sources include any activity or material that may reasonably be expected to add pollutants to waters in the state from the facility. An evaluation of potential pollutant sources shall identify the types of pollutant sources, provide a description of the pollutant sources, and indicate all measures that will be used to prevent contamination from the pollutant sources. The type of pollutant sources found at any particular site varies depending upon a number of factors, including, but not limited to: site location,

historical land use, proposed facility type, and land application practices. The evaluation shall encompass all land that will be used as part of the CAFO as indicated in the site plan. Each potential pollutant source must be identified in the plan. A thorough site inspection of the facility is recommended to ensure that all sources have been identified. Potential pollutant sources found at CAFO facilities include, but are not limited to, the following: manure; sludge; wastewater; dust; silage stockpiles; fuel storage tanks; pesticide storage and applications; lubricants; disposal of any dead animals associated with production at the CAFO; land application of waste and wastewater; manure stockpiling; pond clean-out; vehicle traffic; and pen clean-out. Each plan shall include:]

[(A) a site plan/map, or topographic map indicating, an outline of the property that will be used in the waste generation and utilization activities of the CAFO area; each existing structural control measure to reduce pollutants in wastewater and precipitation runoff; and surface water bodies;]

[(B) identification of the specific location of any recharge features identified on any tracts of land planned to be utilized under the provisions of this subchapter. In addition, the plan should also locate and describe the function of all measures installed to prevent impacts to identified recharge features;]

[(C) a list of any significant spills of these materials at the facility after September 18, 1998, or for new facilities, since date of operation; and]

[(D) all existing sampling data.]

[(2) The pollution prevention plan for each facility shall include a description of management controls appropriate for the facility, and the operator must implement such controls. The appropriateness and priorities of any controls shall reflect the identified sources of pollutants at the facility.]

[(3) The plan shall include the location and a description of structural controls. Structural controls shall be inspected, by those individuals identified in the pollution prevention plan as responsible for development, implementation, maintenance, and revision of the plan, at least four times per year for structural integrity and maintenance. The plan shall include dates for inspection of the retention facility, and a log of the findings of such inspections. The appropriateness of any controls shall reflect the identified sources of pollutants at the facility.]

[(4) The plan must include documentation of the assumptions and calculations used in determining the appropriate volume capacity of the retention facilities. In addition to the 25-year, 24-hour rainfall, the volume capacity of the retention facility shall be designed to meet the demands of a hydrologic needs analysis (water balance) which demonstrates the irrigation water requirements for the cropping system maintained on the wastewater application site(s). Precipitation inputs to the hydrologic needs analysis (water balance) shall be the average monthly precipitation taken from an official source such as the "Climatic Atlas of Texas," LP-192, published by the Texas Department of Water Resources, dated December, 1983, or the most recent edition, or successor publication. The

consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the hydrologic needs analysis (water balance). The following volumes shall be considered in determining the analysis:]

[(A) the runoff volume from all open lot surfaces;]

[(B) the runoff volume from all areas between open lot surfaces that is directed into the retention facilities;]

[(C) the rainfall multiplied by the area of the retention and waste basin;]

[(D) the volume of rainfall from any roofed area that is directed into the retention facilities;]

[(E) all waste and process generated wastewater produced during a 21-day, or greater, period;]

[(F) the estimated storage volume for a minimum one year of sludge accumulation;]

[(G) the storage volume required to contain all wastewater and runoff during periods of low crop demand;]

[(H) the evaporation volume from retention facility surfaces;]

[(I) the volume applied to crops in response to crop demand;]

[(J) the minimum treatment volume required for waste treatment, if treatment lagoon; and/or]

[(K) any additional storage volume required as a safety measure as determined by the system designer.]

[(5) The maximum required storage value calculated by the hydrologic analysis requirements shall not encroach on the storage volume required for the 25-year, 24-hour rainfall event. Wastewater application rates utilized in the hydrologic needs analysis (water balance) shall not induce runoff or create tailwater.]

[(6) In addition, the retention facility shall include a top freeboard of not less than two feet. Freeboard shall account for settlement and slope stability of the materials used at the time of design and construction.]

[(7) (Air quality only). A lagoon in a single lagoon system and a primary lagoon in a multi-stage lagoon system shall be designed to maintain the necessary treatment volume or surface area as calculated using the manure production data (mean plus one standard deviation) published by

American Society of Agricultural Engineers (ASAE) standards D384.1, dated June, 1988, and applicable updates to comply with anaerobic lagoon design criteria as established by ASAE standards EP-403.2, dated December, 1992, and applicable updates, or other site-specific data documented in the pollution prevention plan.]

[(8) Evaporation systems shall be designed to withstand a ten-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic), as determined by a hydrologic needs analysis (water balance), and sufficient freeboard (not less than one foot) shall be maintained to dispose of rainfall and rainfall runoff from the 25-year, 24-hour rainfall event without overflow. In the hydrologic needs analysis determination, in any month in which a catastrophic event occurs, the analysis shall replace such an event with not less than the long-term average rainfall for that month.]

[(9) Site-specific information should be used to determine retention capacity and land application rates. All site-specific information used must be documented in the pollution prevention plan.]

[(10) The plan shall include a description of the design standards for the retention facility embankments. The following minimum design standards are required for construction and/or modification of a retention facility.]

[(A) Soils used in the embankment shall be free of foreign material such as trash, brush, and fallen trees.]

[(B) The embankment shall be constructed in lifts or layers no more than six inches thick and compacted at optimum moisture content.]

[(C) Embankment construction must be accompanied by compaction testing and certified to be in accordance with NRCS, Corps of Engineers, Bureau of Reclamation, or American Society of Civil Engineers (ASCE) design standards. Compaction tests must be certified by a licensed professional engineer.]

[(D) All embankment walls shall be stabilized to prevent erosion or deterioration.]

[(11) The plan must include a schedule for liquid waste removal. A date log indicating weekly inspection of wastewater level in the retention facility, including specific measurement of wastewater level will be kept with the plan. Retention facilities shall be equipped with either irrigation or evaporation or liquid removal systems capable of dewatering the retention facilities. Operators using pits, ponds, tanks, or lagoons for storage and treatment of storm water, manure, and process generated wastewater, including flush water waste handling systems, shall maintain in their wastewater retention facility sufficient available capacity to contain rainfall and rainfall runoff from a 25-year, 24-hour rainfall event. The operator shall restore such capacity to store all runoff from a 25-year, 24-hour rainfall event after any rainfall event or accumulation of wastes or process generated wastewater which reduces such capacity, weather permitting. Equipment capable of dewatering the wastewater retention

structures of waste and/or wastewater shall be available whenever needed to restore the capacity required to accommodate the rainfall and runoff resulting from the 25-year, 24-hour rainfall event.]

[(12) A permanent marker (measuring device) shall be maintained in the wastewater retention facilities to show the following: the volume required for a 25-year, 24-hour rainfall event; and the predetermined minimum treatment volume within any treatment pond. The marker shall be visible from the top of the levee. At no time shall a treatment lagoon at a CAFO that is operated under an air quality authorization be dewatered to a level below the predetermined treatment volume, except for cleanout periods or periods where the net effect of evaporation and rainfall would require the addition of fresh water to maintain the treatment volume without pumping fresh groundwater from an aquifer.]

[(13) (Air quality only). The primary lagoon in a multi-stage lagoon system shall be designed and operated so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. Where practical, any contaminated runoff should be routed around the primary lagoon into the secondary lagoon.]

[(14) A rain gauge shall be kept on site and properly maintained. A log of all measurable rainfall events shall be kept with the pollution prevention plan.]

[(15) Concentrated animal feeding operations constructing a new or modifying an existing wastewater retention facility shall insure that all construction and design is in accordance with

good engineering practices. Where site-specific variations are warranted, the operator must document these variations and their appropriateness to the plan. Existing facilities which have been properly maintained and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site-specific NRCS plans and specifications will be considered to be in compliance with the design and capacity requirements of this subchapter if the site-specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.). All retention structure design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The operator must use those standards that are current at the time of construction.]

[(16) The operator shall include in the plan, site-specific documentation that no significant hydrologic connection exists between the contained wastewater and waters in the state. Where the operator cannot document that no significant hydrologic connection exists, the ponds, lagoons, and basins of the retention facilities must have liners that will prevent the potential contamination of surface waters and groundwaters.]

[(A) The operator can document lack of hydrologic connection by either: documenting that there will be no significant leakage from the retention structure; or documenting that any leakage from the retention structure would not migrate to waters in the state. This documentation shall be certified by an NRCS engineer, licensed professional engineer, or licensed professional geoscientist and must include information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.]

[(B) For documentation of no significant leakage, in-situ materials must, at a minimum, meet the minimum criteria for hydraulic conductivity and thickness as described in this section. Documentation that leakage will not migrate to waters in the state must include maps showing groundwater flow paths, or must show that the leakage enters a confined environment. A written determination by an NRCS engineer, licensed professional geoscientist, or a licensed professional engineer that a liner is not needed to prevent a significant hydrologic connection between the contained wastewater and waters in the state will be considered documentation that no significant hydrologic connection exists.]

[(17) Site-specific conditions must be considered in the design and construction of liners. NRCS liner requirements or liners constructed and maintained in accordance with NRCS design specifications in Appendix 10d of the Agricultural Waste Management Handbook (or its current equivalent) shall be considered to prevent hydrologic connections that could result in the contamination of waters in the state. Liners for retention structures must be constructed in accordance with good engineering practices. Where no site-specific assessment has been done by an NRCS engineer, licensed professional engineer, or licensed professional geoscientist, the liner must be constructed to have a hydraulic conductivity no greater than  $1 \times 10^{-7}$  centimeters per second, with a thickness of 1.5 feet or greater or its equivalent in other materials.]

[(18) Where a liner is installed to prevent hydrologic connection, the operator must maintain the liner to inhibit infiltration of wastewaters. Liners must be protected from animals by fences or other protective devices. No tree shall be allowed to grow within the potential distance of the

tree's root zone. Any mechanical or structural damage to the liner must be evaluated by an NRCS engineer or a licensed professional engineer within 30 days of the damage. Documentation of liner maintenance must be kept with the pollution prevention plan. The operator shall have an NRCS engineer, licensed professional engineer, or licensed professional geoscientist review the documentation and do a site evaluation every five years. If notified by the executive director that significant potential exists for the contamination of waters in the state or drinking water, the operator shall install a leak detection system or monitoring well(s) in accordance with that notice. Documentation of compliance with the notification must be kept with the pollution prevention plan, as well as all sampling data. In the event monitoring well(s) are required, the operator must sample each monitor well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the pollution prevention plan, and compare the analytical results to the baseline data. If a 10% deviation in concentration of any of the sampled constituents is found, the operator must notify the executive director within 30 days of receiving the analytical results. Data from any monitoring wells must be kept on site for three years with the pollution prevention plan. The first year's sampling shall be considered the baseline data and must be retained on site for the life of the facility unless otherwise provided by the executive director.]

