

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§321.32 - 321.34, 321.36 - 321.40, 321.44, 321.46, and 321.47.

### **Background and Summary of the Factual Basis for the Proposed Rules**

These rules implement the federal Concentrated Animal Feeding Operation (CAFO) Regulations and Effluent Guidelines in accordance with the Texas Memorandum of Agreement (MOA) with the United States Environmental Protection Agency (EPA) regarding delegation of the federal National Pollutant Discharge Elimination System (NPDES) CAFO Program.

The primary purpose of the proposed amendments is to implement revised federal CAFO Regulations and Effluent Guidelines in this subchapter that were published in the *Federal Register* on November 20, 2008, and were effective on December 22, 2008, in accordance with the MOA with the EPA regarding delegation of the federal NPDES CAFO Program.

Due to court challenges that successfully vacated portions of the rules, EPA did not finalize these rules until July 19, 2012.

The commission adopted this subchapter in July 2004 for NPDES purposes and to make the Texas rules consistent with federal regulations. The commission modified the CAFO rules in October 2006 to allow dry litter poultry operations located in a sole-source surface drinking water protection zone to obtain authorization under the CAFO general permit rather than by individual permit, to remove the duty to apply for permit coverage for other

dry litter poultry CAFOs based on a potential to discharge, and to add a requirement for all CAFOs to develop and implement a Nutrient Management Plan (NMP). The EPA adopted changes to the federal CAFO Regulations and Effluent Guidelines in response to the order issued by the United States Court of Appeals for the Second Circuit in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The federal rules became effective on December 22, 2008, changing the requirements to operate CAFOs under the Federal Clean Water Act, (See 73 *Federal Register* 70418 (November 20, 2008) (to be codified at 40 Code of Federal Regulations (CFR) Parts 9, 122, and 412)). Due to various court challenges that vacated portions of the new rules, the new CAFO rules were not finalized until July 19, 2012. Specifically, the new federal regulations: 1) require permitted CAFOs to submit their NMPs with their applications for individual permits or notices of intent for authorization under general permits; 2) require permitting authorities to review the NMPs and provide the public with an opportunity for meaningful public review and comment; 3) require incorporation of the terms of the NMP into the NPDES permit; 4) establish a list of changes to the NMP that would constitute a substantial change to the terms of a facilities NMP, thus triggering permit modification and public notice; 5) delete the provision that allowed CAFOs to use a 100-year, 24-hour containment structure to fulfill the no discharge requirement for new source swine, veal calf, and poultry operations and replaced it with a requirement that the facility demonstrate through a rigorous modeling analysis that it has designed a containment system that will comply with the no discharge requirement; and 6) delete the voluntary superior performance new source performance standard (NSPS) for new swine, veal calf, and poultry operations.

Also, EPA adopted two approaches to determine rates of application of manure, litter, and wastewater in NMPs: the linear rate approach and the narrative rate approach. The commission incorporates only the narrative rate approach.

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. Therefore, amendments to the subchapter are necessary to establish the requirements that will allow TCEQ to continue to authorize CAFOs and for consistency with the federal CAFO rules.

The commission took into consideration the following state and federal actions in proposing these amendments to Subchapter B: 1) changes to the federal NPDES CAFO Regulations adopted December 22, 2008, under 40 CFR Parts 122 and 412 and finalized on July 19, 2012; and 2) the NPDES MOA between 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**

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to *Texas Register* and agency

guidelines. These proposed changes include correcting rule structure, certain terminology, and grammatical errors. These changes are non-substantive and generally are not specifically discussed in this preamble.

Proposed §321.32 amends several definitions with slight modifications to enhance understanding and readability. The proposed amendment to §321.32 also adds definitions for Annual(ly); Bypass; Cooling pond; Design rainfall event; Dry litter poultry operation; Operational; and Upset, which are common terms used in the proposed amendments to this subchapter. The following terms are no longer used or needed in the proposed amendments and were deleted from this section: Air contaminant; 100-year, 24-hour rainfall event; and Waste.

The proposed amendment to §321.33 deletes subsection (g) that allowed CAFOs that filed an application for an individual permit before July 27, 2004 to continue to operate until the commission acts upon the application because this provision no longer applies to any CAFOs. The proposed amendment adds "increasing application acreage" and "using a crop or yield goal to determine maximum application rates for manure, sludge, or wastewater that is not authorized by the permit or authorization" in the proposed subsection (g) (formerly subsection (h)) as activities that trigger a permit amendment. Section 321.33(j) was deleted from this section and moved to proposed §321.40(l) for organizational purposes. The provision in proposed §321.33(j) (formerly subsection (l)), relating to permits with no expiration date, was deleted because there are no longer any CAFO

permits in the state without expiration dates.

The proposed amendment to §321.34(f)(3) revises the description of the recharge feature certification requirements to clarify that the recharge feature certification shall be developed in accordance with TCEQ guidance document RG-433 and to modify wording to be more consistent with use of the guidance documents.

The proposed amendment to §321.36 deletes subsection (c) because the requirements are located in §321.37 and §321.38. The proposed amendment to proposed §321.36(c)(1) (formerly subsection (d)(1)) deletes the deadline to develop and implement an NMP, as this date is already past. This paragraph would also be revised to clarify that only large CAFOs are required to develop and implement an NMP and identify who can certify an NMP. The proposed amendment modifies proposed §321.36(c)(1) (formerly subsection (d)(1)) to incorporate the requirements of the narrative rate approach for developing application rates for manure, sludge, and wastewater. The proposed amendment also adds proposed §321.36(c)(2) to incorporate terms of the NMP; proposed §321.36(c)(3) to incorporate requirements for changes to the NMP; and proposed §321.36(c)(4) - (6) to incorporate requirements for substantial and non-substantial changes to the NMP. Section 321.36(e)(1) and (4) were moved to proposed §321.40(m) and §321.36(e)(2) and (3) were moved to proposed §321.46(d)(2) for organizational consistency. Proposed §321.36(g) was modified to apply only to dairy CAFOs in sole-source impairment zones. Proposed §321.36(g)(3) was revised to reflect the correct name of RG-408. Section

321.36(h) was moved to proposed §321.46(c) for organizational consistency. Section 321.36(i) was moved to proposed §321.46(d) for organizational consistency. Proposed §321.36(j) was revised to add the following requirements to the annual report: actual crop(s) planted and actual yield(s) for each land management unit (LMU); manure, litter, and wastewater analyses; amount of any supplemental fertilizer applied during the reporting period; and results of application rate calculations for each LMU. Section 321.36(k) was moved to proposed §321.39(b); §321.36(l) was moved to proposed §321.39(g); and §321.36(m) was moved to proposed §321.39(h), all for organizational consistency.

Proposed §321.37 changes the title "Effluent Limitations for Discharges from Production Areas" to "Effluent Limitations for Concentrated Animal Feeding Operation (CAFO) Production Areas." The proposed amendment to §321.37(c) replaces the 100-year, 24-hour design rainfall event as a design criteria for new source swine, veal, and poultry CAFOs with a no discharge design criteria, and would add a statement that the upset/bypass requirements in 40 CFR §122.41(m) and (n) apply to new source swine, veal, and poultry CAFOs. Section 321.37(g), which describes voluntary superior environmental performance standards for new source swine, veal, and poultry CAFOs, was deleted for consistency with the federal rule.

Proposed §321.38(a) was revised to clarify that any CAFO operator that does not use a retention control structure (RCS) is not subject to §321.38(e) - (g). Proposed

§321.38(e)(7)(A) was reorganized to improve readability and delete the 100-year, 24-hour design criteria for new source swine, veal, and poultry CAFOs. Proposed §321.38(e)(7)(B) was added to provide the design and modeling criteria for new source swine, veal, and poultry CAFOs. Proposed §321.38(g) was revised to incorporate more detailed design, construction, and testing requirements for RCSs.

Proposed §321.39 changes the title from "Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)" to "Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)."

Proposed §321.39(a) was revised to clarify that any CAFO operator that does not use an RCS is not subject to §321.39(b) and (c). Proposed §321.39(b)(2) and (4) were revised to replace references to "25-year or 100-year," and "required rainfall event" with the newly defined term "design rainfall event." Proposed §321.39(b)(5) was revised to clarify liner recertification requirements. Proposed §321.39(b)(6) was moved from §321.36(k).

Proposed §321.39(e) was revised to clarify requirements for temporary storage of manure and sludge. Proposed §321.39(g)(3) was moved from §321.36(l).

The proposed amendment to §321.40(h) makes revisions for readability and to clarify that land application of manure, sludge, and wastewater into surface water in the state is not authorized even though buffers are not required in certain circumstances. The proposed amendment deletes §321.40(k) as the deadline has passed. Proposed §321.40(k) (formerly subsection (l)) was changed to "Nutrient requirement." This proposed §321.40(k) was also

revised and reformatted for readability and to clarify that nutrient utilization plan (NUP) requirements remain in effect for state-only CAFOs and dairy CAFOs located in major sole-source impairment zones. All other TPDES CAFOs would no longer be required to develop a NUP due to new NMP requirements in proposed §321.36(c) superseding the NUP requirements. Proposed §321.40(l) was moved from §321.33(j). Proposed §321.40(m) was amended to require TPDES CAFOs other than those in a major sole source impairment zone to acquire soil samples at a 0-6-inch depth only.

