

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §321.43.

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

Senate Bill (SB) 1740, passed by the 79th Legislature, 2005, affects several aspects of air permitting. Section 1 of SB 1740 created new Texas Health and Safety Code (THSC), §382.004, Construction While Permit Application Pending. Section 382.004 allows an applicant seeking a permit for a modification (or lesser change) to an existing facility to begin construction related to the application after the application is submitted, and before the commission has issued the permit.

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

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

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

## SECTION DISCUSSION

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

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

## FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Local governments or other governmental entities owning or operating AFO facilities may experience some economic benefit as a result of the proposed rule. The proposed rule would implement the provisions of SB 1740, dealing with the distance, setback, and buffer limits at AFOs that apply for an air quality standard permit.

The proposed rule would amend Chapter 321 specifically concerning the air standard permit for AFOs.

A concurrent rulemaking proposes amendments to Chapter 116, which also deals with distance,

setback, and buffer limits for other air quality standard permits. Amendments to Chapter 321 would establish that buffer requirements for AFOs would be satisfied for the purposes of a standard permit at the earlier of the date new construction, expansion, or modification of the facility begins or the date any application or notice of intent is first filed with the commission to obtain approval for the construction or operation of a facility. This would ensure that standard permit projects could continue if subsequent events outside the control of the permit holder occur, thereby reducing the risk that the owners/operators of AFOs would have projects disrupted by changing circumstances. Once boundary limits are satisfied, those requirements could not be changed in future periods to affect project construction or operation.

The proposed rule would not impose new technical or administrative requirements on AFOs. However, the proposed rule may provide an economic benefit because it affords AFO owners and operators with more certainty regarding their projects. Any statewide economic benefit to AFOs could not be reliably estimated given the varied characteristics and conditions under which each AFO operates.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and more efficient and consistent application of permit requirements.

The proposed rule would not impose new technical or administrative requirements, but some AFOs may experience an economic benefit since the proposed rule does provide for more predictability and

certainty for standard permit holders. Once buffer limits are satisfied and a standard permit is issued, those requirements could not be changed in future periods to affect project construction or operation.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small or micro-businesses owning or operating AFOs would experience the same certainty and consistency under the proposed rule as that experienced by governmental entities, individuals, and large businesses concerning buffer limits for air quality standard permits.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a “major environmental rule” as defined in that statute. A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking action implements Section 2 of SB 1740, passed by the

79th Legislature, that amended THSC, §382.05195 to add new subsection (j). The proposed amendment to §321.43 implements this new subsection for the AFO air standard permit to modify how distance limits, setbacks, and buffers are determined at these facilities. The amendment does not specifically protect human health or the environment.

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

Specifically, this amendment implements SB 1740, passed by the 79th Legislature, that amended THSC, §382.05195 and therefore specifically meets an express requirement of state law. Section 2 of SB 1740 only establishes the timing for the determination of property line distance, buffers, or setbacks under state air standard permits, and therefore does not exceed a standard set by federal law. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of

THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code (TWC), which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.017, and 382.05195. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

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

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

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed revisions are necessary to ensure that commission rules maintain consistency with applicable statutes. The proposed revisions do not authorize or allow increased emissions of air contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

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

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

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 2, 2006, at 2:00 p.m., at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512)

239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>.

All comments should reference Rule Project Number 2005-052-116-PR. The comment period closes October 9, 2006. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

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

### **§321.43**

#### **STATUTORY AUTHORITY**

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

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

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

(a) - (g) (No change.)

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

(i) (No change.)

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

(1) (No change.)

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

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

(A) The determination of whether the applicable buffer requirements are [shall be] satisfied shall be made on the basis of conditions existing at the earlier of [at the time that the AFO operator does any of the following]:

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

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

[(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.]

(B) - (C) (No change.)

(D) Written consent, including a letter as defined by §321.32(26) 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 this paragraph from the owner of the land containing each occupied residence or business structure, school

(including associated recreational areas), permanent structure containing a place of worship, or public park located within the buffer distance may be obtained in lieu of satisfying the buffer distance requirements in this paragraph. Written consent from the governmental entity responsible for operating a school or public park, if the governmental entity is not the owner of the land containing the receptor, is required in addition to the consent of the owner of the land containing the receptor. An easement must be recorded with the county. The written consent must include the following information at the time the actions specified in this paragraph occur:

(i) - (vi) (No change.)

(E) - (F) (No change.)

(3) - (5) (No change.)