[(19) The pollution prevention plan shall describe measures that will be used to minimize entry of non-process wastewater into retention facilities. Such measures may include the construction of berms, embankments, or similar structures. Retention facilities shall be equipped with either irrigation or evaporation systems capable of dewatering the retention facilities, or a regular schedule of wastewater removal by contract hauler. The pollution prevention plan must include all

calculations, as well as, all factors used in determining land application rates, acreage, and crops. Land application rates must take into account the nutrient contribution of any land applied manures. If land application is utilized, the following requirements shall apply.]

[(A) The discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge of pollutants into or adjacent to waters in the state.]

[(B) When wastewater is used to irrigate land application areas, the plan shall include: a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and all nutrient analysis data. Application rates shall not exceed the nutrient uptake of the crop coverage or planned crop planting with any land application of wastewater and/or manure. Land application rates of wastewaters shall be based on the available nitrogen content, however, where annual soil sampling analysis for extractable phosphorus as described in paragraph (28)(F) of this subsection indicates a level greater than 200 parts per million (ppm) of extractable phosphorus (reported as P) in Zone 1 for a particular waste or wastewater land application field, the operator may apply wastewater to the affected application area only in accordance with the conditions established in paragraph (28)(G) of this subsection.]

[(C) Wastewater shall not be irrigated when the ground is frozen or saturated or during rainfall events (unless in accordance with subparagraph (E) of this paragraph.)]

[(D) Irrigation practices shall be managed so as to reduce or minimize ponding or puddling of wastewater on the site, pollution of waters in the state, and prevent the occurrence of nuisance conditions.]

[(E) It shall be considered proper operation and maintenance for a facility which has been properly operated in accordance with this subchapter, and that is in danger of imminent overflow due to chronic or catastrophic rainfall, to discharge wastewaters to land application sites for filtering prior to discharging to waters in the state. Only that portion of the total retention facility wastewater volume necessary to prevent overflow due to chronic or catastrophic rainfall shall be land applied for filtering prior to discharging to waters in the state. Monitoring and reporting requirements for such discharges shall be consistent with §321.42 of this title (relating to Monitoring and Reporting Requirements).]

[(F) Facilities including ponds, pipes, ditches, pumps, and diversion and irrigation equipment shall be maintained to insure ability to fully comply with the terms of this subchapter and the pollution prevention plan.]

[(G) Adequate equipment or land application area shall be available for removal of such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.]

[(H) Where land application sites are isolated from surface waters and groundwaters and no potential exists for runoff to reach any waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval of the executive director. No land application under this subsection shall cause or contribute to a violation of water quality standards or create a nuisance.]

[(I) The pollution prevention plan shall include the following information:]

[(i) a site map showing the location of any land application areas, either on-site or off-site which are owned, operated, or under the control of the facility owner or operator which will be utilized for land application of waste or wastewater;]

[(ii) the location and description of the major soil types within the identified land application areas;]

[(iii) crop types and rotations to be implemented on an annual basis;]

[(iv) predicted yield goals based on the major soil types within the identified land application areas;]

[(v) procedures for calculating nutrient budgets to be used to determine application rates;]

[(vi) a detailed description of the type of equipment and method of application to be used in applying the waste or wastewater; and]

[(vii) projected rates and timing of application of the manure and wastewater as well as other sources of nutrients that will be applied to the land application areas.]

[(J) The owner or operator shall maintain on-site and update records of all waste and wastewater either utilized at the facility or removed from the facility.]

[(i) For facilities where waste or wastewater is applied on property owned, operated, or controlled by the owner or operator, such records shall include the following information: date of waste or wastewater application; location of the specific application site and the number of acres utilized during each application event; acreage of each individual crop on which waste or wastewater is applied; number of dry tons, percent nitrogen based on a dry basis, and the percent moisture content of the manure; and actual annual yield of each harvested crop.]

[(ii) Where waste or wastewater is removed from the facility, records must be maintained in accordance with paragraph (23) of this subsection.]

[(20) Solids shall be removed in accordance with a predetermined schedule for cleanout of all treatment lagoons to prevent the accumulation of solids from exceeding 50% of the original treatment volume. Removal of solids shall be conducted during favorable wind conditions that carry

odors away from nearby receptors and the operator shall notify the regional office of the commission as soon as the lagoon cleaning is scheduled, but not less than ten days prior to cleaning, and verification shall be reported to the same regional office within five days after the cleaning has been completed. At no time shall emissions from any activity create a nuisance. Any increase in odors associated with a properly managed cleanout under this subsection will be taken into consideration by the executive director when determining compliance with the provisions of this subchapter.]

[(21) (Manure and pond solids handling and land application). Storage and land application of manure shall not cause a discharge of pollutants to waters in the state, cause a water quality violation in waters in the state, or cause a nuisance condition. At all times, sufficient volume shall be maintained within the control facility to accommodate manure, other solids, wastewaters, and contaminated storm water (rainwater runoff) from the concentrated animal feeding areas.]

[(22) Where the operator decides to land apply manures or pond solids, the plan shall include: a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and all nutrient analysis data. Land application rates of wastes shall be based on the available nitrogen content of the solid waste, except however, where annual soil sampling analysis for extractable phosphorus as described in paragraph (28)(F) of this subsection 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, the operator may apply manure or pond solids to the affected application area only in accordance with the conditions established in paragraph (28)(G) of this subsection.]

[(23) If manure is sold or given to other persons for off-site land application or disposal, the operator must maintain a log of: date of removal from the CAFO; name of hauler; and amount, in wet tons, dry tons, or cubic yards, of waste removed from the CAFO. (Incidental amounts, given away by the pick-up truck load, need not be recorded.) Where the wastes are to be land applied by the hauler, the operator must make available to the hauler any nutrient sample analysis of the manure from that year.]

[(24) The procedures documented in the pollution prevention plan must ensure that the handling and land application of wastes as defined in §321.32 of this title (relating to Definitions) comply with the following requirements.]

[(A) Manure storage capacity based upon manure and waste production and land availability shall be provided. Storage and/or surface disposal of manure in the 100-year flood plain, near water courses or recharge feature is prohibited unless protected by berms or other structures. The land application of wastes at agronomic rates shall not be considered surface disposal in this case and is not prohibited.]

[(B) When manure is stockpiled, it shall be stored in a well drained area with no ponding of water, and the top and sides of stockpiles shall be adequately sloped to ensure proper drainage. Runoff from manure storage piles must be retained on site.]

[(C) Waste shall not be applied to land when the ground is frozen or saturated or during rainfall events.]

[(D) Manure shall be uniformly applied to suitable land at appropriate times and at agronomic rates. Discharge (runoff) of waste from the application site is prohibited. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation, and soil conditions.]

[(E) All necessary practices to minimize waste manure transport to waters in the state shall be utilized and documented to the plan.]

[(F) Edge-of-field, grassed strips shall be used to separate water courses from runoff carrying eroded soil and manure particles. Land subject to excessive erosion shall be avoided.]

[(G) Where land application sites are isolated from surface waters and no potential exists for runoff to reach waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval by the executive director. No land application under this subchapter shall cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create an nuisance condition.]

[(H) Nighttime application of liquid or solid waste shall be allowed only in areas with no occupied residence(s) within 0.25 mile from the outer boundary of the actual area

receiving waste application. In areas with an occupied residence within 0.25 mile from the outer boundary of the actual area receiving waste application, application shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have, in writing, agreed to such nighttime applications.]

[I] Accumulations of solids on concrete cow lanes at dairies and concrete swine pens, without slotted floors, shall be scraped or flushed at least once per week or in accordance with proper design and maintenance of the facility. Farrowing pens at swine facilities which are not scraped or flushed once per week shall be scraped/flushed after each group of sows have been removed from the facility.]

[J] Buildings designed with mechanical flush/scrape systems shall be flushed/scraped at least once per week or as often as necessary to maintain the design efficiency. This provision would include, but would not be limited to, swine and caged poultry operations.]

[K] Earthen pens shall be designed and maintained to ensure good drainage and to prevent ponding.]

[L] Facilities that utilize a solid settling basin(s) shall remove solids from the basin as often as necessary to maintain the design efficiency.]

[(25) The plan shall include an appropriate schedule for preventative maintenance.

Operators will provide routine maintenance to their control facilities in accordance with a schedule and plan of operation to ensure compliance with this subchapter. The operator shall keep a maintenance log documenting that preventative maintenance was done. A preventive maintenance program shall involve inspection and maintenance of all runoff management devices (mechanical separators, catch basins) as well as inspecting and testing facility equipment and containment structures to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.]

[(26) The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion. Where these areas have the potential to contribute pollutants to waters in the state the pollution prevention plan shall identify measures used to limit erosion and pollutant runoff.]

[(27) The operator shall document to the pollution prevention plan as soon as possible, any planned physical alterations or additions to the permitted facility. The operator must insure that any change or facility expansion will not result in a discharge in violation of the provisions of this subchapter or will require an amendment to an existing authorization in force at the time of modification.]

[(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) Sampling procedures shall employ accepted techniques of soil science for obtaining representative and analytical results.]

[(B) Samples should be taken within the same 45-day time frame each year.]

[(C) Obtain one composite sample for each soil depth zone per land management unit and per uniform (soils with the same characteristics and texture) soil type within the land management unit. For the purposes of this subchapter, a land management unit shall be considered to be an area associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used.]

[(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores obtained from each of the following soil depth zones:]

[(i) Zone 1: 0 - 6 inches for land application areas where the waste is incorporated directly into the soil or 0 - 2 inches for land application areas where the waste is not incorporated into the soil; if a 0 - 2 inch sample is required under this subsection, then an additional

sample from the 2 - 6 inch soil depth zone shall be obtained in accordance with the provisions of this section, and]

[(ii) Zone 2: 6 - 24 inches.]

[(E) Soil samples shall be submitted to a soil testing laboratory along with a previous crop history of the site, intended crop use, and yield goal. Soil test reports shall include nutrient recommendations for the crop yield goal.]

[(F) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from wastewater and waste application sites shall include the following:]

[(i) nitrate reported as nitrogen in ppm;]

[(ii) phosphorus (extractable, ppm) - Texas Agricultural Extension Service Soil Testing Laboratory - TAMU extractant or Mehlich III;]

[(iii) potassium (extractable, ppm);]

[(iv) sodium (extractable, ppm);]

[(v) magnesium (extractable, ppm);]

[(vi) calcium (extractable, ppm);]

[(vii) soluble salts/electrical conductivity (dS/m) - determined from  
extract of 2:1 (v/v) water/soil mixture; and]

[(viii) soil water pH.]