The proposed amendment to §321.44(a) adds paragraph (6), which adds any upset that exceeds an effluent limitation to the required discharge notification for consistency with federal regulations. The proposed amendment to §321.44(b)(1) deletes the requirements to analyze for fecal and total coliform bacteria and replace it with a requirement to analyze for *Escherichia coli*. The proposed amendment also clarifies that samples must be analyzed by a National Environmental Laboratory Accreditation Conference (NELAC) accredited lab. Proposed §321.44(b)(3) was added to clarify the procedures required in the event of a discharge outside normal business hours when maximum hold times for certain parameters are exceeded.

The proposed amendment revises §321.46(a) to improve readability and to clarify the requirements for what must be included in the pollution prevention plan. Proposed §321.46(c) was revised to incorporate inspection requirements moved from §321.36(h). Proposed §321.46(d) was revised to incorporate recordkeeping requirements moved from

321.36(i).

Proposed §321.47(b)(3) was amended to include examples of alternative practices that may be used instead of a control facility, and §321.47(b)(3)(A) and (B) were deleted and their requirements incorporated into proposed §321.47(c). Section 321.47(c)(3) was moved to proposed §321.47(d)(2) and §321.47(d)(2) was moved to proposed §321.47(c)(3) for organizational consistency. Other provisions in proposed §321.47(c) and (d) were revised for consistency with proposed §321.38 and §321.40. Proposed §321.47(e)(3), (5), and (6) were revised to replace references to "25-year or 100-year," and "required rainfall event" with the newly defined term "design rainfall event." Proposed §321.47(e)(6) was revised for consistency with proposed §321.39. Proposed §321.47(f) was revised for consistency with proposed §321.40. Proposed §321.47(g) was revised for consistency with proposed §321.36(f) and §321.40(m). Proposed §321.47(k) was revised for consistency with §321.41. Proposed §321.47(l)(1) was revised to clarify that inspections of the control facility and land application equipment would be conducted on a weekly basis. Section 321.47(n) was revised for consistency with proposed §321.39(h).

**Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules affect

regulations for CAFO facilities. State agencies or institutions that own or operate CAFOs will be required to comply with the proposed rules, but any cost increases due to compliance with permitting requirements are not expected to be significant.

The proposed rules implement federal changes regarding CAFOs adopted by EPA. The federal rules became effective December 22, 2008, and the agency, which has been delegated responsibility for the federal NPDES, is required to incorporate federal rule changes into state rules by December 22, 2009, in order to maintain its delegation authority to authorize CAFO operations.

The proposed rules amend Chapter 321 and modify permitting requirements for CAFOs in accordance with federal rules. Several provisions of the rules will impact the agency and CAFO owners or operators. Among these provisions are the following: a requirement to submit NMPs with both individual permit applications and with a Notice of Intent (NOI) for authorization for a general permit; a requirement for permitting authorities to review NMPs and provide opportunities for public review and comment; a requirement for public notice if NMP changes constitute a substantial change and trigger permit modification; and a revision of the design criteria for new source swine, veal calf, and poultry CAFOs. This revision requires a facility to evaluate the adequacy of designed RCSs using the Soil, Plant, Air, and Water (SPA) Field and Pond Hydrology Tool, or other tool approved by the executive director to show that the facility complies with the no discharge requirement of the federal rules instead of relying on design specifications for RCSs.

The proposed rules will require the agency to review more NMPs, mail more notices, and possibly attend more public meetings. The agency does not expect costs related to public meetings to increase significantly as a result of the proposed rules. The agency has had less than ten public meetings within the last five years and only two contested case hearings within the last ten years related to CAFO authorizations and individual permits. Current rules already require NMPs to be submitted with individual permit applications, but NMPs for general permits are only required to be maintained at the facility and updated annually instead of being submitted with the NOI and reviewed by the agency at the time of submission as required by the proposed rules. The agency plans to utilize available resources to implement the proposed rules and they are not expected to have a significant fiscal impact on the agency.

There are an estimated 600 CAFOs in the state that are authorized under the CAFO general permit and approximately 50 CAFOs with individual permits. The proposed rules are not expected to have a fiscal impact on local governments since they do not own or operate CAFOs. Currently only one state agency, the Texas Department of Criminal Justice, owns and operates CAFOs. The Texas Department of Criminal Justice has less than ten CAFO general permit authorizations. Two public universities also have CAFO authorizations.

The agency expects facilities authorized under the CAFO general permit to comply with the

proposed rules when the CAFO general permit is re-issued after the term of the current CAFO general permit expires in July, 2014. When the CAFO general permit is re-issued, the final version of these rules will be incorporated into the permit. At that time, if there are no significant changes to the NMP, the regulated state agency will be required to submit the NMP with the required NOI for authorization under the re-issued CAFO general permit and pay the applicable application fee, currently \$100 to renew the authorization as required under the current rules. NMPs are required to be updated annually under the current rules, but if the annual update includes significant changes, the regulated state agency will be required to submit a permit amendment, which could cost as much as \$6,350 (\$5,000 in consultant fees to develop the permit application; \$350 application fee; and \$1,000 for public notice). If the regulated state agency opens a new source swine, veal, or poultry CAFO, it will be required to perform SPAW Field and Pond Hydrology Tool, or other tool approved, which is estimated to cost \$5,000 per CAFO. This fiscal note assumes that state agencies and institutions are in compliance with current rules regarding annual NMPs, there are no significant changes in operations, and they will not open a new source swine, veal, or poultry CAFO. Therefore, the proposed rules are not expected to have a significant fiscal impact on the regulated state agency or institutions.

### **Public Benefits and Costs**

Nina Chamness 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 and greater opportunity for public participation in the

permitting process for CAFOs.

There are an estimated 600 CAFOs in the state that are permitted under the CAFO general permit and approximately 50 CAFOs that have individual permits. Only CAFOs that change their NMPs substantially or that open new source swine, veal, or poultry CAFOs will be affected by the proposed rules. Staff estimates that there may be as many as 15 CAFOs per year that will have substantial changes that would be subject to the requirements in the proposed rules. Individual and the general permit for CAFOs expire every five years after issuance. The CAFOs authorized under the CAFO general permit will be expected to comply with the new rules when the CAFO general permit is re-issued after the term of the current CAFO general permit expires in July, 2014. When the CAFO general permit is re-issued, the final version of these rules will be incorporated into the permit.

When the current permit for a large business expires, the owner or operator will be required to submit their NMP with the renewal application. If no substantial changes are made to existing CAFO NMPs, a large business will only pay the current \$100 permit renewal fee. If the owner or operator chooses to make substantial changes to the NMP, they will be required to submit a permit amendment, which could cost as much as \$6,350 (\$5,000 in consultant fees to develop the permit application; \$350 application fee; and \$1,000 for public notice). If a large business opens a new source swine, veal, or poultry CAFO, it will also be required to perform SPAW Field and Pond Hydrology Tool, or other

tool approved, which is estimated to cost \$5,000 per CAFO. Staff estimates that there may be one large business per year that may be affected by the proposed rules, but these costs are not expected to be significant for a large business.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since a small business would only see costs increase if they choose to make significant operational changes or to build a new source swine, veal, or poultry CAFO. A small business would incur the same costs as those incurred under the current rules when a permit expires. A small business would incur the same costs as those incurred by a large business if it chooses to make significant changes in its NMP or if it chooses to build a new source swine, veal, or poultry CAFO. Staff estimates that there may be as many as 14 small businesses per year that may choose to make significant changes or build new source swine, veal, or poultry CAFOs.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and are not expected to impact a small business, unless a choice is made to significantly change operations or build a new source swine, veal, or poultry CAFO.

### **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 rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule changes are not subject to Texas Government Code, §2001.0225, because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule that has the specific intent of protecting the environment or reducing 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.

These rules implement the federal CAFO Regulations and Effluent Guidelines in accordance with the MOA with the EPA regarding delegation of the federal NPDES CAFO Program.

The primary purpose of the proposed amendments is to implement revised federal CAFO Regulations and Effluent Guidelines in this subchapter that were published in the *Federal Register* on November 20, 2008, and were effective on December 22, 2008, in accordance with the MOA with the EPA regarding delegation of the federal NPDES CAFO Program. Due to court challenges that successfully vacated portions of the rules, EPA did not finalize these rules until July 19, 2012.

The specific intent of the proposed rule changes is to implement revised federal CAFO Regulations and Effluent Guidelines in accordance with the MOA between the state of Texas and EPA delegating the NPDES program to the state. The federal CAFO rule revisions were originally effective on December 22, 2008, but due to various court challenges EPA did not finalize the rules until July 19, 2012. TCEQ is required by the MOA to adopt rule changes within one year or within two years if a statutory change is necessary to implement the rule changes.

These changes require CAFOs seeking permitting to submit an NMP with their applications for an individual permit or with their NOI for authorization under the CAFO general permit. The revised rules require TCEQ to review the NMPs, incorporate terms of the NMP into CAFO permits, and provide the public with an opportunity for public review and comment. The amendments also revise the NSPSs for swine, veal, calf, and poultry CAFOs, so that these facilities must evaluate the design of their RCSs to show that there will not be a discharge from those structures under any conditions. Therefore, it is not

anticipated that the rules will 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 commission concludes that this rulemaking does not meet the definition of a "major environmental rule."

Additionally, the rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies to rules adopted by an agency that: 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.

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 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 evaluated this rulemaking and performed an assessment of whether the proposed rule changes constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule changes are to incorporate the terms of the NMP into CAFO permits and increase public participation in the CAFO permitting process. Additionally, the rulemaking would require new source swine, veal, calf, and poultry operations to size their RCSs so that they do not discharge in any size rain event. The proposed rule changes would substantially advance this stated purpose by inserting and changing current rule language to comply with the stated purpose of the rulemaking.

