

The Texas Commission on Environmental Quality (commission) proposes amendments to §321.33 and §321.36.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission adopted the current version of the Chapter 321, Subchapter B rules on July 15, 2004, to make the Texas rules consistent with federal regulations. The proposed rulemaking is an administrative change that would make state requirements consistent with federal requirements by modifying the date that existing dry litter poultry operations must obtain authorization and the date that all concentrated animal feeding operations (CAFOs) have to develop and implement a nutrient management plan (NMP). For consistency with the federal rules this rulemaking would extend the deadline for existing dry litter poultry operations to obtain a permit from April 13, 2006, to July 31, 2007, and would extend the deadline for all CAFOs to develop and implement an NMP from December 31, 2006, to July 31, 2007. It is the intent of the commission to make the state and federal requirements consistent, therefore, if the final federal rules change, an adjustment of the date may be required.

SECTION BY SECTION DISCUSSION

The proposed amendment to §321.33(f), Applicability and Required Authorizations, would make the deadline for existing dry litter poultry operations to obtain authorization consistent with changes to the federal requirement. The deadline for existing dry litter poultry operations to obtain authorization under a permit will be extended from April 13, 2006, to July 31, 2007.

The proposed amendment to §321.36(d)(1), Texas Pollutant Discharge Elimination System General

Requirements for Concentrated Animal Feeding Operations, would make the deadline for CAFOs to develop and implement an NMP consistent with changes to the federal requirement. The deadline for CAFOs to develop and implement an NMP will be extended from December 31, 2006, to 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 amendments are in effect, no significant fiscal implications are anticipated for the agency except that some fee revenue collections will be delayed by one year due to the extension of deadlines. No fiscal implications are anticipated for other units of state or local government.

The proposed rules would extend the deadline for all CAFOs to develop and implement NMPs as well as extend the deadline for existing dry litter poultry operations to obtain authorization under the agency permitting program. The proposed rulemaking would make state requirements consistent with federal requirements by modifying the date that the affected CAFOs would be required to be in compliance.

The rulemaking would revise the deadlines currently specified in agency rules to reflect the date required under the finalized federal rules. The existing deadlines for NMPs and existing dry litter poultry operations are December 31, 2006, and April 13, 2006, respectively. As proposed, the rulemaking would extend the deadlines to July 31, 2007, for both NMPs and existing dry litter poultry operations. There are approximately 668 CAFOs in the state that would be affected by the NMP deadline revision and approximately 1,300 existing dry litter poultry operations that would be required to obtain coverage by the revised deadline. The 1,300 dry litter poultry operations would also be required to develop and implement NMPs by the revised deadline.

The extension of the deadlines would move fee revenue collections into subsequent fiscal years (FYs). Fiscal implications would only be applicable to fee revenue received from the dry litter poultry operations. The NMPs would not require any agency permits or fees to implement. The exact fiscal impact to the agency would be dependent upon when the affected CAFOs obtain authorization. Fee revenue of approximately \$130,000 for general permit fees that was projected to be received in FY 2006 may not be received until FY 2007. Fee revenue of approximately \$390,000 for consolidated water quality fees that was projected to be received in FY 2007 may not be received until FY 2008. Both fees are deposited to the Water Resource Management Account – Fund 153. The delay in fee revenue collections is not expected to have a significant impact on agency operations. Other units of state and local government would remain unaffected 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 rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with federal law.

The proposed rules would extend the deadline for all CAFOs to develop and implement NMPs as well as extend the deadline for existing dry litter poultry operations to obtain authorization under the agency permitting program. EPA is proposing federal rules that would extend the established deadlines.

Affected owners and operators will be able to delay the expense of permit fees for approximately one year and delay the development of NMPs for approximately seven months due to the extension of the

deadlines. However, affected CAFOs would still be required to comply with the new requirements, so any financial relief that the additional time would provide is unknown and would be dependent upon how far along the individual CAFO was in the process of becoming compliant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Small and micro-businesses would experience the same benefits as larger businesses. It is believed that the majority of businesses who own and operate CAFOs 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 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 adopted rulemaking in light of the regulatory analysis requirements 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 Texas Government Code, §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). Texas Government Code, §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 rulemaking, which is an administrative change to the rules, 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. 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.

Written comments on the draft regulatory impact analysis determination of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these rules in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to make an administrative change that would make state requirements consistent with federal requirements by modifying the date that existing dry

litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. The rulemaking substantially advances this stated purpose.

This rulemaking is a proposal to adopt a rule by a governmental entity. Therefore, Texas Government Code, Chapter 2007 applies. However, this governmental action will not result in a burden on private real property. If adopted, this rulemaking will only change the dates regarding when existing dry litter poultry operations obtain authorization and when CAFOs are required to develop and implement an NMP. Therefore, the adoption of the proposed rules would not result in a constitutional or statutory taking of private real property and no private 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 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.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The commission determined that the amendments are consistent with CMP goals and policies because the rulemaking is an administrative rule that would make state requirements consistent with federal requirements concerning the date that

existing dry litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. These changes 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 amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

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

The commission will hold a public hearing on this proposal in Austin on March 15, 2006, at 10:00 a.m. in Building E, Room 201S, at the commission's central office 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 and will answer questions after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-0600. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal

Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas, 78711-3087, or faxed to (512) 239-6087. All comments should reference Rule Project Number 2006-021-321-PR. Comments must be received no later than 5:00 p.m., March 27, 2006. For further information, please contact Beth Helms, Water Quality Division, at (512) 239-2526.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (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, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.027, which provides the commission's authority to issue permits for the discharge of waste into or adjacent to water in the state; TWC, §26.0286, regarding the procedures applicable to permits for certain CAFOs; TWC, §26.040, which provides the commission the authority to issue general permits to authorize the discharge of waste into or adjacent to water in the state; 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; and TWC, §26.302, regarding the regulation of poultry facilities.

The proposed amendments implement TWC, §§5.102, 5.103, 5.105, 26.011, 26.027, 26.0286, 26.040, 26.121, and 26.302.

§321.33. Applicability and Required Authorizations.

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

(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 July 31, 2007 [April 13, 2006].

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

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

(a) - (c) (No change.)

(d) Nutrient management plan (NMP).

(1) On or before July 31, 2007 [December 31, 2006], the operator of a CAFO shall develop and implement an NMP certified in accordance with the Natural Resources Conservation Service Code 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) - (3) (No change.)

(e) - (m) (No change.)