[(G) Except as provided under §321.49 of this title (relating to Dairy Waste Application Field Soil Sampling and Testing), when results of the annual soil analysis for extractable phosphorus in subparagraph (F) of this paragraph indicate 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 CAFO operator shall ensure that the nutrient utilization plan, at a minimum, evaluates and addresses the following factors to assure that the beneficial use of manure is conducted in a manner that prevents phosphorus impacts to water quality:]

[ (i) slope of application fields (as a percentage) and distance of the land application area from waters in the state;]

[ (ii) average rainfall for the area for each month;]

[ (iii) soil series, soil type, soil family classification, and pH values of all soils in application fields;]

[ (iv) chemical characteristics of the waste, including total nitrogen and phosphorus;]

[ (v) recommended rates, methods, and schedules of application of manure and wastewater for all fields;]

[(vi) crop types, maximum crop uptake rate, and expected yield for each crop; and]

[(vii) best management practices to be utilized to prevent phosphorus impacts to water quality, including any physical structures and vegetative filterstrips.]

[(29) The operator shall annually analyze at least one representative sample of irrigation wastewater and one representative sample of solid waste for total nitrogen, total phosphorus, and total potassium.]

[(30) Results of initial and annual soils, wastewater and solid waste analyses shall be maintained on-site as part of the pollution prevention plan.]

[(31) Operators submitting applications for renewal or expansion of existing facilities authorized under this subchapter to utilize a playa lake as a wastewater retention structure shall within 90 days of the effective date of the renewal, submit a groundwater monitoring plan to the Agriculture Section, Water Quality Division of the Texas Commission on Environmental Quality. At a minimum, the groundwater monitoring plan shall specify procedures to annually collect a groundwater sample from each well providing water for the facility, have each sample analyzed for chlorides and nitrates, and compare those values to background values for each well.]

**§321.40. Concentrated Animal Feeding Operation (CAFO) Land Application Requirements.**

(a) The purpose of this section is to describe the land application requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter.

(b) The land application of manure, litter, or wastewater at agronomic rates and hydrologic needs shall not be considered surface disposal and is not prohibited.

(c) Manure, litter, or wastewater may be applied to the areas in the 100-year flood plain at agronomic rates not to exceed the hydrologic needs of the crop.

(d) Discharge of manure, litter, or wastewater from the land management unit (LMU) is prohibited and shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition.

(e) Irrigation practices shall be managed so as to minimize ponding or puddling of wastewater on the site, prevent tailwater discharges to waters in the state, and prevent the occurrence of nuisance conditions.

(f) Land application shall not occur when the ground is frozen or saturated or during rainfall events unless in accordance with §321.39(b)(3) of this title (relating to Control Facility Operational

Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs) or as approved by the commission.

(g) The CAFO operator shall not locate a new LMU within the required well buffer zones identified in §321.38(b) of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs). An exception to the full well buffer zone for a private drinking water well or a water well used exclusively for agricultural irrigation may be approved by the executive director if a licensed Texas professional engineer or licensed Texas professional geoscientist provides accurate documentation showing that additional wellhead protective measures will be or have been implemented that will prevent pollutants from entering the well and contaminating groundwater. Additional protective measures may include a sanitary seal, annular seal, a steel sleeve, or surface slab.

(h) Vegetative buffer strips shall be no less than 100 feet of vegetation to be maintained between manure, litter, or wastewater application areas and water in the state. The CAFOs operator shall maintain the buffer strips in accordance with Natural Resources Conservation Service (NRCS) guidelines.

(i) CAFOs introducing wastewater or chemicals to water wellheads for the purpose of irrigation shall install backflow prevention devices in accordance with requirements contained in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers).

(j) Nighttime application of manure, litter, or wastewater by a CAFO shall be allowed only in areas with no occupied residence(s) within 1/4 mile from the outer boundary of the LMU receiving manure, litter, or wastewater. In areas with an occupied residence within 1/4 mile from the outer boundary of the LMU receiving manure, litter, or wastewater shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have, in writing, agreed to such nighttime applications.

(k) Any CAFO operator who owns, operates, controls, rents, or leases land where manure, litter, or wastewater from the CAFO is land applied must be in compliance with the deadline and requirements specified in §321.36(d) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)). Before this deadline, the operator of any existing CAFO must manage nutrients on LMUs according to all other applicable requirements of this subchapter.

(1) Nutrient requirement. Any land application of manure, litter, and wastewater shall not exceed the nutrients necessary to meet the planned crop requirements. Land application rates of manure, litter, and wastewater shall be based on the total nutrient concentration on a dry weight basis.

(2) Phosphorus limit. A permit or other authorization shall establish the appropriate limits for phosphorus in the soil and the requirements to develop the nutrient utilization plan (NUP). If an operator is required to develop a NUP, the operator shall cease land application of manure, litter, or wastewater to the affected area and may resume only after a detailed NUP has been implemented.

(3) NUP. An NMP (Practice Standard 590) certified as meeting the NRCS standard is equivalent to the requirements for a NUP. The NUP must be developed and certified 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 Registry of Certified Professionals in Agronomy, Crops and Soils, after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner. After a NUP is implemented, the operator shall land apply in accordance with the NUP will until soil phosphorus is reduced below 200 parts per million. Thereafter, the operator of a CAFO shall implement the requirements of the nutrient management plan certified in accordance with §321.36(d) of this title. All other CAFOs must follow the requirements in this section.

(4) For a CAFO, land application under the terms of the NUP may begin 30 days after the plan is filed with the executive director, unless before that time the executive director has returned the plan for failure to comply with all the requirements of this subsection.

**[§321.40. Best Management Practices.]**

[The following Best Management Practices (BMPs) shall be utilized by CAFOs owners or operators, as appropriate, based upon existing physical and economic conditions, opportunities, and

constraints. Where the provisions in a NRCS plan are equivalent or more protective, the operator may refer to the NRCS plan as documentation of compliance with the BMPs required by this subchapter.]

[ (1) Control facilities must be designed, constructed, and operated to contain all process generated wastewaters and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the point source. Calculations may also include allowances for surface retention, infiltration, and other site specific factors. Waste control facilities must be constructed, maintained and managed so as to retain all contaminated rainfall runoff from open lots and associated areas, process generated wastewater, and all other wastes which will enter or be stored in the retention structure.]

[ (2) Facilities shall not expand operations, either in size or numbers of animals, prior to amending or enlarging the waste handling procedures and structures to accommodate any additional wastes that will be generated by the expanded operations.]

[ (3) Open lots and associated wastes shall be isolated from outside surface drainage by ditches, dikes, berms, terraces or other such structures designed to carry peak flows expected at times when the 25-year, 24-hour rainfall event occurs.]

[ (4) New or expanding facilities shall not be built in any stream, river, lake, wetland, or playa lake (except as defined by and in accordance with the Texas Water Code §26.048).]

[(5) No waters in the state shall come into direct contact with the animals confined on the concentrated animal feeding operation. Fences and other methods may be used to restrict such access.]

[(6) Wastewater retention facilities or holding pens may not be located in the 100-year flood plain, as defined in Chapter 301 of this title (relating to Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements), unless the facility is protected from inundation and damage that may occur during that flood event.]

[(7) There shall be no water quality impairment to public and neighboring private drinking water wells or surface water or watercourses due to waste handling at the permitted facility. Vegetative buffer strips shall be maintained in accordance with NRCS guidelines. The minimum buffer shall be no less than 100 feet of vegetation to be maintained between waste or wastewater application areas and surface water and watercourses. Wastewater retention facilities, holding pens, or waste/wastewater land application sites shall not be located closer than 500 feet of a public water supply well or 150 feet of a private water well.]

[(8) Waste handling, treatment, and management shall not create a nuisance condition or an environmental or a public health hazard; shall not result in the contamination of drinking water; shall conform with State regulations for the protection of surface and ground water quality.]

[(9) Solids, sludges, manure, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent pollutants from being discharged into waters in the state or creation of a nuisance condition.]

[(10) The operator shall prevent the discharge of pesticide contaminated waters into waters in the state. All wastes from dipping vats, pest and parasite control units, and other facilities utilized for the application of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent any significant pollutants from entering the waters in the state or create a nuisance condition.]

[(11) Dead animals shall be properly disposed of within three days as required by statute or by rules of the commission unless otherwise provided for by the executive director. Animals shall be disposed of in a manner to prevent contamination of waters in the state or creation of a nuisance or public health hazard.]

[(12) Collection, storage, and land application of liquid and solid waste shall be managed in accordance with recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land application site shall be secondary to the proper application of waste and wastewater. All herbicides and pesticides shall be stored, used, and disposed of in accordance with label instructions. There shall be no disposal of herbicides, pesticides, solvents or heavy metals, or of spills or residues from storage or application equipment or containers, into retention structures. Incidental amounts of such substances entering a retention

structure as a result of stormwater transport of properly applied chemicals is not a violation of this rule.]

[(13) Appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant shall be taken. Where potential spills can occur materials, handling procedures and storage shall be specified. Procedures for cleaning up spills shall be identified and the necessary equipment to implement a clean up shall be available to personnel.]

**§321.41. Special Requirements for Discharges to a Playa.**

(a) This section applies to any animal feeding operation (AFO) operator authorized by the commission before July 13, 1995 to discharge manure, litter, or wastewater into a playa or to use a playa as a RCS for manure, litter or wastewater in accordance with Texas Water Code, §26.048.

(b) A playa that is in use as a retention control structure, as allowed by Texas Water Code (TWC), §26.048, and that show no signs of leakage, is considered to satisfy all applicable design and construction requirements specified in §321.38 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)).

(c) A groundwater plan for use of a playa shall be implemented in accordance with TWC, §26.048.

(d) If the executive director determines that contamination of groundwater is occurring as a result of use of the playa as a retention facility for manure, litter, or wastewater from the AFO, the executive director shall require action to correct the problem or revoke the AFOs authority to discharge into the playa.

**[§321.41. Other Requirements.]**

[a) Education and training.]

[(1) Any CAFO owner or operator with greater than the number of animals specified in §321.32(9)(B) of this title (relating to Definitions) and located within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions) shall obtain authorization under this subchapter and, within 12 months of receiving such authorization, the owner or operator or his designee with operational responsibilities shall complete an eight-hour course or its equivalent on animal waste management. In addition, that owner or operator shall also complete at least eight additional hours of continuing animal waste management education for each two- year period after the first 12 months. The minimum criteria for the initial eight hours and the subsequent eight hours of continuing animal waste management education shall be developed by the executive director and the Texas Agricultural Extension Service. Verification of the date and time(s) of attendance and completion of required training shall be documented to the pollution prevention plan.]