Promulgation and enforcement of this rulemaking would be neither a statutory nor a constitutional taking of private real property because it only affects real property to the extent of requiring new source swine, veal, calf, and chicken CAFOs to have larger RCSs to prevent discharges of contaminated wastewater.

There are no burdens imposed on private real property, and the benefits to society are increased by preventing discharges from new source swine, veal, calf, and poultry CAFOs. The rule changes do not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond what would otherwise exist in the absence of the regulation. Therefore, these rule changes, if adopted, do not constitute a taking under the Texas

Government Code, Chapter 2007.

### **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, it 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 at 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules 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 must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must 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 disposal of manure, litter, or wastewater from Animal Feeding Operations (AFOs) into or adjacent to water in the state, except in accordance with an individual permit, the CAFO general permit, or other authorization issued 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, the CAFO general permit, 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 were developed to reduce the possibility of discharges 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**

The commission will hold a public hearing on this proposal in Austin on April 8, 2014, 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 prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Michael Parrish, 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.texas.gov/rules/ecomments/>*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-011-321-OW. The comment period closes April 14, 2014.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *[http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html)*. For further information,

please contact Chris Ulmann, Water Quality Division, (512) 239-0418.

**SUBCHAPTER B: CONCENTRATED ANIMAL FEEDING OPERATIONS**

**§§321.32 - 321.34, 321.36 - 321.40, 321.44, 321.46, 321.47**

**Statutory Authority**

The amendments are proposed under Texas Water Code (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 and §5.105, which provides the commission with the general authority to adopt rules; TWC, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.027, regarding the commission's authority to issue permits for discharges into or adjacent to water in the state; TWC, §26.0286, regarding the procedures applicable to permits for certain Concentrated Animal Feeding Operation; 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, §26.041, which allows the commission to use any means provided by TWC, Chapter 26 to prevent a discharge of waste that is injurious to public health; and 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 implement the TWC, §§5,103, 26.026, and 26.040 in addition to the Federal Clean Water Act, §303 (33 United States Code, §1313).

**§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 animal manure, sludge [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 based upon a realistic yield goal.

[(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.]

(2) [(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 post-harvest [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 the beneficial use of manure, sludge, or wastewater [wastes]. A land management unit is not part of an AFO.

(3) Annual(ly)--Once per calendar year with required events not more than 18 months apart, unless approved in writing by the executive director on a case-by-case basis.

(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), permanent structure containing a place of worship, or public park within a one-mile radius of the permanent odor sources at the animal feeding operation [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, sludge [litter], or wastewater to land in a manner that does not exceed the agronomic need or rate for a harvested or cover crop. Application of manure, sludge, 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) Bypass--The intentional diversion of waste streams from any portion of a treatment facility.

(9) [(8)] Catastrophic conditions--Conditions that cause structural or mechanical damage to the animal feeding operation [AFO] from natural events including high winds, tornadoes [tornados], hurricanes, earthquakes, or other natural disasters, other than rainfall events.

(10) [(9)] Certified nutrient management specialist--An organization in Texas or an individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service, Texas

Certified Crop Advisor's Board or Texas AgriLife Extension Service recognized certification program .

(11) [(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.

(12) [(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.

(13) [(12)] Comprehensive Nutrient Management Plan (CNMP)--A resource management plan containing a grouping of conservation practices and management activities that, when implemented in 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.

(14) [(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, each weighing [more than] 55 pounds or more; 10,000 swine, each 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 manure [waste] handling system);

(ix) 30,000 laying hens or broilers (if the operation uses 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 (if the operation uses 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 discharges 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 with the following number of animals [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 if the operation does not use [and other than] a liquid manure handling system);

(ix) 9,000 to 29,999 laying hens or broilers (if the operation uses a liquid manure handling system), or 25,000 to 81,999 laying hens (if the operation does not use [other than] a liquid manure handling system); or

(x) 1,500 to 4,999 ducks (if the operation uses a liquid manure handling system), or 10,000 to 29,999 ducks (if the operation does not use [other than] a liquid manure handling system).

(C) Small CAFO--Any [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 an AFO designated by the executive director as a CAFO because it is a significant contributor of pollutants into or adjacent to water in the state. A state-only CAFO is authorized under state law.

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

(16) Cooling Pond--A shallow man-made structure filled with water for the specific purpose to keep animals cool and promote animal comfort.

(17) [(15)] Crop removal--The amount of nutrients contained in and removed by harvest of the proposed crop.

(18) [(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.

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

(20) Design rainfall event--A design parameter corresponding to precipitation frequency values for a given rainfall duration and return period based on United States Department of Commerce, Weather Bureau, Technical Paper 40 or 49, May 1961.

(21) Dry litter poultry operation--A poultry animal feeding operation that does not use a liquid manure handling system.

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

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

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

(25) [(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 manure [waste] or wastewater from a CAFO has been applied.

(26) [(22)] Hydrologic connection--The connection and exchange between surface water and groundwater.

(27) [(23)] Lagoon--A retention control structure used for the biological treatment of liquid organic manure [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.

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

(29) [(25)] Land management unit (LMU)--An area of land owned, operated, controlled, rented, or leased by an animal feeding operation (AFO) owner or operator where [to which] manure, sludge [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 where [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, where [wherein] the manure is given or sold to others for land application.

(30) [(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), permanent structure containing a place of worship, or public park, or a document signed by the governmental entity or the authorized legal representative of the entity responsible for the operation of a school or public park. The document specifically consents 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)).

(31) [(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 wastewater [liquids] contained in retention control structures and water in the state.

(32) [(28)] Liquid manure [waste] handling system--A system in which freshwater or wastewater is used for transporting and land applying manure [waste].

(33) [(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) where [for which] the commission has developed [, at some time, prepared] and adopted [submitted] a total maximum daily load [standard].

(34) [(30)] Manure--Feces and/or urine excreted by livestock and poultry [animals]. Manure includes litter [manure], bedding, compost, feed, and other raw materials commingled with feces and/or urine.

(35) [(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 New Dischargers).

(36) [(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.

(37) [(33)] Nutrient management plan (NMP)--A plan based on the [The] Natural Resources Conservation Service Practice Standard Code 590, for Texas, [plan. A

plan] to address the amount, rate, source, placement, method of application, [form] and timing of the application of plant [all] nutrients, and soil amendments.

(38) [(34)] Nutrient utilization plan (NUP)--A nutrient management plan [developed] to evaluate and address site-specific characteristics of a land management unit to ensure that the beneficial use of manure, sludge [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.]

(39) [(36)] One-hundred-year flood plain--Any land area that is subject to a 1.0% or greater chance of flooding in any given year from any source.

(40) [(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.

(41) Operational--The facility is constructed such that animals may be stabled, confined, fed, and maintained in accordance with the permit or authorization. The facility does not have to be operating at the maximum number of animals allowed in the permit or authorization.

(42) [(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.

(43) [(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.

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

(45) [(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. Pesticide includes insecticides, nematicides, rodenticides, fungicides, and herbicides.

(46) [(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.

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

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

(49) [(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.

(50) [(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 hydrologic connection between the ground surface and the underlying groundwater within

an aquifer. Significant artificial features include, but are not limited to, wells and excavation or material pits. Significant natural hydrologic connections 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.

(51) [(47)] Retention control structure (RCS)--Any basin, pond, pit, tank, conveyance, or lagoon [basins, ponds, pits, tanks, conveyances, and lagoons] used to hold, store, [and/] or treat manure, [litter,] wastewater, and sludge. The term [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, or wastewater, nor does it include cooling ponds located in the production area [litter, or water].

(52) [(48)] Significant expansion of concentrated animal feeding operation (CAFO) [expansion]--Any change to a CAFO that increases the manure [waste] production at the CAFO by more than 50%, above the maximum operating capacity stated in the initial authorization for [notice of intent, during] the facility under TXG920000. [term of the general permit.]

(53) [(49)] Sludge--Solid, semi-solid, or slurry manure [waste] generated during the treatment of [and/] or storage of any manure or wastewater. The term includes material resulting from treatment, coagulation, or sedimentation of manure [waste] in a

retention control structure. Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation) rules covering sludge do not apply to this subchapter.

(54) [(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.

(55) [(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.

(56) [(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.

(57) [(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 49 United States [U.S.] Weather Bureau and United States Department of Agriculture [USDA], Two-to-Ten Day Precipitation for Return Periods of 2 to 100 Years in the Contiguous United States

(1964)[", and subsequent amendments]; or equivalent regional or state rainfall information.

(58) [(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.

(59) [(55)] United States Department of Agriculture (USDA) - Natural Resources Conservation Service (NRCS)--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.]

(60) Upset--An exceptional incident where there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment

facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(61) [(57)] Wastewater--Any water, including process-generated wastewater and precipitation, which [that] comes into contact with any manure, sludge [litter], bedding, or any raw material or intermediate or final material or product used in or resulting from the production of livestock [animals] or poultry or direct products (e.g., milk, meat, or eggs).

(62) [(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.

(63) [(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 to inject [for the injection] or place [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.

**§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 subsection [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 manure [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 where [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. No [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 existing 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.]

~~(g)~~ ~~(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 Amendments [Amendment]). Before the permittee begins physical construction or operation of any new control facility, the operator must obtain commission authorization.

Changes for which an individual [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 or increasing application acreage; and [.]

(4) using a crop or yield goal to determine maximum application rates for manure, sludge, or wastewater that is not authorized by the permit or authorization.

