

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §321.33.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 is located or proposed to be located within the protection zone of a sole-source surface drinking water supply must obtain an individual permit. SB 1707 revised TWC, §26.0286 by removing the requirement 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 to obtain an individual permit. This allows these facilities the ability to apply for coverage under a general permit.

Additionally, this rulemaking would modify the permitting requirements for new source dry litter poultry CAFOs and for expanding dry litter poultry animal feeding operations (AFOs) to be consistent with TCEQ regulations regarding existing dry litter poultry CAFOs. 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 not indicated how it will address the *Waterkeeper* decision in the National Pollutant Discharge Elimination System (NPDES) rules, but has extended the deadline by which newly defined CAFOs must obtain permit coverage until July 31, 2007. In Texas, dry litter poultry CAFOs were the only

newly defined CAFOs affected by this change to the federal requirements. In order to maintain consistency with federal regulations, TCEQ extended the deadline for existing dry litter poultry CAFOs to obtain permit coverage to July 31, 2007. Currently, TCEQ rules require new source dry litter poultry CAFOs and expanding dry litter poultry AFOs to obtain a permit prior to construction, while allowing existing dry litter poultry CAFOs to operate without a permit until July 31, 2007. TCEQ is proposing that all dry litter poultry CAFOs meet the same permitting deadline.

SECTION DISCUSSION

Section 321.33, Applicability and Required Authorizations, the proposed change to subsection (b)(3) adds the following sentence “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 proposed change to subsection (d) adds the following sentence: “This subsection does not apply to dry litter poultry operations until the date specified in subsection (f) of this section.” The proposed change to subsection (f) deletes the word “existing” so that subsection (f) now reads “Dry litter poultry operations. 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 July 31, 2007.”

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Walter Perry, Analyst, Strategic Planning and Assessment Section, determined that, for the first five-year period the proposed amendment is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government. The proposed rule implements SB 1707,

79th Legislature, 2005, which changed the permitting requirements for certain CAFOs located in the protection zone of a sole-source surface drinking water supply. The proposed rulemaking removes the requirement 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 to obtain an individual permit. This change allows these facilities to apply for coverage under a general permit. There are estimated to be less than 50 existing regulated entities that would be affected by implementing SB 1707. The proposed rule would also allow new source dry litter poultry CAFOs and expanding dry litter poultry AFOs to meet the same July 31, 2007, permitting deadline as existing facilities. Current rules require new source dry litter poultry CAFOs and expanding dry litter poultry AFOs to obtain permit coverage prior to construction. It is not known how many new or expanding facilities may be affected by extending this deadline.

In general, no significant fiscal implications are anticipated for the agency to implement the proposed rule, though permit processing times may be shortened, and because the general permit does not allow for a contested case hearing, any future potential contested case hearings costs may be avoided. Any decrease in fee revenue due to the proposed change from an individual permit to a general permit is not expected to be significant. The renewal fee for an individual permit is \$315 and \$100 for a general permit. There are estimated to be less than 50 existing CAFOs affected by implementing SB 1707. If all 50 CAFOs were affected, the agency would see a revenue decrease of \$10,750 over the five-year period. Other units of state and local government are not expected to be affected by the proposed rule as they do not own or operate CAFOs.

PUBLIC BENEFITS AND COSTS

Mr. Perry also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state and federal law and the continued protection of public health and the environment.

Cost savings, which could be significant, are anticipated for businesses or individuals who own or operate dry litter poultry CAFOs located in the protection zone of a sole-source surface drinking water supply. The proposed rulemaking to implement SB 1707 is anticipated to affect approximately 50 existing facilities.

Under the current rules, the renewal cost for an individual permit is \$315 and \$100 for authorization under the general permit. CAFO permits are renewed every five years. Affected dry litter poultry CAFO owners would realize a cost savings of \$215 for a renewal authorization under the general permit. However, costs for those seeking permit applications would still include consultant and/or engineering fees for permit application preparation; publication fees for public notices and potential public meeting notices permit fees; and costs associated with facility design and construction to meet agency and statutory requirements, just as with an individual permit. The most significant difference will be that applicants will no longer have the possible costs of a contested case hearing that could range anywhere from \$5,000 to \$100,000 for attorney fees. The amount of fees would vary, depending on the complexity of the issues involved, and the length of the hearing. CAFO owners and operators may also benefit from the reduced time necessary to process a new or significant expansion authorization under the general permit rather than an individual permit. New source dry litter poultry CAFOs and

expanding dry litter poultry AFOs will benefit from the extension of the July 31, 2007, deadline in that they may be able to delay any associated permit costs. It is not known how many new or expanding facilities will be affected by the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking would result in no additional costs for small and micro-businesses. Small and micro-businesses would experience the same potential cost savings as larger businesses. It is believed that the majority of businesses who own and operate CAFOs, and would be affected by the rulemaking, are small and micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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 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 proposed amendment 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 proposed amendment, 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 invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of the rulemaking in accordance with Texas Government Code, §2007.043. The rulemaking would implement SB 1707 and allow 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 would make all dry litter poultry CAFOs meet the same permitting deadline. 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. If adopted, this rulemaking allows certain dry litter poultry facilities to obtain coverage under either an individual or general permit. Also, if adopted, 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 proposed 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 proposed rule 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.

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 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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on June 13, 2006, at 2:00 p.m. in Building F, Room 2210 at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Office of Legal Services, at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-062-321-PR. Comments must be received by 5:00 p.m., June 19, 2006. Copies of the proposed rule can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Beth Helms, Water Quality Division, at (512) 239-2526.

SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS

§321.33

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 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.

The proposed 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) (No change.)

(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) [§26.027(c)].

(1) - (2) (No change.)

(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) - (5) (No change.)

(c) (No change.)

(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 until the date specified in subsection (f) of this section.

(e) (No change.)

(f) Dry litter poultry operations. Dry [Existing dry] litter poultry CAFOs [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 July 31, 2007. Prior to July 31, 2007, 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.

(g) - (o) (No change.)