[(2) Where the employees are responsible for work activities which relate to compliance with provisions of this subchapter, those employees must be regularly trained or informed of any information pertinent to the proper operation and maintenance of the facility and land application of waste. Employee training shall inform personnel at all levels of responsibility of the general components and goals of the pollution prevention plan. Training shall include topics as appropriate such as land application of wastes, proper operation and maintenance of the facility, good housekeeping and material management practices, necessary recordkeeping requirements, and spill response and clean up. The operator is responsible for determining the appropriate training frequency for different levels of personnel, and the pollution prevention plan shall identify periodic dates for such training.]

[(b) Inspections and Recordkeeping. The operator or the person named in the pollution prevention plan as the individual responsible for drafting and implementing the plan shall be responsible for inspections and recordkeeping.]

[(c) Recordkeeping and Internal Reporting Procedures. Incidents such as spills, other discharges or nuisance conditions, along with other information describing the pollution potential and quality of the discharge shall be included in the records. Inspections and maintenance activities shall be documented and recorded. These records must be kept on site for a minimum of three years.]

[(d) Visual Inspections. The authorized person shall inspect designated equipment and facility areas. Material handling areas shall be inspected for evidence of, or the potential for, pollutants

entering the drainage system or the creation of a nuisance. A follow-up procedure shall be used to ensure that appropriate action has been taken in response to the inspection.]

[(e) Site Inspection. A complete inspection of the facility shall be done and a report documenting the findings of the inspection made at least once/year. The inspection shall be conducted by the authorized person named in the pollution prevention plan, to verify that the description of potential pollutant sources is accurate; the site plan/map has been updated or otherwise modified to reflect current conditions; and the controls outlined in the pollution prevention plan to reduce pollutants and avoid nuisance conditions are being implemented and are adequate. Records documenting significant observations made during the site inspection shall be retained as part of the pollution prevention plan. Records of inspections shall be maintained for a period of three years.]

[(f) Additional Requirements. No condition of this authorization shall release the operator from any responsibility or requirements under other statutes or regulations, Federal, State or Local.]

**§321.42. Requirements Applicable to the Major Sole-Source Impairment Zone.**

(a) The purpose of this section is to describe certain requirements for individual water quality permits for dairy concentrated animal feeding operations (CAFOs) or other authorizations allowed by this subchapter when an operation is located in a major sole-source impairment zone. Additionally, subsection (i) of this section applies to any dairy animal feeding operation (AFO), including any dairy CAFO, which is located in a major sole-source impairment zone.

(b) The dairy CAFO operator must adhere to provisions of this section and the other requirements contained in this subchapter. When a requirement of this section conflicts with another requirement of this subchapter, the requirement of this section shall supercede the other requirement.

(c) The dairy CAFO operator must operate and maintain a margin of safety in the retention control structure (RCS) to contain the volume:

(1) of runoff and direct precipitation from the 25-year, ten-day rainfall event; or

(2) necessary to prevent overflow resulting from a statistically determined probability of overflow resulting in a discharge frequency of no more than once in 25 years. The margin of safety using this method must be evaluated using the Soil Plant Air and Water (SPAW) Field and Pond Hydrology Tool and be certified by a Texas licensed professional engineer.

(d) The dairy CAFO is only authorized to discharge from a properly operated and maintained RCS when the volume of the rainfall runoff and direct precipitation exceed the volume for the margin of safety that must be.

(e) If construction of new or modified RCSs is necessary to comply with subsections (c) and (d) of this section, a permit or other authorization will specify a schedule for compliance.

(f) The dairy operator shall install and maintain a permanent marker (measuring device) in the RCS visible from the top of the levee to show the following:

(1) the volume for the margin of safety; and

(2) one-foot increments beginning from the predetermined minimum treatment volume of the RCS to the top of the embankment or spillway.

(g) The dairy operator shall implement an RCS management plan incorporating the margin of safety developed by a licensed Texas professional engineer. The management plan shall become a component of the pollution prevention plan (PPP), shall be developed for the RCS system, and must describe or include:

(1) RCS management controls appropriate for the CAFO and the methods and procedures for implementing such controls;

(2) the methods and procedures for proper operation and maintenance of the RCS consistent with the system design;

(3) the appropriateness and priorities of any controls reflecting the identified sources of pollutants at the facility;

(4) a stage/storage table for each RCS with minimum depth increments of one-foot, including the storage volume provided at each depth;

(5) a second table or sketch that includes increments of water level ranges for volumes of total design storage, including the storage volume provided at each specified depth (or water level) and the type of storage designated by that depth; and

(6) the planned end of month storage volume anticipated for each RCS for each month of the year and the corresponding operating depth expected at the end of each month of the year, based on the design assumptions.

(h) The dairy operator shall monitor and record wastewater levels daily in the RCS. A log shall be kept in the PPP to document the level of wastewater observed each day. In circumstances where the RCS has a water level exceeding the expected end of the month depth, the operator shall document in the PPP why the level of water in the structure is not at or below the expected depth.

(i) The dairy operator shall provide for management and disposal of waste as specified in Texas Water Code, §26.503, in accordance with the following:

(1) beneficially used outside of the watershed;

(2) disposed in landfills outside of the watershed, subject to the requirements of commission rules relating to industrial solid waste;

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

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

(5) applied in any of the following ways:

(A) in accordance with a nutrient management plan (NMP) certified in accordance with Natural Resources Conservation Service (NRCS) 590 Practice Standard to a waste application field that is owned, operated, controlled, rented, or leased by the owner of the CAFO, if the field is not a historical waste application field, as defined in §321.32 of this title (relating to Definitions);

(B) in accordance with a NMP certified in accordance with NRCS 590 Practice standard to a historical waste application field that is owned, operated, controlled, rented, or leased 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 (zero to six inches) depth; or

(C) in accordance with a detailed nutrient utilization plan (NUP) approved by the executive director which, at a minimum, meets the requirements of §321.40(k)(2) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements) , to a historical waste application field that is owned, operated, controlled, rented, or leased 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 (zero to six inches) depth.

(j) Permits for existing dairy CAFOs in the major sole-source impairment zone that are not expanding may allow the operator to provide manure, litter, and wastewater to operators of third-party fields, i.e., areas of land not owned, operated, controlled, rented, or leased by an AFO owner or operator, that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. The permit provision must, at a minimum, include the following requirements:

(1) there must be a written contract between the dairy operator and the recipient that requires all transferred manure, litter, and wastewater to be beneficially applied to third-party fields identified in the PPP in accordance with the applicable requirements in §321.36 of this title (relating to Texas Pollutant Discharge Elimination System Requirements for Concentrated Animal Feeding Operations (CAFOs) and §321.40 of this title at an agronomic rate based on soil test phosphorus;

(2) the permit must prohibit the dairy operator from delivering manure, litter, or wastewater to an operator of a third-party field once the soil test phosphorus analysis shows a level equal to or greater than 200 ppm or after becoming aware that the third-party operator is not following any provisions of this subchapter or the contract;

(3) all land managements units (LMUs) and third-party fields identified in the PPP on which manure, litter, or wastewater have been applied during the preceding year must be sampled annually by a nutrient management specialist and the samples analyzed in accordance with §321.36(g) of this title; and

(4) the dairy operator shall submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of manure, litter, or wastewater transferred to operators of third-party fields.

(k) The dairy operator must contract with an employee of the NRCS, a certified nutrient management specialist, the Texas State Soil and Water Conservation Board, the Texas Cooperative Extension, or an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas to collect one or more representative composite soil samples from each LMU including any historical waste application fields, not less than once every 12 months .

(l) The dairy operator shall notify the appropriate regional office in writing or by electronic mail with the date, time, and location at least ten working days before collecting soil samples.

(m) The dairy operator shall ensure that soil samples are analyzed in accordance with the procedures and laboratory analysis requirements in §321.36(g) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)).

(n) If the samples tested under subsection (j)(3) of this section show a phosphorus level in the soil of more than 500 ppm in Zone 1 (zero to six inches) depth, the operator shall file with the executive director a new or amended NUP with a phosphorus reduction component that is certified as acceptable by a person described in §321.40(k)(3) of this title.

(o) If the samples tested under subsection (j)(3) of this section show a phosphorus level in the soil of more than 200 ppm but not more than 500 ppm in Zone 1 (zero to six inches) depth, the operator shall:

(1) file with the executive director a new or amended NUP with a phosphorus reduction component that is certified as acceptable by a person described in §321.40(k)(3) of this title;  
or

(2) show that the level is supported by a NUP that is certified as acceptable by a person described under §321.40(k)(3) of this title.

(p) If the owner or operator of a waste application field is required by this section to have a NUP 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 (zero to six inches) 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.

(q) The dairy operator shall inspect the irrigation system to prevent discharges. If an unauthorized discharge from an irrigation system within the major sole-source impairment zone is documented as a violation, then the CAFO operator shall, if required by the executive director, install an automatic emergency shutdown or alarm system to notify the operator of system problems.

(r) The dairy operators are prohibited from land application of manure, litter, or wastewater in a major sole-source impairment zone between midnight and 4 a.m.

(s) All dairy CAFOs in a major sole-source impairment zone shall develop and operate under a comprehensive nutrient management plan (CNMP) certified by the Texas State Soil and Water Conservation Board. This CNMP shall be implemented not later than December 31, 2006.

(t) In addition to the requirements of §321.44 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Notification Requirements), a CAFO operator in a major sole-source impairment zone must comply with this subsection. In the event of a discharge from the RCS or LMU during a chronic or catastrophic rainfall event or resulting from catastrophic conditions, the CAFO operator shall orally notify the appropriate regional office within one hour of the discovery of the discharge. The operator shall send written notification to the appropriate regional office within 14 working days.

(u) Any dairy CAFO operator to whom this section applies who has an unauthorized discharge from the RCS and who used the SPAW certification method for the margin of safety shall, within 90 days of written notification by the executive director, develop and implement the capacity for a 25-year, ten-day margin of safety. Upon written request, the executive director may grant a variance from the 90-day time requirement.

(v) Any dairy CAFO operator to whom this section applies shall, in the event of a discharge from an RCS or LMU, submit a report to the appropriate regional office showing the facility records that substantiates that the overflow was a result of cumulative rainfall that exceeded the volume of storage capacity and margin of safety without the opportunity for dewatering, and was beyond the control of the operator. After review of the report, if required by the executive director, the operator shall have an engineering evaluation by a licensed Texas professional engineer developed and submitted to the executive director. This requirement is in addition to the discharge notification requirement in this subchapter.

**§321.42. Monitoring and Reporting Requirements.]**

[(a) If, for any reason there is a discharge to waters in the state, the operator shall notify the executive director orally within 24 hours and in writing within 14 working days of the discharge from the retention facility or any component of the waste handling or land application system. In addition, the operator shall document the following information to the pollution prevention plan and submit that information to the appropriate regional office within 14 days of becoming aware of such discharge:]

[(1) A description and cause of the discharge, including a description of the flow path to the receiving water body. Also, an estimation of the flow and volume discharged.]