(h) [(i)] AFOs that are not defined or designated as CAFOs. Discharges of manure, sludge [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.]

(i) [(k)] Edwards Aquifer. New CAFOs are prohibited within [on] the Edwards Aquifer recharge zone.

(j) [(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.]

(k) [(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.

(l) [(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.

(m) [(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), or (c) of this section.

#### **§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; Amendments [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 (CAFO) general permit in accordance with the requirements of the CAFO general permit.

(2) If an individual water quality permit application is [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] An authorization under the general permit will be renewed in accordance with the requirements in the [a CAFO] general permit and this subchapter.

(3) A CAFO owner or operator who submits an NOI for a CAFO general permit authorization or is authorized under the 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 a contested case hearing if the application qualifies for the exception in Texas Water Code, §26.028(d) [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(19) [§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(g) [§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. The recharge feature certification shall be developed in accordance with this subsection and the executive director's guidance, RG-433 Guidelines for Identifying and Protecting Aquifer Recharge Features. Use of the forms provided in RG-433 is optional.

(A) A [certified] water quality management plan certified [prepared] by the Texas State Soil and Water Conservation Board [that is developed] for a dry litter poultry facility that evaluates site-specific recharge characteristics and management practices of the operation will meet the recharge feature certification requirement of this paragraph.

[(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) If [In preparing] the recharge feature certification identifies the presence of recharge features the applicant shall have protective measures developed, signed, and sealed by a licensed Texas professional engineer, or licensed Texas professional geoscientist, as appropriate and in conformance with the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts. The permittee must implement the protective measures. The protective measures must prevent impacts to the aquifer from any recharge features present. The protective measures must include at least one of the following [, 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. The plan must be signed and sealed by a licensed Texas professional engineer or licensed Texas professional geoscientist, as appropriate and in conformance with the Texas Engineering Practices Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts. The plan must prevent impacts to an aquifer from any recharge features present. The plan must include at least one of the following:]

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

(ii) [(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] which requires annual groundwater sampling [monitoring plan shall specify procedures to annually collect a groundwater sample] from representative wells and the groundwater [, have each sample] analyzed for chlorides, nitrates, and total dissolved solids[, and compare those values with background values for each well]; or

(iii) [(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]

(4) [(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.

**§321.36. 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, unless otherwise noted.

(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).]

(c) [(d)] Nutrient management plan (NMP).

(1) The [On or before July 31, 2007, the] operator of a large CAFO shall develop and implement an NMP certified by a person or entity identified in §321.32(10) of this title (relating to Definitions) to be in accordance with the Texas Natural Resources

Conservation Service NRCS [Code 590] Practice Standard Code 590. The plan shall include site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients in the manure, sludge [litter], or wastewater. The NMP shall be updated annually. The operator shall determine the amount, in tons/acre or acre-inches/acre, of manure, sludge, and wastewater for each land management unit (LMU) using the following methodology:

(A) determine the phosphorus index rating using the Agronomy Technical Note No. 15 Phosphorus Assessment Tool of Texas;

(B) determine the maximum annual application rate using Appendix 5 of the NRCS Practice Standard Code 590 for Texas;

(C) determine the crop requirement or the crop removal rate, as appropriate, from the S Crops Table as contained in the Texas NRCS 590-633 Software Tool, or other sources as approved by the executive director; and

(D) account for:

(i) the results of soil tests required by §321.40(m)(1)(B) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements);

(ii) credits for all nitrogen in the soil that will be available for plant use;

(iii) the amount of nitrogen and phosphorus in the manure and wastewater to be applied;

(iv) consideration of multi-year phosphorus application (for any LMU where nutrients are applied at a rate based on crop phosphorus requirement, the methodology must account for single-year nutrient applications that supply more than the crop's annual phosphorus requirement); and

(v) all other additions of plant available nitrogen and phosphorus to the LMU (i.e., from sources other than manure or wastewater or credits for residual nitrogen).

(2) Terms of the NMP include the following:

(A) animal type and authorized head count;

(B) LMU and application acreage for each LMU;

(C) crops (including alternative crops) identified in the NMP with their yield goals for each LMU;

(D) the maximum application rates for nitrogen and phosphorus for each crop in each LMU;

(E) the methodology in paragraph (1) of this subsection (including formulas, sources of data, protocols for making determinations, etc.) and actual data used to calculate application rates; and

(F) any other factors necessary to determine the amounts of nitrogen and phosphorus to be applied.

(3) Changes to a NMP. Any changes, except changes resulting from annual recalculation, must be submitted to the executive director. The NMP will be reviewed by the executive director to determine if changes require revisions to the terms of the NMP. Revisions to terms of the NMP can be substantial or non-substantial.

(4) Substantial change. The following changes to the terms of the NMP are considered substantial:

(A) changing animal type or authorized head count;

(B) adding LMUs or increasing application acreage; and

(C) using a crop or yield goal to determine maximum application rates for manure, sludge or wastewater that is not authorized by the permit or authorization.

(5) If changes to the terms of the NMP are determined to be substantial, the changes must be incorporated into the permit in accordance with §321.33(g) of this title (relating to Applicability and Required Authorizations).

(6) If changes to the terms of the NMP are determined to be non-substantial, the executive director will notify the permittee and include the revised permit in the permit record.

(7) [(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 records of manure and wastewater application [and documentation of the implementation].

(d) [(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)]

subchapter 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, if applicable, 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, cubic yards, acre-inches, acre-feet, or gallons 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.]

(e) [(f)] Buffers for LMUs [land management units (LMUs)]. A sinkhole shall be protected with a 100-foot buffer from manure, sludge [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.

(f) [(g)] Soil sampling and testing procedures for dairy CAFOs, both state-only and Texas Pollutant Discharge Elimination System, located in a major sole-source impairment zone.

(1) Initial sampling. Before commencing land [wastewater irrigation or manure/litter] application of manure, sludge, or wastewater on an LMU [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. Soil 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 this section and the agency's publication, RG-408 entitled "Soil Sampling for Concentrated Animal Feeding Operations [Nutrient Utilization Plans (RG-408)]."

(B) Samples shall be collected by the Texas Commission on Environmental Quality [operator] or its designee and analyzed by a soil testing laboratory within the same 45-day time frame each year (from 45 days prior to until 45 days after the date of the previous year's sampling date), 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. Laboratory [The CAFO operator shall have a laboratory] analysis of the soil samples shall be performed for physical and chemical parameters to include: nitrate as nitrogen in parts per million (ppm), extractable phosphorus (ppm, using Mehlich III with Inductively Coupled Plasma (ICP)), potassium (extractable, ppm); sodium (extractable, ppm); magnesium (extractable, ppm); calcium (extractable, ppm); soluble salts (ppm) or electrical conductivity (deciSiemens/meter

(dS/m) or millimhos/cm (mmhos/cm) - 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 pond 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 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.]

(g) [(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, sludge [litter], and wastewater generated during the reporting period;

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

(4) total manure, sludge [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, sludge [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 or revised and approved by a certified nutrient management specialist;

(8) a copy of the initial soil analysis for each LMU, regardless of whether manure, sludge [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 if applicable; [and]

(11) the actual crop(s) planted and yield(s) for each LMU;

(12) the actual nitrogen and phosphorus content of the manure, sludge, and wastewater;

(13) the data used in calculations and the results of calculations conducted in accordance with subsection (c) of this section;

(14) the amount of manure, sludge, and wastewater applied to each LMU during the reporting period;

(15) any supplemental fertilizer applied during the reporting period; and

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

[(k) Pond marker. A permanent pond marker that identifies the level of the design rainfall event shall be installed and maintained in the RCS. In addition, if the operator must maintain a minimum treatment volume in accordance with §321.43(j)(3)(B) of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)), the pond marker must identify this level. The pond 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, at a minimum, be developed using standards contained in the NRCS Practice Standard Code 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.]

**§321.37. Effluent Limitations for Concentrated Animal Feeding Operation (CAFO) [Discharges from] Production Areas.**

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

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

(c) There [Except as provided by this section, there] shall be no discharge of manure, sludge [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.

(1) 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) such that no discharge will occur [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].

(2) Provisions for upset or bypass, as defined in §321.32 of this title (relating to Definitions) and as provided in 40 CFR §122.41 (m) and (n), apply to a new source subject to this provision. To establish the affirmative defense of upset, a permittee shall demonstrate, through properly signed operating logs, or other relevant evidence that:

(A) an upset occurred and that the permittee can identify the cause(s) of the upset; and

(B) the permitted facility was at the time being properly operated in accordance with its permit or authorization and all applicable CAFO rules and regulations.

(d) Except as provided by this subsection, and §321.42(c) of this title (relating to Requirements Applicable to the Major Sole-Source Impairment Zone) [section], for all other CAFOs, there shall be no discharge of manure, sludge [litter], or wastewater from a CAFO production area.

(1) 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.

(2) [(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.

(3) [(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 paragraph (1) of this 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).]

**§321.38. 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 operations (CAFOs) [operation (CAFO) general or individual water quality permits or other authorizations under this subchapter]. Any CAFO operator that does not use a retention control structure (RCS) is not subject to subsections (e), (f), and (g) of this section.

(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 RCS [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 land management units (LMUs), 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). For new wells drilled after July 20, 2004, documentation [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 unless the facility is protected from inundation and damage that may occur during the 100-year flood event.

