

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §321.33 *with changes* to the proposed text as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4166).

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

This rulemaking implements Senate Bill (SB) 1707, 79th Legislature, 2005, which changed the permitting requirements under Texas Water Code (TWC), Chapter 26 for certain concentrated animal feeding operations (CAFOs) located in the protection zone of a sole-source surface drinking water supply. Prior to SB 1707, any CAFO where any part of the production area of the CAFO was located or proposed to be located within the protection zone of a sole-source surface drinking water supply was required to obtain an individual permit. SB 1707 revised TWC, §26.0286 by removing the requirement to obtain an individual permit for poultry CAFOs that do not use a liquid waste handling system (dry litter poultry) located in the protection zone of a sole-source surface drinking water supply. This allows these facilities the ability to apply for coverage under a general permit.

Additionally, this rulemaking would modify the permitting requirements for dry litter poultry CAFOs to modify the duty to apply for permit coverage by stating that they do not have a duty to apply for permit coverage for a potential to discharge. The Second Circuit Court of Appeals in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005), vacated and remanded portions of the federal CAFO rules to the United States Environmental Protection Agency (EPA). EPA has issued proposed rules to address the *Waterkeeper* decision in the National Pollutant Discharge Elimination System

(NPDES) rules. In light of this, TCEQ is modifying the permitting requirements for dry litter poultry operations.

## SECTION DISCUSSION

Section 321.33, Applicability and Required Authorizations, modifies subsection (a) to state that this subsection is applicable except as provided in subsection (f). The following sentence was added to subsection (b)(3): “This paragraph does not apply to a poultry operation that does not use a liquid waste handling system, which is commonly referred to as a dry litter poultry operation.” The adopted change to subsection (d) adds the following sentence: “This subsection does not apply to dry litter poultry operations.” The adopted change to subsection (f) is modified to now read “Dry litter poultry operations. Dry litter poultry CAFOs do not have a duty to apply for permit coverage for a potential discharge of manure or litter into or adjacent to water in the state. A dry litter poultry CAFO shall only be required to obtain authorization by an individual water quality permit or a CAFO general permit in accordance with subsection (a), (b), or (c) of this section if it proposes to discharge or the executive director determines that a permit is necessary due to an unauthorized discharge; the operation’s failure to comply with, or timely obtain, a certified water quality management plan approved by the Texas State Soil and Water Conservation Board; or other pertinent factors.” The adopted change to subsection (f) also adds the following sentence: “A dry litter poultry CAFO is authorized to be constructed and operated if the operation has a certified water quality management plan approved by the Texas State Soil and Water Conservation Board or is otherwise in compliance with the plan implementation schedule set forth in the notes following the codified sections of TWC, §26.302.” This change clarifies that dry litter poultry CAFOs can be constructed and operated as long

as the facility has a water quality management plan or is in compliance with the schedule as set forth in the TWC.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirement of Texas Government Code, §2001.0225, and made a determination that the rulemaking is not subject to §2001.0225. The adopted rulemaking does not meet the definition of a “major environmental rule” as defined in §2001.0225, 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). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state 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.

“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 adopted rulemaking, which is 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 change incorporates new state requirements. 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. The commission invited public comment on the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

#### TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of the rulemaking in accordance with Texas Government Code, §2007.043. The rulemaking implements SB 1707 and allows dry litter poultry facilities located in the protection zone of a sole-source surface drinking water supply the ability to obtain coverage under either an individual or general permit. Additionally, the rulemaking modifies the duty to apply for dry litter poultry operations. The rule substantially advances these stated purposes. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to the implementation of SB 1707 and the addition of the permitting deadline because this rulemaking is a governmental action that results in the adoption of a rule or regulatory requirement. However, this governmental action does not result in a burden on private real property. This rulemaking allows certain dry litter poultry facilities to obtain coverage under either an individual or general permit. Also, this rulemaking would change the dates when all dry litter poultry CAFOs are required to obtain authorization. Therefore, the adoption of this change does not result in a constitutional or statutory taking of private real property and no real property interests are burdened or impacted by this rulemaking.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is subject to the Texas 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 consistency determination for the adopted rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with CMP goals and policies because the rulemaking is an administrative rule that changes the authorization type available to dry litter poultry CAFOs located in the protection zone of a sole-source surface drinking water supply; makes permitting requirements consistent for all dry litter poultry CAFOs; will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

#### PUBLIC COMMENT

A public hearing for this rulemaking was held in Austin on June 13, 2006. The public comment period for this rulemaking closed at 5:00 p.m. on June 19, 2006. Comments were received from the Texas Poultry Federation represented by Jackson Walker L.L.P. (TPF).

## RESPONSE TO COMMENTS

### Comment

TPF commented that it supports the rule proposal to implement the requirements of SB 1707, so as to exclude dry litter poultry operations located within the protection zone of a sole-source surface drinking water supply from the requirement to obtain individual water quality permits and it supports the rule that extends the deadline for all dry litter poultry CAFOs to apply for authorization under a general permit or individual permit.