[(2) The period of discharge, including exact dates and times, and, if not corrected the anticipated time the discharge is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the discharge.]

[(3) If caused by a precipitation event(s), information from the on site rain gauge concerning the size of the precipitation event.]

[(4) Unless otherwise directed by the executive director, facilities authorized under this subchapter shall sample and analyze all discharges from retention facilities. Sample analysis shall be documented to the pollution prevention plan.]

[(5) Samples shall consist of grab samples taken from the over-flow or discharges from the retention structure. A minimum of one sample shall be taken from the initial discharge (within 30 minutes). The sample shall be taken and analyzed in accordance with EPA approved methods for water analysis listed in 40 CFR 136. Measurements taken for the purpose of monitoring shall be representative of the monitored discharge.]

[(6) Sample analysis of the discharge must, at a minimum, include the following: Fecal Coliform bacteria; 5-day Biochemical Oxygen Demand (BOD<sub>5</sub>); Total Suspended Solids (TSS); ammonia nitrogen; and any pesticide which the operator has reason to believe could be in the discharge.]

[(7) In lieu of discharge sampling data, the operator must document description of why discharge samples could not be collected when the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples including weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.). Once dangerous conditions have passed, the operator shall collect a sample from the retention structure pond or lagoon. The sample shall be analyzed in accordance with paragraph (6) of this subsection.]

[(b) All discharge information and data will be made available to the executive director upon request. Signed copies of monitoring reports shall be submitted to the executive director if requested at the address specified in the request.]

[(c) Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under the provisions of this subchapter, including reports of compliance or noncompliance shall be subject to administrative penalties not to exceed \$10,000 per violation. Such person(s) may also be subject to civil and criminal penalties pursuant to the Texas Water Code, §26.122 and §26.213.]

[(d) The operator shall retain copies on-site of all records required by this subchapter for a period of at least three years from the date reported or received, and shall make them available to the executive director upon request. This period may be extended by request of the executive director at any time.]

[(e) The operator shall furnish to the executive director, within a reasonable time, any information which the executive director may request to determine compliance with the provisions of this subchapter. The operator shall also furnish to the executive director, upon request, copies of records required to be kept by the provisions of this subchapter.]

[(f) When the operator becomes aware that they failed to submit any relevant facts or submitted incorrect information in any report to the executive director, they shall promptly submit such facts or information.]

[(g) All reports or information submitted to the executive director shall be signed and certified in accordance with §305.44 of this title (relating to Signatories to Applications).]

[(h) The operator shall maintain ownership, operation, or control over the retention facilities, land application areas, and control facilities identified in the site plan submitted with the application under §321.34 or §321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). In the event the owner loses ownership, operation, or control of any of these areas, the operator shall notify the executive director prior to such loss of control and immediately request and file an application to amend the existing authorization to reflect an alternate method for beneficially utilizing the waste or wastewater or to add new or additional land application areas to the authorization, an application for a new authorization under this subchapter or present the executive director with a plan to cease all CAFOs at that site.]

[(i) Any operator required to obtain authorization under §321.33 of this title (relating to Applicability) shall locate and maintain all facilities in accordance with the site plan submitted with the application as required under §321.34 or §321.35 of this title. In the event the operator does not properly locate and maintain such facilities in accordance with the site plan and the provisions of §321.33(p) of this title, they shall be deemed in noncompliance with the provisions of this subchapter.]

[(j) The operator shall furnish to the executive director soil testing laboratory results of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of this subchapter.]

**§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 and authorization under this air standard permit for the same AFO and associated facilities. This does not preclude the operator from holding individual permits 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.

(A) The buffer requirements in Figure 1 shall be satisfied at the time that the AFO operator does any of the following:

(i) claims authorization under the air standard permit for an AFO already in operation;

(ii) begins construction of a new AFO; or

(iii) begins construction for expansion or modification of an AFO

already in operation by performing activities including, but not limited to, increasing the maximum number of animals confined under the water quality authorization, constructing new pens, or constructing or modifying RCSs.

Figure 1: 30 TAC §321.43(j)(2)(A)

<u>AFO Status and Proposed Action</u>	<u>Buffer Option 1</u>	<u>Buffer Option 2</u>
<u>Construction of an AFO that started or plans to start operations after August 19, 1998.</u>	<u>1/2 mile buffer</u>	<u>1/4 mile buffer and an odor control plan in accordance with §321.43(j)(2)(F).</u>
<u>Expansion of an AFO that started operations after August 19, 1998.</u>	<u>1/2 mile buffer</u>	<u>1/4 mile buffer and an odor control plan in accordance with §321.43(j)(2)(F).</u>
<u>Continued operation of an AFO that was in operation on or before August 19, 1998.</u>	<u>1/4 mile buffer</u>	<u>odor control plan in accordance with §321.43(j)(2)(F).</u>
<u>Expansion or modification of an AFO that was in operation on or before August 19, 1998.</u>	<u>1/4 mile buffer</u>	<u>odor control plan in accordance with §321.43(j)(2)(F).</u>

(B) The operator of an AFO shall document that the applicable buffer

requirement is satisfied in accordance with paragraph (2)(A) of this subsection. 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), place of worship, or public park.

(D) Written consent, including a letter as defined by §321.32(25) of this title (relating to Definitions), easement, or lease agreement specifically consenting to location and operation of permanent odor sources at an AFO within the required minimum buffer distance in subsection (j)(2)(A) of this section from the owner of the land containing each occupied residence or business structure, school (including associated recreational areas), place of worship, or public park located within the buffer distance may be obtained in lieu of satisfying the buffer distance requirements in Figure 1. An easement must be recorded with the county. The written consent must include the following information at the time the actions specified in paragraph (2)(A) of this subsection occur:

(i) the name, physical address, mailing address, and phone number of the owner(s) of the land containing the receptor;

(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 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 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 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 subsection (j)(2)(A) of this section , and documentation and copies of the written consent from landowners within the buffer distance shall be kept on site and made available upon request by the executive director.

(F) The odor control plan, if required by subsection (j)(2)(A) of this section , 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. RCSs at AFOs that produce process-generated wastewater (excluding water trough overflow in open lots and wastewater from boiler operations) shall be designed to minimize odors in accordance with accepted engineering practices. Each system shall be operated in accordance with 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) anaerobic treatment lagoons 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 so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. A multi-stage system shall be designed to route contaminated storm water runoff around the primary lagoon and into the secondary structure;

(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.

**[§321.43. Notification.]**

[All new animal feeding operations which confine more than 300 animal units and/or any animal feeding operation which confines more than 300 head of a species or combination of species not specifically listed under the definition of CAFO as stated in §321.32 of this title (relating to Definitions) and have a potential to discharge into the waters in the state shall notify the executive director of their business name, physical location including a map or hand drawn sketch, mailing address and number of head in confinement. Such notification shall be in writing and signed by the owner/operator and shall be submitted not later than 180 days of the effective date of these rules or commencement of operation, whichever is later. Additionally, should an animal feeding operation covered by this section change ownership or substantially change the number of head in confinement, that operator shall submit an amended notification. No fees are associated with notification under this section.]

**§321.44. Concentrated Animal Feeding Operation (CAFO) Notification Requirements.**

(a) Discharge notification. If for any reason there is a discharge to water in the state, the concentrated animal feeding operation (CAFO) operator shall notify the appropriate regional office orally within 24 hours or upon discovery of the discharge, whichever occurs first. The CAFO operator shall also submit written notice, within 14 working days of the discharge from the retention control structure or any component of the waste handling or land application system to the Office of Compliance and Enforcement, Enforcement Division. In addition, the operator shall document the following information, keep the information on site, and submit the information to the appropriate regional office within 14 working days of becoming aware of such discharge. The notification must include:

(1) a description and cause of the discharge, including a description of the flow path to the receiving water body;

(2) an estimation of the volume discharged;

(3) the period of discharge, including exact dates and times, and, if not corrected, the anticipated time the discharge is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the discharge;

(4) if caused by a precipitation event(s), the date(s) of the event(s) and the rainfall amount(s) recorded from the on-site rain gauge; and

(5) results of analysis as required by subsection (b) of this section .

(b) Discharge monitoring. A permit or authorization will establish requirements for sample collection and analysis, sample type and frequency, and the parameters to be monitored.

(1) Sample analysis of the discharge must, at a minimum, include the following:

(A) fecal coliform bacteria;

(B) total coliform;

(C) five-day biochemical oxygen demand (BOD<sub>5</sub>);

(D) total suspended solids (TSS);

(E) Ammonia Nitrogen (as N);

(F) Nitrate (as N);

(G) total dissolved solids (TDS);

(H) total phosphorus (as P); and

(I) any pesticide which the operator has reason to believe could be in the discharge.

(2) If the operator is unable to collect samples due to climatic conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.), the operator shall document why discharge samples could not be collected. Once dangerous conditions have passed, the operator shall conduct the required sampling.

(c) Construction notification. After all initial construction activity has been completed, and before beginning operations, an operator of a new CAFO must notify the appropriate regional office orally that the facility is commencing operations.

**[§321.44. Dairy Outreach Program Areas.]**

[For the purposes of this subchapter the Dairy Outreach Program Areas includes all of the following counties: Erath, Bosque, Comanche, Hamilton, Johnson, Hopkins, Wood and Rains. The commission shall review the areas designated under this section on at least a triennial basis to determine whether counties should be deleted or other areas should be added. At any time, areas under this section may be added or deleted by the commission in accordance with the rulemaking process.]

**§321.45. Concentrated Animal Feeding Operation (CAFO) Training Requirements.**

(a) Employee training. A permit or authorization will establish requirements for training of employees who are responsible for work activities relating to compliance with provisions of this subchapter that address all levels of job responsibility associated with compliance with this subchapter.

(b) Dairy outreach program area operator training. The operator of a concentrated animal feeding operation (CAFO) located in §321.32(17) of this title (relating to Definitions) shall attend and complete training developed by the executive director and the Texas Cooperative Extension as follows:

(1) an eight-hour course or its equivalent on animal waste management within 12 months of receiving authorization under this subchapter; and

(2) at least eight additional hours of continuing education on animal waste management or its equivalent for each two-year period after completing the requirements of paragraph (1) of this subsection.

**[§321.45. Effect of Conflict or Invalidity of Rule.]**

[(a) If any provision of this subchapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the provisions contained in this subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.]

[(b) To the extent of any irreconcilable conflict between provisions of this subchapter and other rules of the commission, the provisions of this subchapter shall supersede.]

**§321.46. Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting.**

(a) Pollution prevention plan (PPP).

(1) A permit or authorization will establish requirements for the development of a PPP.