(e) RCS design capacity. 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 CAFO [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 and Biological Engineers, American Society of Civil Engineers, [or] American Society of Testing Materials, or other technical standard approved by the executive director 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 without any modifications and has no apparent structural problems or leakage is considered to be properly designed with respect [and constructed] to [meet] the RCS sizing, embankment design and construction, and liner [capacity] requirements of this section, 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 meet the capacity for the design rainfall event] must be certified by a licensed Texas professional engineer as providing protection equivalent to the requirements of this section.

(5) Any RCS documented 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, manure, sludge, and wastewater [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 RCSs [retention control structures (RCSs)]. Poultry (chickens and turkeys), swine, or veal calf CAFOs subject to the new source performance standards in subparagraph (B) of this paragraph shall be designed in accordance with subparagraphs (B) and (C) of this paragraph or subparagraphs (B) and (D) of this paragraph. For all other CAFOs, the [The] volume must include design rainfall event runoff and normal operating capacity requirements in accordance with subparagraphs (A) and (C) [(B)] of this paragraph or design rainfall event runoff and evaporation systems in accordance with subparagraphs (A) and (D) [(C)] of this paragraph.

(A) Design rainfall event runoff. All CAFOs, other than poultry (chickens and turkeys), swine, or veal calf CAFOs subject to the new source performance standards in subparagraph (B) of this paragraph, 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)

or authorized under §321.37(d)(3) of this title (relating to Effluent Limitations for Concentrated Animal Feeding Operation (CAFO) Production Areas).

[ (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) 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 (CFR) §412.46 shall have an RCS designed and constructed such that no discharge will occur in accordance with the following:

(i) Information used in the design of the RCS shall include, but is not limited to, the following: design rainfall event, additional minimum capacity for chronic rainfalls identified in the evaluation required by clause (ii) of this subparagraph, the requirements of subparagraph (C) or (D) of this paragraph, additional storage capacity for wastewater intended to be transferred to another recipient at a later time, and any other factors that would affect the sizing of the RCS.

(ii) An evaluation of the adequacy of the designed RCS using the most recent version of the Soil Plant Air Water (SPAW) Hydrology Tool, or other tool approved by the executive director. The evaluation must include all inputs to SPAW including, but not limited to, daily precipitation, temperature, and evaporation data for the previous 100 years, user-specified soil profiles representative of the LMUs, planned crop rotations consistent with the nutrient management plan, and the final modeled result of no discharges from the designed RCS. For those CAFOs where 100 years of local weather data is not available, a simulation with a confidence interval analysis conducted over a period of 100 years may be used.

(C) [(B)] Design capacity requirements for systems using irrigation.

(i) The RCS shall be designed for the authorized number of animals to include any storage volume required by a hydrologic needs analysis (water

balance) that documents that the typical irrigation demands of the proposed crop and irrigated land area will not be exceeded.

(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 for the design rainfall event [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) All [waste and] process-generated wastewater produced during a 21-day or greater period.

(vii) 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)).

(D) [(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 design 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. RCSs shall be equipped with irrigation or wastewater removal systems capable of dewatering the RCSs whenever needed to restore the operating capacity.  
Dewatering equipment shall be maintained in proper working order.

(g) RCS embankment and liner design. [A permit or authorization shall identify required design specifications for all RCS.]

(1) For RCSs where the depth of water impounded against the embankment at the spillway elevation is three feet or more, the RCS is considered to be designed with an embankment. The pollution prevention plan shall include a description of the design specifications for the RCS embankments. The following design specifications are required for all new construction or the modified portions [and for all structural modifications] of existing RCSs [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].

(A) Soils used in the embankment shall be free of foreign material such as rocks larger than four inches, trash, brush, and fallen trees.

(B) The embankment shall be constructed in lifts or layers no more than eight inches compacted to six inches thick at a minimum compaction effort of 95% Standard Proctor Density (ASTM D698) at - 1% to +3% optimum moisture content.

(C) All embankment walls shall be stabilized to prevent erosion or deterioration.

(D) Embankment construction must be accompanied by certified compaction tests including in-place density and moisture in accordance with ASTM D1556, D2167, or D2937 for density and D2216, D4634, D4944, or D4959 for moisture, and D2922-91 or D6938-07 for moisture and density, or equivalent testing standards.

(E) Additional protection for new or modified portions of existing RCSs that are constructed with embankments designed to contain runoff from a drainage area shall be constructed with a spillway or other outflow device properly sized according to NRCS design and specifications to protect the integrity of the embankment.

(F) For all new construction or the modified portions of existing RCSs, each RCS must have a minimum of two vertical feet of freeboard constructed with 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 of freeboard between the top of the embankment and the required storage capacity.

(2) For all new construction and for all structural modifications of existing RCSs, each RCS must meet the requirements for lack of hydrologic connection or have a liner consistent with subparagraph (B), (C), or (D) of this paragraph [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) This subparagraph applies to lack of hydrologic connection requirements. 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 it is claimed that no significant leakage would result from the use of *in-situ* materials, documentation must be provided that leakage will not migrate to

waters in the state. The operator 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. [This information will be considered documentation that no significant hydrologic connection exists.]

(B) This subparagraph applies to RCS liners using *in-situ* material. *In-situ* material is undisturbed, in-place, native soil material. *In-situ* materials must at least meet the minimum criteria for hydraulic conductivity, thickness, and calculated specific discharge, as described in subparagraph (C) of this paragraph. Samples shall be collected and analyzed in accordance with subparagraph (E) of this paragraph. This documentation must be certified by a licensed Texas professional engineer or licensed Texas professional geoscientist.

(C) This subparagraph applies to constructed or installed earthen liners. Constructed or installed liners must be designed by a licensed Texas professional engineer. The liner must be constructed in accordance with the design and certified as such by a licensed Texas professional engineer. Compaction tests and post construction sampling and analyses will provide support for the liner certification. Liners shall be designed and constructed [Site-specific conditions may be considered in the design and

construction of liners. Where no site-specific assessment has been performed demonstrating 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 liner must be designed by a licensed Texas professional engineer 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, and not to exceed a specific discharge through the liner of  $1.1 \times 10^{-6}$  cm/sec calculated using Darcy's Law with the water level at the spillway depth. Constructed or installed liners must be designed and constructed to meet the soil requirements, lift requirements, and compaction testing requirements identified in the permit or authorization. [The liner must be constructed in accordance with the design and certified as such by a licensed Texas professional engineer.] The operator shall maintain the liner to minimize the percolation of wastewater through the liner.

(D) This subparagraph applies to geosynthetic liners. Geosynthetic liners that meet the specific discharge requirements in subparagraph (C) of this paragraph are acceptable if certified by a licensed Texas professional engineer. Documentation must be presented to the executive director for review and approval before putting into service. Installation of the liner shall be certified by a licensed professional engineer that the liner and subgrade were completed according to the manufacturer's recommendations and current standards. Seams shall be completed in accordance with the manufacturer's requirement. When wedge weld seams are used, non-destructive seam testing shall be conducted on the complete length of the wedge weld by standard air pressure testing. The

certification must document compliance with all of the following standards: ASTM D5888 Storage and Handling of Geosynthetic Clay Liners, ASTM D5889 Quality Control of Geosynthetic Clay Liners, and ASTM D6102 Guide for Installation of Geosynthetic Clay Liners.

(E) This subparagraph applies to liner sampling and analyses of *in-situ* material and earthen liners.

(i) The licensed Texas professional engineer or licensed Texas professional geoscientist shall use best professional practices to ensure that corings or other liner samples will be appropriately plugged with material that also meets liner requirements of this subsection.

(ii) Samples shall be collected in accordance with ASTM D1587 or other method approved by the executive director. For each RCS, a minimum of two core samples collected from the bottom of the RCS and a minimum of at least one core sample from each sidewall. Additional samples may be necessary based on the best professional judgment of the licensed professional engineer. Distribution of the samples shall be representative of liner characteristics, and proportional to the surface area of the sidewalls and floor. Documentation shall be provided identifying the sample locations with respect to the RCS liner.

(iii) For earthen liners, undisturbed samples shall be analyzed for hydraulic conductivity in accordance with ASTM D5084, whole pond seepage analysis as described in ASABE Paper Number 034130, Double Ring Infiltrometer (stand pipe), or other method approved by the executive director.

(F) [(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.

(G) [(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.

**§321.39. [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 operations (CAFOs). Any CAFO operator that does not use a retention control structure (RCS) is not subject to subsections (b) and (c) of this section [operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter].

(b) RCS [Retention control structure (RCS)] operation and maintenance. A CAFO using an RCS for storage and treatment of stormwater [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 design [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 in accordance with [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 allowed [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 drainage pathway at the point of discharge from the LMU, analyze [edge of] the samples [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), and provide the appropriate notifications in accordance with §321.44(a) of this title. 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 design [required] rainfall event shall be installed and properly maintained.

(5) The CAFO operator shall maintain the liner to inhibit infiltration of wastewater. 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 or embankment. Any mechanical or structural damage to the liner or embankment shall be evaluated by a licensed Texas professional engineer within 30 days following discovery of the damage. For re-certification of an earthen liner following mechanical or structural damage, a minimum of one sample shall be collected and analyzed to document that the liner meets the requirements of the liner certification for that RCS prior to the damage.

(6) The CAFO operator shall install and maintain a permanent pond marker in the RCS, visible from the top of the embankment that identifies, either physically or by documentation in the pollution prevention plan, the volume required for the design rainfall event and minimum treatment volume, in accordance with §321.43(j)(3)(B) of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)).