### Response

**The commission acknowledges TPF's support for the rule changes.**

### Comment

TPF suggested that §321.33(a) be modified to include the phrase "except as provided in subsection (f) of this section," to remove any ambiguity that subsection (f) provides the necessary authorization for dry litter poultry CAFOs to be constructed and operated. It stated that without this clarification, subsection (a) could be read to require all such CAFOs to obtain authorization under a general permit or individual permit, rather than the permit by rule contained in this rule.

**Response**

**The commission agrees with this comment and has amended §321.33(a) to reflect this change.**

Comment

TPF commented that the wording in §321.33(f) inadvertently omits from authorization those dry litter poultry operations that do not yet have a Texas State Soil and Water Conservation Board (TSSWCB) water quality management plan but that are in compliance with the schedule to obtain a plan as provided in SB 1339, 77th Legislature, Regular Session, 2001. It suggested adding language to the end of §321.33 to include “or is otherwise in compliance with the plan implementation schedule set forth in Senate Bill 1339 (77th Legislature, Regular Session).”

**Response**

**The commission agrees that the purpose was not to exclude those operations that are not required to have a water quality management plan under the implementation schedule in the notes following the codified sections of TWC, §26.503 as required by SB 1339 from the extension deadline. The commission revised §321.33(f) to reflect this change.**

Comment

TPF commented that while it supports the deadline extension, it urges the commission to go further. TPF stated that the Second Circuit Court of Appeals in the *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486, 534 (2nd Cir. 2005) eliminated the portion of the federal CAFO rule that was the basis to regulate dry litter poultry. It stated the Second Circuit clearly vacated those provisions and that the

Second Circuit decision is final and that portion of the federal rule that Texas relied upon to regulate dry litter poultry operations is no longer the law. Based on the action of the Second Circuit, the commission should eliminate the requirement for dry litter poultry operations to obtain a permit and amend the rule language to reflect that change. It further commented that new and existing operations in the state have, or will soon have, water quality management plans developed by the TSSWCB and to require them to comply with the CAFO rules is inefficient and unnecessary. TPF urges the commission to adopt a rule that makes clear that dry litter poultry operations do not have a duty to apply for CAFO permit coverage. It stated that a duty to apply exceeds federal requirements and puts Texas at a competitive disadvantage when seeking new poultry investments.

### **Response**

**In light of the Second Circuit decision, EPA's proposed rulemaking, and in response to TPF's comment, the commission has modified §321.33(a), (d), and (f) to address the duty to apply for dry litter poultry operations. Dry litter poultry operations do not have the duty to apply unless they propose to discharge or the executive director determines that a permit is necessary based on an unauthorized discharge, the operation's failure to comply with or obtain a certified water quality management plan, or other pertinent factors.**

**SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS**

**§321.33**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §26.027, regarding TCEQ's authority to issue permits for the discharge of waste into or adjacent to water in the state; and TWC, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission.

This amendment is also adopted under TWC, §26.011, regarding the commission's authority over water quality in the state; and TWC, §26.0286, which requires the commission to process an application for authorization to construct or operate a CAFO, except dry litter poultry CAFOs, located in the protection zone of a sole-source surface drinking water supply as an application for an individual permit. Finally, this amendment is also adopted 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.

The adopted amendment implements SB 1707, 79th Legislature, 2005, which changed the permitting requirements under TWC, §26.0286, for dry litter poultry CAFOs located in the protection zone of a sole-source surface drinking water supply.

**§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, except as provided in subsection (f) of this section. 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 new 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. This paragraph does not apply to a poultry operation that does not use a liquid waste handling system, which is commonly referred to as a dry litter poultry operation.

(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 (USC), §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 animal feeding operation (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 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);

(F) the production area or land management unit of any new CAFO is located in a watershed of a segment listed on the current 303(d) list of impaired water bodies for bacteria, nutrients, and/or pathogens as required by 33 USC, §1313(d); or

(G) 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 new 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 defined 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). This subsection does not apply to dry litter poultry operations specified in subsection (f) of this section.

(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. Dry litter poultry CAFOs do not have a duty to apply for permit coverage for a potential to discharge manure or litter into or adjacent to water in the state. A dry litter poultry CAFO shall only be required to obtain authorization by an individual water quality

permit or a CAFO general permit in accordance with subsection (a), (b), or (c) of this section if it proposes to discharge or the executive director determines that a permit is necessary due to an unauthorized discharge; the operation's failure to comply with, or timely obtain, a certified water quality management plan approved by the Texas State Soil and Water Conservation Board; or other pertinent factors. Any dry litter poultry CAFO is authorized to be constructed and operated if the operation has a certified water quality management plan approved by the Texas State Soil and Water Conservation Board or is otherwise in compliance with the plan implementation schedule set forth in the notes following codified TWC, §26.302.

(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.