PPPs shall be prepared in accordance with good engineering practices and shall include measures necessary to limit the discharge of pollutants to or adjacent to water in the state. The plan shall describe and ensure the implementation of practices which are to be used to assure compliance with the limitations and conditions of this subchapter. The plan shall identify a specific individual(s) at the facility who is responsible for development, implementation, operation, maintenance, inspections, recordkeeping, and revision of the PPP. The activities and responsibilities of the pollution prevention personnel shall address all aspects of the facility's PPP.

(2) The plan shall be signed by the operator or other signatory authority in accordance with §305.44 of this title (relating to Signatories to Applications), and the plan shall be retained on site.

(3) Upon completion of a PPP review, the executive director may notify the operator of a concentrated animal feeding operation (CAFO) at any time that the plan does not meet one or more of the minimum requirements of this subchapter. After such notification from the executive director, the operator shall make changes to the plan within 90 days after such notification, unless otherwise provided by the executive director.

(4) The operator of the CAFO shall amend the plan:

(A) before any change in the number or configuration of land management units (LMUs);

(B) before any increase in the maximum number of animals;

(C) before operation of any new control facilities;

(D) before any change that has a significant effect on the potential for the discharge of pollutants to water in the state;

(E) if the PPP is not effective in achieving the general objectives of controlling discharges of pollutants from the CAFO or LMU(s); or

(F) within 90 days following written notification from the executive director that the plan does not meet one or more of the minimum requirements of this section.

(5) Where design, planning, construction, operation and maintenance, or other documentation equivalent to PPP requirements are contained in site specific-plans prepared and certified by the Natural Resources Conservation Service (NRCS), Texas State Soil and Water Conservation Board, or their designee, information in the plans are sufficient to document best management practices (BMPs) or applicable portions of the technical requirements in this subchapter. Where provisions in the certified plan are substituted for applicable BMPs or portions of the PPP, the PPP must refer to the appropriate section of the certified plan. If the PPP contains a reference to a certified plan, a copy of the certified plan must be kept in the PPP.

(6) The PPP shall provide a description of potential pollutant sources. Potential pollutant sources include any activity or material that may reasonably be expected to contain pollutants at the facility, including the CAFO, the associated control facilities, and LMUs. An evaluation of potential pollutant sources shall identify the types of potential pollutant sources, provide a description of the potential pollutant sources, and indicate all measures that will be used to prevent contamination from the potential pollutant sources.

(7) A permit or authorization will establish requirements for the development and retention by the operator of:

(A) a site map, including a depiction of buffer zones and setbacks;

(B) soil, crop, and crop nutrient information;

(C) a description of land application procedures and equipment used; and

(D) a description of BMPs utilized to minimize the entry of uncontaminated runoff into the control facility and retention control structure (RCS).

(b) Management documentation. A permit or authorization will establish additional requirements for recordkeeping and documentation. At a minimum, these records must include:

(1) a copy of the administratively complete and technically complete individual water quality permit application, notice of intent seeking authorization under a CAFO general permit, and the written authorization issued by the commission or executive director, for any facility required to obtain written authorization;

(2) the RCS management plan, if applicable;

(3) the written procedures for spill prevention and recovery for pesticides and chemicals used on site;

(4) a copy of the approved recharge feature certification;

(5) the groundwater monitoring plan associated with the use of a playa;

(6) a copy of the comprehensive nutrient management plan, nutrient management plan or nutrient utilization plan, if required;

(7) site-specific documentation that no significant hydrologic connection exists between the contained wastewater and water in the state;

(8) any written agreement with a landowner which documents the allowance of nighttime application of manure, litter, or wastewater;

(9) the odor control plan requirements established in §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)); and

(10) documentation of employee training, including dates when training occurred and, for daily outreach program area (DOPA)-required training, verification of the date, time of attendance, and completion of training.

(c) Site evaluation.

(1) Once every five years, the CAFO operator shall have an NRCS engineer, licensed Texas professional engineer, or licensed Texas professional geoscientist review the existing engineering documentation, complete a site evaluation of the structural controls, review existing liner documentation, and complete and certify a report of their findings.

(2) A complete inspection of the facility, including the CAFO, the associated control facilities, and LMUs shall be completed by the CAFO operator and a report documenting the findings of the inspection made at least once per year. The inspection shall verify that:

(A) the description of potential pollutant sources is accurate;

(B) the site plan/map has been updated or otherwise modified to reflect current conditions;

(C) the controls outlined in the PPP to reduce pollutants and avoid nuisance conditions are being implemented and are adequate; and

(D) records documenting significant observations made during the site inspection.

(d) Recordkeeping requirements. The CAFO operator shall keep records on site for a minimum of five years from the date the record was created and shall submit them within five days of a written request by the executive director. The following records must be included:

(1) a list of any significant spills of potential pollutants at the CAFO that have a significant potential to reach water in the state;

(2) a log of wastewater, manure, litter, and sludge removal that shows the dates, times, and location of application or disposal;

(3) a log of all daily measurable rainfall events, including the measured rainfall;

(4) a log of all weekly wastewater levels observed in the RCS, or daily wastewater levels in a major sole-source impairment zone;

(5) documentation of liner maintenance by an NRCS engineer, licensed Texas professional engineer, or qualified groundwater scientist;

(6) groundwater monitoring records, if required by §321.41 of this title (relating to Special Requirements for Discharges to a Playa);

(7) records that show the control facilities have been inspected for structural integrity and maintenance, the date of each inspection, and a description of the findings;

(8) records of all manure, litter, and wastewater either used at the facility or removed from the facility, updated at least monthly. For CAFOs where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the CAFO owner or operator, such records must include the following information:

(A) date of manure, litter, or wastewater application to each LMU;

(B) location of the specific LMU and the volume applied during each application event;

(C) acreage of each individual crop on which manure, litter, or wastewater is applied;

(D) basis for and the total amount of nitrogen and phosphorus applied per acre to each LMU, including sources of nutrients other than manure, litter, or wastewater on a dry basis;

(E) the percentage of moisture content of the manure;

(F) actual annual yield of each harvested crop; and

(G) weather conditions (such as the temperature, precipitation, and cloud cover) during the land application and 24 hours before and after the land application;

(9) annual nutrient analysis for at least one representative sample of irrigation wastewater and one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium;

(10) the results of initial and annual soil analysis reports as required by this subchapter;

(11) monthly records describing disposal and storage of chemicals , including pesticide containers; and

(12) copies of all notifications to the executive director, including any made to a regional office, as required by this subchapter, a permit, or authorization.

(e) Reporting requirements.

(1) The CAFO operator shall furnish to the appropriate regional office and the commission's Office of Compliance and Enforcement, Enforcement Division in Austin, soil testing analysis of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of this subchapter.

(2) CAFO operators shall provide all other reports required by this subchapter to the Office of Compliance and Enforcement, Enforcement Division.

**[§321.46. Air Standard Permit Authorization.]**

[For the purposes of air quality, the term "CAFO," as used in this subchapter, includes any associated feed handling and/or feed milling operations located on the same site as the CAFO. Pursuant to Texas Clean Air Act, §382.051, any CAFO which meets all of the requirements for registration or individual permit outlined in this subchapter or all the requirements for operating under a CAFO general permit and which satisfy this section is hereby entitled to an air quality standard permit authorization in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Facilities which meet all the "Air Quality Only" requirements in §321.39 of this title (relating to Pollution Prevention Plans) and obtain either a registration or individual permit or a CAFO general permit are eligible for an air quality standard permit. The air quality standard permit may be obtained in

conjunction with a water quality application. If no water quality application is pending, a separate request may be submitted in writing which demonstrates compliance with all the requirements in this subchapter. In addition to meeting the "Air Quality Only" requirements, the applicant must also demonstrate compliance with the following:]

[ (1) Construction or expansion of a new animal feeding operation. Animal feeding operations not in operation on August 19, 1998, must document compliance with either subparagraph (A) or (B) of this paragraph at the time of application for amendment, transfer, registration, or an individual permit under this subchapter or for a CAFO general permit.]

[ (A) Operator shall not locate any permanent odor sources within 0.50 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or]

[ (B) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this

subsection. Operator shall also develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum address manure collection, manure and wastewater storage and treatment, land application, dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.]

[(2) Expansion of an existing animal feeding operation. Animal feeding operations in operation on August 19, 1998 must document compliance with either subparagraph (A) or (B) of this paragraph at the time of application for transfer, amendment, registration, or an individual permit under this subchapter or for a CAFO general permit.]

[(A) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or]

[(B) Operator shall develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum address manure collection, manure and wastewater storage and treatment, land application,

dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.]

**§321.47. Requirements for Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs).**

(a) Purpose. This section provides an animal feeding operation (AFO) that is not defined or designated as a concentrated animal feeding operation (CAFO) authorization to operate, and identifies the operational requirements necessary to achieve the purposes of this subchapter.

(b) Applicability.

(1) Any AFO not defined or designated as a CAFO that uses control facilities to manage manure, litter, or wastewater generated on site shall comply with all the requirements of this section.

(2) Any AFO not defined or designated as a CAFO that does not use control facilities to manage manure, litter, or wastewater generated on site shall comply with the following general requirements.

(A) An AFO operator must locate, construct, and manage the facility in a manner that will protect surface and groundwater quality;

(B) An AFO operator must prevent nuisance conditions and minimize odor conditions; and

(C) An AFO shall not expand operations, either in size or numbers of animals, before amending or enlarging the waste handling procedures and structures to accommodate all additional wastes that will be generated by the expanded operations.

(c) General requirements.

(1) An AFO operator must locate, construct, and manage the control facility and land management unit (LMU) in a manner that will protect surface and groundwater quality.

(2) An AFO operator must prevent nuisance conditions and minimize odor conditions in accordance with the requirements of §321.31(b) of this title (relating to Manure, Litter, and Wastewater Discharge and Air Emission Limitations).

(3) The AFO may discharge from the production area, if the discharge is the result of a rainfall event which exceeds the design capacity of a retention control structure (RCS) that has been properly designed, constructed, operated, and maintained. RCSs shall be designed in accordance with §321.38 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)).

(4) An AFO shall not expand operations, either in size or numbers of animals, before amending or enlarging the waste handling procedures and structures to accommodate all additional wastes that will be generated by the expanded operations.

(5) As applicable to the operation, the production area of a new or expanding AFO must comply with the requirements of §321.41 of this title (relating to Special Requirements for Discharges to a Playa).

(6) All control facilities, including holding pens and RCSs, must be located outside of the 100-year flood plain, as defined in Chapter 301 of this title (relating to Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements), unless the control facilities are protected from inundation and damage from a 100-year, 24-hour rainfall event.