(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 the RCSs in accordance with the design schedule for cleanout to prevent the accumulation of sludge from encroaching on the

volumes reserved for minimum treatment, if necessary, and the design rainfall event  
[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 business days prior to [before] cleaning. The operator shall also provide written verification of completion to the same regional office within five business days after the cleaning is complete [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 take appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant. Where potential spills can occur, materials [material], handling procedures, and storage shall be specified. The CAFO operator shall identify the procedures for cleaning up spills and shall make available the necessary equipment to personnel to implement a cleanup. The CAFO operator shall store, use, and dispose of all [herbicides and] pesticides 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

RCSs. Incidental amounts of such substances entering an RCS as a result of stormwater [storm water] transport of properly applied chemicals is not a violation of this section.

(e) Storage of manure and sludge [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. Temporary storage of manure and sludge in the 100-year flood plain, near water courses, or near recharge features is prohibited, unless protected from inundation and damage that may occur during the 100-year runoff event. Contaminated 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.

(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, sludge, [litter, bedding, feed,] and dead animals generated on site. 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 RCS 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 post-harvest [postharvest] residues in the normal growing season, excluding the feed and water trough areas [and open lots designated on the site map].

(3) 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, 58.31(b), and 59.12 (relating to Disposal, Disposal of Diseased or Exposed Livestock, and Carcass Disposal Requirements, respectively). Carcass disposal shall be addressed in the potential pollutant sources section of the pollution prevention

plan with management practices to prevent contamination of surface or groundwater, control access, and minimize odors.

(h) Closure required.

(1) The operator shall submit a closure plan to the executive director and the appropriate regional office within 90 days of permanently ceasing operations.

(2) The closure plan must be developed and certified by a licensed Texas professional engineer to meet the standards contained in the NRCS Practice Standard Code 360 (Closures of Waste Impoundments), and using the guidelines contained in the Texas AgriLife Extension Service/NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures).

(3) The RCS or CAFO shall be properly closed within one year of Texas Commission on Environmental Quality receipt of the closure plan or an alternate schedule approved by the executive director. The RCS or CAFO is considered properly closed upon certification by a licensed Texas professional engineer that closure is complete according to the closure plan.

(4) The operator shall maintain or renew its existing authorization and maintain compliance with the requirements of this subchapter until the facility is properly closed.

**§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 operations (CAFOs) [operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter].

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

(c) Manure, sludge [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, sludge [litter], or wastewater from a [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)), unless additional wellhead protective measures are implemented that will prevent pollutants from entering the well and contaminating groundwater. 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 maintained in accordance with Natural Resources Conservation Service (NRCS) Practice Standard Code 393. The minimum buffer shall be no less than 100 feet of vegetation to be maintained between manure, sludge [litter], or wastewater application areas and water in the state. A buffer is not required for wastewater irrigation when applied by low-pressure, low-profile center pivot irrigation systems in areas of the state where the annual average rainfall is less than 25 inches per year. Land application of manure, sludge, and wastewater into surface water in the state is an unauthorized discharge and is prohibited [The CAFO 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) and Chapter 290 of this title (relating to Public Drinking Water), as appropriate.

(j) Nighttime application of manure, sludge [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 actual area [LMU] receiving manure, sludge [litter], or wastewater application. In areas with an occupied residence within 1/4 mile from the outer boundary of the actual area [LMU] receiving manure, sludge [litter], or wastewater application, application shall only be allowed from one hour after sunrise until one hour before sunset,

unless the current resident owner or lessee [occupants] of such residences have agreed [,] in writing[, agreed] to specified [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.]

(k) [(1)] Nutrient requirement.

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

(2) Critical phosphorus level. Land application of manure, sludge, or wastewater [A permit or other authorization] shall not exceed the crop removal rate when results of the annual soil analysis for extractable [establish the appropriate threshold for] phosphorus indicate: [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.]

(A) a level greater than 200 parts per million (ppm) for a particular LMU; or

(B) a level greater than 350 ppm for an LMU where the average annual rainfall is 25 inches or less and 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 executive director to do so in order to protect water in the state.

(3) Dairy CAFOs located in a major sole-source impairment zone shall develop a nutrient utilization plan (NUP) when the annual soil analysis for extractable phosphorus in zone 1 (0 - 6-inch incorporated; 0 - 2 or 2 - 6-inch if not incorporated) depth in an LMU is greater than 200 ppm. State-only CAFOs shall develop a NUP when the annual soil analysis for an LMU indicates the critical phosphorus levels in paragraph (2) of this subsection have been exceeded. A nutrient management plan, based on crop

removal certified as meeting the NRCS Practice Standard Code 590 is equivalent to the requirements for a NUP.

(A) If an operator is required to develop a NUP, the operator shall cease land application of manure, sludge, or wastewater to the affected area and may resume only after a NUP is implemented.

(B) [(3) NUP. An NMP (Practice Standard 590) certified as meeting the NRCS standard is equivalent to the requirements for a NUP.] The NUP [, based on crop removal,] must be developed and certified by:

(i) an employee of the NRCS;[,]

(ii) a nutrient management specialist certified by the NRCS;[,]

(iii) the Texas State Soil and Water Conservation Board;[,]

(iv) Texas AgriLife [Cooperative] Extension Service;[,]

(v) an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas;[,]

(vi) a [or a professional agronomist or soil scientist certified by the] Certified Professional Agronomist certified through the certification program of the American Society of Agronomy; [,]

(vii) a Certified Professional Soil Scientist certified through the certification program of the Soil Science Society of America; [,] or

(viii) a licensed geoscientist-soil scientist in Texas after approval by the executive director based on a determination by the executive director that another person or entity identified in this subparagraph [paragraph] cannot develop the plan in a timely manner.

(C) After a NUP is implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below the critical phosphorus level. Thereafter, the operator of a dairy CAFO located in a major sole-source impairment zone shall implement the requirements of the nutrient management plan certified in accordance with §321.36(c) [§321.36(d)] of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)) and the operator of other state-only [ . All other] CAFOs must follow the requirements in this section.

(D) [(4)] Land [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.

(l) Runoff from an LMU. Where manure, sludge, or wastewater is applied in accordance with a site-specific nutrient management plan that complies with §321.36(c) of this title or when the land application conforms to this section, precipitation-related runoff from LMUs is authorized as:

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

(2) an agricultural stormwater discharge for all other sources.

(m) Sampling and Testing.

(1) Initial sampling. Before commencing land application of manure, sludge, or wastewater on LMUs and before resuming land application on LMUs where manure, sludge, or wastewater was not applied during the preceding year, the operator shall:

(A) collect and analyze at least one representative sample of manure, sludge (if applicable), and wastewater for total nitrogen, total phosphorus, and total potassium;

(B) collect and analyze at least one representative soil sample from each LMU according to the procedures in paragraphs (4) and (5) of this subsection; and

(C) utilize the results of these analyses in determining application rates for manure, sludge, and wastewater.

(2) Annual Sampling. The operator shall:

(A) collect and analyze at least one representative sample of manure, sludge (if applicable), and wastewater for total nitrogen, total phosphorus, and total potassium;

(B) collect and analyze at least one representative soil sample from each LMU where manure, sludge, or wastewater was applied during the preceding year according to the procedures in paragraphs (4) and (5) of this subsection; and

(C) utilize the results of these analyses in determining application rates for manure, sludge, and wastewater.

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

(4) 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 methods described in the agency's guidance RG-408 entitled "Soil Sampling for Concentrated Animal Feeding Operations."

(B) Samples shall be collected by the operator or its designee and analyzed by a soil testing laboratory annually, except when crop rotations or inclement weather require a change in the sampling time. The pollution prevention plan shall contain documentation to explain the reasons for adjusting the sampling timeframe.

(C) Obtain one composite sample for each LMU and per uniform soil type (soils with the same characteristics and texture) within the LMU.

(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores at a depth of zero to six inches.

(5) Laboratory analysis. The operator shall have a laboratory analysis of the soil samples performed for physical and chemical parameters to include: nitrate reported as nitrogen in ppm; phosphorus (extractable, ppm, using Mehlich III extractant with Inductively Coupled Plasma (ICP) analysis); potassium (extractable, ppm); sodium (extractable, ppm); magnesium (extractable, ppm); calcium (extractable, ppm); soluble salts (ppm) or electrical conductivity (deciSiemens/meter (dS/m) or millimhos/cm (mmhos/cm) determined from extract of 2:1 volume to volume (v/v) water/soil mixture); and soil water pH (soil:water, 1:2 ratio).

**§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 of becoming aware of the discharge or by the next business day and in writing [upon discovery of the discharge, whichever occurs first. The CAFO operator shall also submit written notice,] within 14 business [working] days of the discharge from the retention control structure or any component of the manure [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 business [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; and [.]

(6) any upset which exceeds any effluent limitation in the permit or authorization.

(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) The effluent shall be analyzed by [Sample analysis of the discharge must, at] a [minimum, include] National Environmental Laboratory Accreditation Conference accredited lab for the following parameters:

(A) *Escherichia coli* [fecal coliform bacteria];

[B] total coliform;]

[B] [(C)] five-day biochemical oxygen demand (BOD 5);

[C] [(D)] total suspended solids (TSS);

[D] [(E)] Ammonia Nitrogen (as N);

[E] [(F)] Nitrate (as N);

[F] [(G)] total dissolved solids (TDS);

(G) [(H)] total phosphorus (as P); and

(H) [(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, hurricanes [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 and analyses.