(7) Where applicable, equivalent measures contained in a site-specific plan which meet the requirements of this subchapter may be substituted for applicable best management practices and/or portions of the technical requirements in this subchapter. Equivalent measures may be contained in:

(A) United States Department of Agriculture (USDA) - Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG) for Texas; and/or

(B) Texas State Soil and Water Conservation Board (TSSWCB) regulations;  
and/or

(C) a certified water quality management plan certified by the TSSWCB;

and/or

(D) a comprehensive nutrient management plan (NMP) certified by the TSSWCB, the USDA - NRCS, or their designee.

(d) Control facilities.

(1) The AFO operator shall minimize entry of non-process wastewater into RCSs.

Such measures may include the construction of berms, embankments, or similar structures.

(2) 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 and to maintain a packed pen surface. Earthen pens shall be designed and maintained to ensure good drainage, minimize ponding, and minimize the entrance of uncontaminated stormwater to the RCS.

(3) The AFO operator constructing a new or modifying an existing RCS shall ensure that all construction and design is certified by a licensed Texas professional engineer. The certification shall be signed and sealed in accordance with the requirements of the Texas State Board of Professional Engineers . All RCS design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The operator must use those standards that are current at the time

of construction. Where site-specific variations are warranted, the operator must ensure a licensed Texas professional engineer documents these variations and their appropriateness to the plan.

(4) Existing facilities which have been properly maintained and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site-specific NRCS plans and specifications will be considered to be in compliance with the design and capacity requirements of this subchapter if the site-specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.).

(5) RCS embankments and liners shall be designed and constructed in accordance with the requirements of §321.38 of this title.

(6) The AFO operator shall adhere to the well buffer requirements in §321.38 of this title.

(7) The AFO operator must maintain copies of documentation of the sources of information, assumptions, and calculations used in determining the appropriate volume capacity of the retention facilities.

(8) RCSs shall be equipped with either irrigation, evaporation, or liquid removal systems capable of dewatering the RCSs.

(9) Sludge shall be removed from RCSs in accordance with the design schedule for cleanout to prevent the accumulation of sludge from exceeding the designed sludge volume of the structure.

(e) Operation and maintenance.

(1) Sufficient volume shall be maintained at all times within the RCS to accommodate sludge, wastewaters, and contaminated storm water (rainwater runoff and direct precipitation) from the AFO facility.

(2) The operator shall restore such capacity after each rainfall event or accumulation of manure, sludge, or process-generated wastewater that reduces such capacity, when conditions are favorable for irrigation. Favorable conditions shall be when the soil moisture level decreases so that irrigation will not cause runoff.

(3) The normal operating wastewater level in the RCS shall be maintained within the design of the RCS. If the water level in the RCS encroaches into the storage volume reserved for the design rainfall event (25-year or 100-year) the operator must document the conditions that resulted in this occurrence. As soon as irrigation is not prohibited, the AFO operator shall irrigate until the water level is at or below the design rainfall level.

(4) Adequate equipment shall be available and maintained in good working order to remove of such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.

(5) A rain gauge capable of measuring the design containing the required rainfall event shall be installed on site and properly maintained.

(6) A permanent marker (measuring device) shall be maintained in the RCS to show the following: the volume for a 25-year, 24-hour rainfall event or a 100-year, 24-hour rainfall event, as required by the facility's design standard; and the predetermined minimum treatment volume within any treatment lagoon. The markings on the marker shall be visible from the top of the levee.

(7) The AFO operator shall ensure that liners are protected from animals by fences or other protective devices. No tree shall be allowed to grow such that the root zone would intrude or compromise the structure of the liner. Any mechanical or structural damage to the liner shall be evaluated by an NRCS engineer or a licensed Texas professional engineer within 30 days of the damage.

(8) The AFO operator shall maintain ponds, pipes, ditches, pumps, and diversion and irrigation equipment to ensure ability to fully comply with the terms of this subchapter.

(9) An AFO operator using a liquid manure handling system shall scrape or flush accumulated manure at least once per week or in accordance with proper design and maintenance of the facility.

(10) If an RCS is in danger of imminent overflow from chronic or catastrophic rainfall or catastrophic conditions, the AFO operator shall take reasonable steps to irrigate wastewater to land management units (LMUs) only to the extent necessary to prevent overflow from the RCS.

(f) Land application.

(1) The runoff of manure, litter, or wastewater to water in the state as the result of the application of manure, litter, or wastewater from an AFO is authorized provided the land application activity is implemented in accordance with a plan for nutrient management detailed in this section.

(2) The AFO operator shall apply manure, litter, and wastewater uniformly to suitable land at appropriate times and at agronomic rates. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation, and soil conditions.

(3) The AFO operator shall develop and utilize the information in this paragraph for land application unless an NMP is developed and implemented. At that time, the NMP must be followed for land application. The AFO operator must adhere to the following:

(A) a site map showing the location of any land application areas, either on-site or off-site which are owned, operated, controlled, rented, or leased by the facility owner or operator which will be utilized for land application of waste or wastewater;

(B) the location, description, and limitations of the major soil types within the identified LMUs, and a plan to address the soil limitations;

(C) crop types and rotations to be implemented on an annual basis;

(D) predicted yield goals based on the major soil types within the identified LMUs;

(E) procedures for calculating nutrient budgets to be used to determine application rates;

(F) a detailed description of the type of equipment and method of application to be used in applying the waste or wastewater; and

(G) projected rates and timing of application of the manure and wastewater as well as other sources of nutrients that will be applied to the LMUs.

(4) Discharge of manure, litter, or wastewater from the LMU is prohibited and shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition.

(5) Application rates shall not exceed the nutrient uptake of the crop coverage or planned crop planting with any land application of wastewater and/or manure. Land application rates of manure and wastewater shall be based on the available nutrient content.

(6) Land application shall not occur when the ground is frozen or saturated or during rainfall events, unless in accordance with §321.39(b)(3) of this title (relating to Control Facility Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)).

(7) Irrigation practices shall be managed so as to minimize ponding or puddling of wastewater on the site, prevent discharge of tailwater to waters in the state, prevent pollution of waters in the state, and prevent the occurrence of nuisance conditions.

(8) The land application of manure, litter, and wastewater at agronomic rates shall not be considered surface disposal and is not prohibited.

(9) Manure, litter, or wastewater may be applied to the areas in the 100-year flood plain at agronomic rates not to exceed the hydrologic needs of the crop.

(10) The AFO operator shall develop and maintain the calculations and assumptions used for determining land application rates and all nutrient analysis data.

(11) The AFO operator shall annually analyze at least one representative sample of irrigation wastewater and one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium.

(12) Vegetative buffer strips shall be no less than 100 feet of vegetation to be maintained between waste or wastewater application areas and surface water and watercourses. The AFO operator shall maintain the buffer strips in accordance with NRCS guidelines.

(13) Manure/litter storage capacity requirements based upon manure/litter and waste production, land availability, and the USDA - NRCS FOTG for Texas shall be provided. Permanent storage structures for AFO operations must meet NRCS design specifications. All litter/manure removed from operation and not temporarily stored must be located within the drainage of the RCS, in a well-drained area with no ponding of water, and where the top and sides of stockpiles are adequately sloped to ensure proper drainage to prevent polluted rainfall runoff.

(14) Temporary storage of manure in the 100-year flood plain, near water courses or recharge features is prohibited unless protected by berms or other structures sufficient to prevent inundation during a 100 year-year storm. Temporary storage of manure/litter shall not exceed 30 days and is only allowed in LMUs. Polluted runoff from manure/litter storage piles must be retained on site.

(15) Any dairy AFO that is located in the major sole-source impairment zone, as defined under §321.32 of this title (relating to Definitions), at a minimum must provide for management and disposal of waste in accordance with §321.42(i) of this title (relating to Requirements Applicable to the Major Sole-Source Impairment Zone).

(16) Nighttime application of liquid or solid waste shall be allowed only in areas with no occupied residence(s) within 1/4 mile from the outer boundary of the LMU receiving manure/litter or wastewater application. In areas with an occupied residence within 1/4 mile from the outer boundary of the LMU, application shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have, in writing, agreed to such nighttime applications.

(17) AFOs introducing wastewater or chemicals to water wellheads for the purpose of irrigation shall install backflow prevention devices in accordance with requirements contained in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers).

(18) Composting on site at an AFO shall be performed in accordance with Chapter 332 of this title (relating to Composting). AFOs may compost waste generated on site, including manure, litter, bedding, feed, and dead animals. In accordance with Chapter 332 of this title, an AFO operator may add agricultural products to provide an additional carbon source or bulking agent to aid in the composting process. If the compost areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall

event, the compost areas shall be located within the drainage of the RCS. The runoff volume from compost areas shall be accounted for in the design of the RCS.

(19) Maintenance of animals.

(A) Animals confined at the AFO shall be restricted from coming into direct contact with surface water in the state through the use of fences or other controls.

(B) An AFO that maintains animals in pastures must maintain crops, vegetation, forage growth, or postharvest residues in the normal growing season, excluding the feed and water trough areas and designated open lots.

(g) Soil sampling and testing.

(1) The AFO operator is not required to collect soil samples from LMUs where manure, litter, or wastewater has not been applied during the preceding year. The AFO operator must comply with paragraph (2) of this subsection before resuming land application to such LMUs the unused LMU.

(2) Prior to commencing wastewater irrigation or manure, litter application on land owned, operated, controlled, rented, or leased by the AFO operator, and annually thereafter, the

operator shall collect and analyze representative soil samples from each of the LMUs according to the following procedures.

(3) Sampling procedures shall employ accepted techniques of soil science for obtaining representative samples and analytical results. Samples should be collected using approved procedures described in the executive director's guidance document entitled "Soil Sampling for Nutrient Utilization Plans" as updated.

(4) Samples should be collected within the same 45-day time frame each year.

(5) One composite sample shall be collected for each soil depth zone per LMU and per uniform soil type (soils with the same characteristics and texture) within the LMU.

(6) Composite samples shall be comprised of ten to 15 randomly sampled cores obtained from each of the following soil depth zones:

(A) Zone 1: zero to six inches for LMUs where the manure or litter is incorporated directly into the soil or zero to two inches for LMUs where the waste is not incorporated into the soil; if a zero to two-inch sample is required under this subsection, then an additional sample from the two to six-inch soil depth zone shall be obtained in accordance with the provisions of this section; and

(B) Zone 2: six to 24 inches.

(7) Soil samples shall be submitted to a soil testing laboratory along with a previous crop history of the site, intended crop use, and yield goal. Soil test reports shall include nutrient recommendations for the crop yield goal.

(8) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from LMUs shall include the following:

(A) nitrate reported as nitrogen in parts per million (ppm);

(B) phosphorus (extractable, ppm) - Mehlich III;

(C) potassium (extractable, ppm);

(D) sodium (extractable, ppm);

(E) magnesium (extractable, ppm);

(F) calcium (extractable, ppm);

(G) soluble salts/electrical conductivity (deciSiemens/meter (dS/m)) -  
determined from extract of 2:1 (volume to volume (v/v)) water/soil mixture; and

(H) soil water pH.