(3) In the event that a discharge occurs outside of the normal business hours of the testing laboratory, which causes the maximum hold time to lapse, the operator shall collect a secondary sample from the retention control structure, and have it analyzed on the first business day for each parameter where the maximum hold time is exceeded.

(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.

**§321.46. 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 revise the plan:

(A) before any change in the acreage [number] or boundaries [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 which [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 production area [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, that information may be used [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 with [in] the PPP.

(6) [The PPP shall provide a description of potential pollutant sources.]

Potential pollutant sources include any activity or material of sufficient quantity that may reasonably be expected to add [contain] pollutants to surface water in [at] the state from the facility. [, including the CAFO,] The owner shall conduct a thorough site inspection of the [associated control facilities,] facility to identify all potential pollutant sources. The inspection shall include all land that is part of the production area 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) The operator shall maintain and update the following items as part of the

PPP [A permit or authorization will establish requirements for the development and retention by the operator of]:

(A) a site map, showing the production area and include, at a minimum, pens and open lots, barns, berms, permanent manure storage areas, composting areas, control facilities including retention control structures (RCSs), water wells (abandoned and in use), surface water in the state, and dead animal burial sites; including a depiction of buffer zones and setbacks;

(B) LMU Map, showing the boundary and acreage of each LMU; all buffer zones, the location of the production area, water wells (abandoned and in use) that are onsite or within 500 feet of the facility boundary, all surface water in the state located onsite and within one mile of the facility boundary, and the facility boundary.

(C) [(B)] soil, crop, and crop nutrient information;

(D) [(C)] a description of land application procedures and equipment used; and

(E) [(D)] a description of BMPs utilized to minimize the entry of uncontaminated runoff into the control facility and RCS [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) procedures for spill prevention and recovery;

(4) a copy of the [approved] recharge feature certification, if applicable;

(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, sludge [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 dairy outreach program area (DOPA)-required training, verification of the date, time of attendance, and completion of training.

(c) Required inspections. The CAFO operator shall perform the routine inspections described in 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 [Site evaluation].

(1) CAFO operators shall conduct a daily inspection of all water lines, including drinking water and cooling water lines that are located within the drainage area of the RCSs. These daily inspections shall be recorded in the PPP either daily or in the weekly report.

(2) CAFO operators shall conduct a weekly inspection of all control facilities and equipment used during that week for land application of manure, sludge, or wastewater. An inspection must include all stormwater diversion devices, runoff diversion structures, and devices channeling contaminated stormwater to each RCS. The weekly inspection will note the level of liquid in each RCS as indicated by the pond marker.

(3) CAFO operators shall conduct monthly inspections on mortality management systems, including containers, burial sites, composting facilities, incinerators, and chemical storage and disposal areas.

(4) A complete site inspection of the CAFO and LMUs shall be conducted and documentation of the findings of the inspection made at least once per year. The inspection shall include:

(A) a review of the list of potential pollutant sources to ensure it is current;

(B) the inspection of all controls and operations outlined in the PPP to reduce the potential for pollutants to be transported off the CAFO; and

(C) updating the PPP to reflect the current conditions.

(5) [(1)] Once every five years, beginning five years after initial authorization under this subchapter, any CAFO operator who uses an RCS shall have a licensed Texas professional engineer review the existing engineering documentation, complete a site evaluation of the structural controls, and review existing liner documentation. The engineer shall [, and] complete and certify a report of their findings that must be kept with the PPP.

[(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 in the PPP [on site] for a minimum of five years from the date the record was created. Upon [and shall submit them within five days of a] written request, any of the records maintained to comply with the permit shall be submitted to [by] the executive director within five business days of the operator receiving the request. The records shall document the inspections and actions taken in response to deficiencies identified during any inspection. A CAFO operator shall correct all the deficiencies within 30 days or shall document the factors preventing immediate correction and submit to the executive director an explanation of the factors that prevented the correction of the deficiencies. Any CAFO operator that does not use an RCS is not subject to paragraphs (3) - (6) [(5)] and (8) [(7)] of this subsection. The following records must be included unless otherwise specified:

(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 removed from the CAFO, other than single pickup truck loads, that shows the dates and[, ] times of removal from the CAFO, name and address of the [, and] recipient, amount (in wet tons, dry tons, cubic yards, acre-inches, acre-feet, or gallons) of manure, sludge, or wastewater;

(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) 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;

(7) [(6)] groundwater monitoring records, if required by §321.41 of this title (relating to Special Requirements for Discharges to a Playa);

(8) [(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;

(9) records describing mortality management practices;

(10) [(8)] a log of all manure, sludge [litter], and wastewater used at the CAFO updated at least monthly. For CAFOs where manure, sludge [litter], or wastewater is applied on LMUs [property owned, operated, controlled, rented, or leased by the CAFO owner or operator], such records must include the following information:

(A) date of manure, sludge [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, sludge [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, sludge [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;

(11) [(9)] annual nutrient analysis for [at least one representative sample of] irrigation wastewater, sludge, if applicable, and [one representative sample of] manure[/litter for total nitrogen, total phosphorus, and total potassium];

(12) documentation describing any 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 the discharge;

(13) [(10)] the results of initial and annual soil analysis reports as required by this subchapter; and

(14) [(11)] copies of all notifications to the executive director, including any made to a Texas Commission on Environmental Quality regional office, as required by this subchapter, a permit, or authorization.

(e) Reporting requirements.

(1) The CAFO operator shall furnish to the appropriate regional Texas Commission on Environmental Quality office and the commission's Office of Compliance and Enforcement, Enforcement Division in Austin, soil testing analysis of all soil samples with the annual report due February 15 of each year.

(2) CAFO operators shall provide all other reports required by this subchapter to the Office of Compliance and Enforcement, Enforcement Division.

**§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) Except as identified in paragraph (2) of this subsection, the owner or operator of an AFO not defined or designated as a CAFO who uses a control facility to manage manure, sludge [litter], or wastewater generated on site shall comply with all the requirements of this section.

(2) The owner or operator of an AFO not defined or designated as a CAFO who qualifies for, obtains, and is operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board (TSSWCB) and subsection (c)(1) - ~~(4)~~ [(3)] of this section are considered to meet all technical requirements of this section.

(3) The owner of an AFO not defined or designated as a CAFO who uses an alternative treatment practice, such as filter strips (Natural Resources Conservation Service (NRCS) Code 393), constructed wetlands (NRCS Code 656), or vegetated treatment areas (NRCS Code 635), instead of [does not use] a control facility to manage manure, sludge [litter], or wastewater generated on site shall comply with all [adhere to] the [following general] requirements of this section except the requirements mentioned in subsection (d) of this section.

[(A) The owner shall ensure that manure, litter, or wastewater generated at an AFO is stored, beneficially used, or disposed of in a manner that will protect surface and groundwater quality.]

[(B) The owner shall prevent nuisance conditions and minimize odor conditions.]

(c) General requirements.

(1) An AFO operator must locate, construct, and manage the control facility, alternative treatment practice, 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) Proper pen drainage shall be maintained at all times. Earthen pen areas shall be maintained to ensure good drainage by scraping uncompacted manure and shaping pen surfaces as necessary to minimize odors and ponding [The AFO may discharge from the production area, if the discharge is the result of a chronic or catastrophic rainfall event, or catastrophic condition 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 manure [waste] handling procedures and structures to

accommodate all additional manure [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, alternative treatment practices, [including] holding pens, and retention control structures (RCSs) [RCSs,] must be located outside of the 100-year flood plain unless the structures [control facilities] are protected from inundation and damage that may occur during the 100-year flood 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) - NRCS [Natural Resources Conservation Service (NRCS)] Field Office Technical Guide [(FOTG)] for Texas; [and/]or

(B) TSSWCB rules [regulations]; [and/]or

(C) a certified water quality management plan certified by the TSSWCB; [and/]or

(D) a comprehensive nutrient management plan (CNMP) certified by the TSSWCB, the USDA - NRCS, or their designee.

(8) The AFO operator shall adhere to the well buffer requirements in §321.38(b) of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)) and §321.40(g) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements).

(d) Control facilities.

(1) The AFO operator shall minimize entry of uncontaminated runoff [non-process wastewater] into RCSs. Such measures may include the construction of berms, embankments, or similar structures.

(2) The AFO may discharge from the production area if the discharge is the result of a chronic or catastrophic rainfall event, or catastrophic condition that exceeds the design capacity of an RCS that has been properly designed, constructed, operated, and maintained. RCSs shall be designed in accordance with §321.38 of this title. [Proper pen

drainage shall be maintained at all times. Earthen pen areas shall be maintained to ensure good drainage by scraping uncompacted manure and shaping pen surfaces as necessary to minimize odors and ponding and to minimize the entrance of uncontaminated storm water 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, American Society of Agricultural and Biological Engineers, American Society of Civil Engineers, American Society of Testing Materials, or other technical [The operator must use those] standards approved by the executive director, that are in effect [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 RCSs that [facilities which] have been properly maintained without any modifications and have [show] no apparent [signs of] structural problems [breakage] or leakage will be considered to be properly designed and constructed with respect to the RCS sizing, embankment design and construction, and liner requirements of this subchapter, provided that any required documentation was completed in accordance

with the requirements at the time of construction. If no documentation exists, the RCS must be certified by a licensed Texas professional engineer as providing protection equivalent to the requirements of this section. 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, manure [wastes] generated, etc.) and the RCS is operated and maintained in accordance with NRCS requirements.

(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.]

(6) [(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 RCSs [retention facilities].