(h) Nutrient utilization plans (NUPs).

(1) An operator shall not land apply any waste or wastewater to the LMU unless the  
waste or wastewater application is implemented in accordance with a detailed NUP when results of the  
annual soil analysis for extractable phosphorus indicate:

(A) a level greater than 200 ppm of extractable phosphorus (reported as P) in  
Zone 1 for a particular LMU; or

(B) a level greater than 350 ppm of extractable phosphorus in Zone 1 (zero to  
six-inch depth) for an LMU where the average annual rainfall is 25 inches or less, erosion control is  
adequate to keep erosion at the soil loss tolerance (T) or less, and the closest edge of the field is more  
than one mile from a named stream; or

(C) if ordered by the commission to do so in order to protect the quality of  
waters in the state.

(2) An NMP certified in accordance with NRCS Practice Standard Code 590 complies with the requirements of a complete and effective NUP.

(3) A NUP shall be developed by an employee of the NRCS, a nutrient management specialist certified by the NRCS, the TSSWCB, 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 Registry of Certified Professionals in Agronomy, Crops and Soils , after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner. No land application under an approved NUP shall cause or contribute to a violation of water quality standards or create a nuisance.

(4) Land application under the terms of the NUP may begin as soon as the plan is developed in accordance with this subsection. After a NUP has been implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below 200 ppm. Thereafter, the AFO operator shall apply manure, litter, or wastewater at agronomic rates according to the requirements of this section.

(i) Recordkeeping requirements.

(1) Records required under this subsection must be kept on site for a minimum of five years from the date the record was created. Records shall include:

(A) a list of any significant spills of pollutants with the potential to reach water in the state;

(B) a schedule for liquid waste removal;

(C) a date log indicating weekly inspection of wastewater level in the RCS;

(D) a log of all measurable rainfall events;

(E) a copy of the results of initial and annual soils, manure, litter, and wastewater analyses;

(F) records of dates of inspection of the RCS, and a log of the findings of such inspections as required under subsection (k)(2) of this section;

(G) records of all manure, litter, and wastewater either utilized at the facility or removed from the facility;

(H) the groundwater monitoring plan associated with the use of a playa;

(I) a copy of the NUP, if required;

(J) site-specific documentation that no significant hydrologic connection exists between the wastewater in the RCS and water in the state; and

(K) any written agreement with a landowner which documents the allowance of nighttime application of manure, litter, or wastewater.

(2) For facilities where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the AFO owner or operator, such records shall include the following information:

(A) the date of manure, litter, or wastewater application to each field;

(B) the location of the specific application site and the number of acres utilized during each application event;

(C) the acreage of each individual crop on which manure, litter, or wastewater is applied;

(D) the basis for and the total amount of nitrogen and phosphorus applied per acre to each field, including sources of nutrients other than manure, litter, and wastewater; the number of dry tons; and the percentage of nitrogen/phosphorus based on a dry basis;

(E) the percentage of moisture content of the manure; and

(F) the actual annual yield of each harvested crop.

(3) Where manure, litter, or wastewater is removed from the facility, records must be maintained in accordance with §321.46(d)(8) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting). If manure is sold or given to other persons for off-site land application or disposal, the operator must maintain a log of: the date of removal from the CAFO; the name of hauler; and the amount, in wet tons, dry tons, or cubic yards, of waste removed from the CAFO. (A single pickup load need not be recorded.) Where the wastes are to be land applied by the hauler, the operator must make available to the hauler any nutrient sample analysis of the manure from that year.

(j) Documentation of liner maintenance. The operator shall have an NRCS engineer, licensed Texas professional engineer, or qualified groundwater scientist review the documentation and do a site evaluation every five years.

(k) Groundwater monitoring. In the event that one or more samples of groundwater are required, the operator must sample each well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the pollution prevention plan, and compare the analytical results to the baseline data. Data from any required monitoring wells must be submitted to the executive director and kept on site for five years. The first year's sampling shall be considered the

baseline data and must be retained on site for the life of the facility, unless otherwise provided by the executive director. If a 10% deviation in concentration of any of the sampled constituents is found, the operator must notify the executive director within 30 days of receiving the analytical results.

(l) Inspections. The AFO operator must conduct the following inspections to assure the facility maintains its efficiency.

(1) Preventative maintenance program. The operator shall periodically inspect designated equipment at the control facility and LMUs. Material handling areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system or the creation of a nuisance. Inspections shall include visual inspections and equipment testing to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.

(2) Site inspection. A complete inspection of the control facility and LMUs shall be done and a report documenting the findings of the inspection made at least once a year. The inspection shall be conducted by the operator to verify that the description of potential pollutant sources is accurate, and the controls necessary to reduce pollutants and avoid nuisance conditions are being implemented and are adequate. Records documenting significant observations made during the site inspection shall be retained. Records of inspections shall be maintained for a period of five years.

(m) Notification. An existing or new AFO operator has the continuing obligation to provide the executive director notice of the number of animals in confinement in accordance with the following requirements.

(1) All new AFOs which confine a number of animals that fall within the range of the number of animals specified in any of the categories under §321.32(12)(B) of this title (relating to Definitions) shall notify the executive director of their legal entity name, physical location including a map or hand drawn sketch, mailing address, and number of head in confinement.

(2) Such notification shall be in writing and signed by the operator and shall be submitted not later than 180 days after commencement of operation.

(n) Closure required. The AFO operator shall properly close the AFO and RCS within one year of inactivity or ceasing of operations at the facility, or in accordance with an alternative schedule in a closure plan prepared by a licensed Texas professional engineer. The closure plan for the RCS must be developed using standards contained in the NRCS Practice Standard 360 (Closures of Waste Impoundments, as updated) and using the guidelines contained in the Texas Cooperative Extension/NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures, as updated). AFOs shall maintain compliance with the requirements of this subchapter until the facility has been properly closed.

**[§321.47. Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization.]**

[In lieu of the procedure specified in §321.33 of this title (relating to Applicability), the owner or operator of any existing facility as described in §321.33(a) of this title (relating to Applicability) may submit to the executive director written notice that they will operate the facility in accordance with the provisions of this subchapter. Such notice shall be on forms approved by the executive director and submitted within 60 days of the effective date of these amended (1999) rules. Subject to the provisions of §321.35(h) of this title (relating to Procedures for Making Application for Registration), a facility for which a complete and accurate written notice has been submitted in accordance with this section may operate as an authorized TPDES facility under this amended subchapter for the remainder of the unexpired term of their current authorization. Such initial TPDES authorization shall not require compliance with "air quality only" provisions of this title that can be accomplished only by making structural changes to a structure that is currently in compliance with the design and engineering standards in the facility's latest permit. Upon expiration of the specified term of the facility's current state-only authorization, the owner or operator shall file for renewal in accordance with either §321.34 or §321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). If the existing authorization contains any special conditions or provisions, the owner or operator shall operate such facility in accordance with the provisions of this subchapter and any additional special provisions or conditions specified in the authorization.]

**SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS**

**§321.48, §321.49**

**STATUTORY AUTHORITY**

The repeals are proposed under TWC, §5.102, which provides the commission with the general authority necessary to carry out its duties and general powers under its jurisdiction; TWC, §5.103, which provides the commission with the general authority to adopt rules; TWC, §5.105, which is the commission's authority to set policy by rule; and TWC, §5.013, which states the commission's authority over various statutory programs.

These repeals are also proposed under TWC, §26.011, regarding the commission's authority over water quality in the state; and TWC, §26.028, which provides the commission's authority to approve certain applications for wastewater discharge; and TWC, §26.0286, which requires the commission to 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.

These repeals are also proposed under TWC, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment by HB 1542 in 1997, in order to continue to regulate small AFOs under a permit by rule. In addition, §26.040 authorizes the commission to approve a general permit to authorize the discharge of waste into or adjacent to water in the state by a category of dischargers that engage in the same or substantially similar types of operations.

These repeals are also proposed under TWC, §26.041, which allows the commission to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health; and §26.048, which allows the commission to propose rules to prohibit the discharge into a playa or use of it as a wastewater retention facility. In addition, these amendments are proposed under TWC, §26.121, which prohibits the discharge of waste into or adjacent to any water in the state except as authorized with a commission permit or other authorization.

These repeals are also proposed under TWC, Chapter 26, Subchapter L, which requires the commission to authorize the construction or operation of a new or expanded dairy CAFO located in 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.

These repeals are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

Finally, these repeals are also proposed under Texas Health and Safety Code, §382.011, which provides the commission the authority to control the quality of the state's air; §382.017, which authorizes the commission to propose rules consistent with the policy and purposes of the Texas Clean Air Act and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for

proper control of the state's air; and §382.051, which provides the commission the authority to issue air standard permits. These repeals are also proposed under Texas Health and Safety Code, §382.05195, which authorizes the commission to issue and amend air standard permits for new or existing similar facilities, and to propose rules to implement and administer the issuance, amendment, renewal, and revocation of authorizations to use standard permits.

The proposed repeals implement TWC, §§5.013, 5.102, 5.103, 5.105, 26.011, 26.028, 26.040, 26.041, 26.048, 26.121, and 26.0286.

In addition, the proposed repeals implement TWC, Chapter 26, Subchapter L; Texas Government Code, §2001.006; and Texas Health and Safety Code, §§382.011, 382.017, 382.012, 382.051, and 382.05195.

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

[(a) This section applies to new CAFOs and to CAFOs increasing the number of animals confined under an existing operation that are:]

[(1) 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; and]

[(2) 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 CAFO, as defined in §321.32 of this title; or]

[(2) increasing the number of 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 disposal 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) disposed in landfills outside of the watershed, subject to the requirements of commission rules relating to industrial solid waste;]

[(C) delivered to a composting facility approved by the executive director;]

[(D) put to another beneficial use approved by the executive director; or]

[(E) applied in any of the following ways:]

[(i) in accordance with the 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 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 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 CAFOs or CAFOs increasing the number of animals, the requirements of this section must be implemented concurrently with the next required annual soil sampling date established in the pollution prevention plan.]

[(c) For existing CAFOs not increasing the number of animals, the requirements of this section must be implemented concurrently with the next required annual soil sampling date established in the pollution prevention plan, beginning six months after the effective date of these amended and new rules (2002).]

[(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, including each historical waste application field, and to ensure compliance with subsection (f) of this section; and]

[(2) have sampling under subsection (d)(1) of this section performed in accordance with the 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) The CAFO operator shall ensure that each sample collected under subsection (d) of this section is tested in accordance with the applicable requirements of §321.39(f)(28)(A) - (F) of this title and is tested for any other nutrient designated by the executive director.]

[(f) The CAFO operator shall ensure that the analytical results from the testing performed under subsection (e) of this section are submitted to the executive director and that a copy is 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 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.]