(7) [(8)] An irrigation system or other liquid manure removal system used by an AFO must be designed to ensure that the system is capable of dewatering the RCSs on a regular schedule. RCSs shall be equipped with [either] irrigation, [evaporation,] or

wastewater [liquid] removal systems capable of dewatering the RCSs whenever needed to restore the operating capacity. Dewatering equipment shall be maintained in proper working order.

(8) [(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] encroaching on other required storage volumes.

(e) Operation and maintenance.

(1) Sufficient volume shall be maintained at all times within the RCS to accommodate sludge, wastewaters, and contaminated stormwater [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 such manure, sludge, [waste] and wastewater from the RCS as required to maintain the required volume in [retention capacity of the facility for] compliance with this subchapter.

(5) A rain gauge capable of measuring the design [required] rainfall event shall be installed on site and properly maintained.

(6) The AFO operator shall install and maintain a [A] permanent pond marker [(measuring device) shall be maintained] in the RCS, visible from the top of the embankment that identifies, either physically or by onsite documentation, [to show the following:] the volume required for the design [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 or embankment. Any mechanical or structural damage to the liner shall be evaluated by a licensed Texas professional engineer within 30 days following discovery 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 LMUs only to the extent necessary to prevent overflow from the RCS.

(f) Land application.

(1) The runoff of manure, sludge [litter], or wastewater to water in the state as the result of the application of manure, sludge [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, sludge [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 a nutrient management plan (NMP) [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 all LMUs [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 manure, sludge [waste] or wastewater; and

(G) projected rates and timing of application of the manure, sludge, and wastewater as well as other sources of nutrients that will be applied to the LMUs.

(4) Discharge of manure, sludge [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 of manure, sludge, and wastewater shall not exceed the crop requirement of the crop or planned crop planting [with any land application of wastewater and/or manure]. Land application rates of manure sludge, and wastewater shall be based on the available nutrient content of the manure, sludge, and wastewater.

(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 Operational [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, sludge [litter], and wastewater at agronomic rates shall not be considered surface disposal and is not prohibited.

(9) Manure, sludge [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 sludge, if applicable, 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 manure, sludge, [waste] or wastewater application areas and surface water and watercourses. The AFO operator shall maintain the buffer strips in accordance with NRCS guidelines. A buffer is not required for wastewater irrigation when applied by low-pressure, low-profile center pivot irrigation systems in areas of the state where the annual average rainfall is less than 25 inches per year. Land application of manure, sludge, and wastewater into surface water in the state is an unauthorized discharge and is prohibited.

(13) Manure[/litter] and sludge storage capacity requirements based upon manure[/litter] and sludge [waste] production, land availability, and [the USDA -] NRCS or equivalent standards [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]. Manure or sludge stored for more than 30 days must be stored [located] within the drainage area of an [the] RCS, or stored in a manner (i.e. storage shed, bermed area, tarp covered area, etc.) that otherwise prevents contaminated stormwater [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 from the storage area. Storage for more than 30 days is prohibited in the 100-year flood plain.

(14) Temporary storage of manure and sludge shall not exceed 30 days and is allowed only in LMUs or an RCS drainage area. Temporary storage of manure or sludge in the 100-year flood plain, near water courses or recharge features is prohibited unless protected from [by berms or other structures sufficient to prevent] inundation and damage that may occur during the [a] 100-year flood event [storm]. [Temporary storage of manure/litter shall not exceed 30 days and is only allowed in LMUs. Polluted] Contaminated runoff from manure[/litter] and sludge 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 manure [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 manure [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], sludge, 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 manure [waste] generated on site, including manure, sludge [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) Sampling [Soil sampling] and testing.

(1) Initial sampling. Before commencing application of manure, sludge [The AFO operator is not required to collect soil samples from LMUs where manure, litter], or wastewater on LMUs and [has not been applied during the preceding year. The AFO operator must comply with paragraph (2) of this subsection] before resuming land application on [to such] LMUs. Where manure, sludge, or

[(2) Prior to commencing] wastewater was not applied during the preceding year [irrigation or manure, litter application on land owned, operated, controlled, rented, or leased by the AFO operator, and annually thereafter], the operator shall:

(A) collect and analyze at least one representative sample of manure, sludge (if applicable) and wastewater for total nitrogen, total phosphorus, and total potassium;

(B) collect and analyze at least one representative soil sample [samples] from each LMU [of the LMUs] according to the [following] procedures in paragraphs (4) and (5) of this subsection; and

(C) Utilize the results of these analyses in determining application rates for manure, sludge, and wastewater.

(2) Annual sampling. The operator shall:

(A) collect and analyze at least one representative sample of manure, sludge (if applicable), and wastewater, for total nitrogen, total phosphorus, and total potassium;

(B) collect and analyze at least one representative soil sample from each LMU where manure, sludge, or wastewater was applied during the preceding year according to the procedures in paragraphs (4) and (5) of this subsection; and

(C) utilize the results of these analyses in determining application rates for manure, sludge, and wastewater.

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

(4) [(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 [should] be collected using approved methods [procedures] described in the agency's [executive director's] guidance RG-408 [document] entitled "Soil Sampling for Concentrated Animal Feeding Operations." [Nutrient Utilization Plans" as updated.]

(B) [(4)] Samples shall [should] be collected by the operator or its designee and analyzed by a soil testing laboratory annually [within the same 45-day time frame each year].

(C) [(5)] Obtain one [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.

(D) [(6)] Composite samples shall be comprised of ten to 15 randomly sampled cores at a depth of zero to six inches. [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.]

(5) Laboratory analysis. The operator shall have a laboratory analysis of the soil samples performed for physical and chemical parameters to include: nitrate reported as nitrogen in parts per million (ppm); phosphorus (extractable, ppm, using Mehlich III extractant with Inductively Coupled Plasma (ICP) analysis); potassium (extractable, ppm); sodium (extractable, ppm); magnesium (extractable, ppm); calcium (extractable, ppm); soluble salts (ppm) or electrical conductivity (deciSiemens/meter (dS/m) or millimhos/cm (mmhos/cm) determined from extract of 2:1 volume to volume (v/v) water/soil mixture); and soil water pH (soil:water, 1:2 ratio).

(6) [(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 (ppm), using Inductively Coupled Plasma (ICP);]

[(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) Manure, sludge, or wastewater [An operator] shall not be land applied to a [apply any waste or wastewater to the] LMU, unless the land [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 water [the quality of waters] in the state.

(2) An NMP, based on crop removal, certified in accordance with NRCS Practice Standard Code 590 complies with the requirements of a complete and effective NUP.

(3) A NUP, based on crop removal, shall be developed by an employee of the NRCS, a nutrient management specialist certified by the NRCS, the TSSWCB, Texas AgriLife [Cooperative] Extension Service, 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. Any AFO operator that does not use an RCS is not subject to subparagraphs (B) - (D) and (F). Unless otherwise specified, 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 manure [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, sludge [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) the groundwater monitoring plan associated with the use of a playa;

[(H) a copy of the NUP, if required;]

(H) [(I)] site-specific documentation that no significant hydrologic connection exists between the wastewater in the RCS and water in the state; [and]

(I) [(J)] any written agreement with a landowner which documents the allowance of nighttime application of manure, sludge [litter], or wastewater; and[.]

(J) a copy of the NUP, if required.

(2) For facilities where manure, sludge [litter], or wastewater is applied on LMUs [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, sludge [litter], or wastewater application to each field;

(B) the location of the specific LMU [application site] and volume or amount applied [the number of acres utilized] during each application event;

(C) the acreage of each individual crop on which manure, sludge [litter], or wastewater is applied;

(D) the assumptions [basis] for calculating [and] the total amount of nitrogen and phosphorus applied per acre to each field, including sources of nutrients other than manure, sludge [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 sludge; and

(F) the actual annual yield of each harvested crop.

(3) Where manure, sludge [litter], or wastewater, if applicable, [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 AFO [CAFO]; the name and address of the recipient [hauler]; and the amount, in wet tons, dry tons, or cubic yards, of manure or gallons of wastewater [waste] removed from the AFO [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 licensed Texas professional geoscientist review the documentation and conduct [do] a site evaluation every five years.

(k) Groundwater monitoring. In the event that [one or more samples of] groundwater monitoring is [are] required by §321.41 of this title or required by the executive director, the operator shall annually collect a groundwater [must] sample from each well that provides water for the facility. Each sample shall be analyzed for nitrate as nitrogen and chloride where groundwater monitoring is required by §321.41 of this title and analyzed [annually] for nitrate as nitrogen, chloride, and total dissolved solids where groundwater monitoring is required by the executive director. The operator shall use [using] the methods outlined in the groundwater monitoring [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. Records of inspections shall be maintained for a period of five years.

(1) Preventative maintenance program. The operator shall conduct weekly inspections of [periodically inspect designated equipment at] the control facility and land application equipment to determine preventative maintenance or repair needs. Operators that do not use an RCS are required to conduct inspections for applicable portions of their operation as required by this section [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 water [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(13)(B) [§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 in accordance with a closure plan prepared by a licensed Texas professional engineer. The AFO and RCS must be closed within one year of permanently [inactivity or] ceasing [of] operations at the facility[,] or [in accordance with] an alternate [alternative] schedule determined [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 Code 360 (Closures of Waste Impoundments, as updated) and using the guidelines contained in the Texas AgriLife [Cooperative] Extension Service/NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures, as updated). The RCS or AFO is considered to be properly closed upon certification by a licensed Texas professional engineer that closure is complete according to the closure plan.

AFOs shall maintain compliance with the requirements of this subchapter until the facility has been properly closed.