The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§321.31-321.46, concerning the updating of technical requirements and simplifying administrative procedures related to authorizations of concentrated animal feeding operations (CAFOs). Sections 321.31- 321.37, 321.39-321.42, 321.44 and 321.46 are adopted with changes to the proposed text as published in the March 6, 1998, issue of the *Texas Register* (23 TexReg 2230). Sections 321.38, 321.43 and 321.45 are adopted without changes and will not be republished.

The purpose for adopting the amendments to these rules is to create, together with a new general permit currently proposed and under consideration, a variety of vehicles available for the regulation and authorization of air emissions and water discharges by CAFOs, tailored according to regulatory needs including the sizes and natures of the facilities and their discharges, statutory requirements, and the necessary administrative burdens both on the commission and on the dischargers. As adopted, the amendments to this subchapter offer or require, as appropriate, authorization by individual permit or by registration under a permit by rule. In combination with the new proposed general permit, these regulatory options provide a full spectrum of options for the commission to regulate CAFOs by suitable and efficient means.

The commission has taken into consideration the following state and federal actions in adopting these amendments to Subchapter B:

1) Senate Bill 2, 72nd Texas Legislature, First Called Session (1991): Consolidation of the Texas Air Control Board, Texas Water Well Drillers Board, Texas Board of Irrigators, Texas Water

Commission and selected programs from the Texas Health Department into the TNRCC with the express purpose and instruction that the new TNRCC streamline permit procedures and promote more comprehensive and more expeditious review of proposed facilities.

2) Senate Bill 503, 73rd Texas Legislature (1993), that allows the Texas State Soil and Water Conservation Board to assist small agricultural and silvicultural facilities in meeting water quality requirements in the state through financial assistance and the development of certified water quality management plans.

3) The United States Environmental Protection Agency (EPA) Region VI General Permit for CAFOs (March, 1993), which establishes technical and procedural requirements substantially identical to those contained in these adopted amendments for CAFOs to meet in order to receive federal authorization to discharge under the National Pollutant Discharge Elimination System (NPDES).

4) Section 26.040 of the Texas Water Code, under which Subchapter B was originally adopted and which regulate and set requirements and conditions for discharges of waste. As amended, §26.040 allows the commission to amend rules it promulgated thereunder prior to its amendment.

5) House Bill 1542, 75th Texas Legislature (1997), which amended §26.040 of the Texas Water Code to allow the TNRCC to authorize the discharge of wastewaters through the issuance of general permits. Discharges under such general permits are limited to no more than 500,000 gallons in a 24-hour period. This bill further specifies that all current rules adopted by the TNRCC under

§26.040 as it read prior to the effective date of the HB 1542 should remain in effect, as they may be amended by the commission from time to time as appropriate, and provides that the commission's authority for subsequent amendments or modifications is not affected by the changes made by the bill.

6) The General Appropriation Acts of 73rd, 74th and 75th Sessions of the Texas Legislature which have limited the number of employees and funds allocated to the various programs of the TNRCC.

The commission has applied for authorization under Section 402(b) of the federal Clean Water Act to administer the NPDES in Texas. The EPA has informed the commission that its application is complete. Under the terms of the application and federal law, the commission must regulate CAFOs in conformity with federal requirements, either by rule, general permit or individual permit. Currently, the EPA regulates all CAFOs in Region VI under its jurisdiction by general permit. One reason for the adoption of these amendments and the proposed general permit is to enable the commission to perform this task efficiently through the use of permits by rule and a general permit that are consistent with the federal NPDES general permit. TNRCC recognizes that additional amendments may be necessary if NPDES authorization becomes effective. The amendments adopted today are, however, generally equivalent to the EPA Region VI general CAFO permit. Thus by adopting these amendments, the commission fulfills the requirements for NPDES authorization and also avoids the inefficiency and duplication of permitting each CAFO operation individually, but all with the same NPDES standards. The nature of CAFOs is such that uniform standards of performance and management, as reflected in

the EPA Region VI general permit and in these rules, are sufficient to carry out the state and federal regulatory mandates and provide ample protection of the state's air and water resources.

Under this adoption of amendments to Subchapter B, the commission changed the existing technical and procedural requirements for some CAFOs. The permitting procedure as it operated prior to these adopted amendments required the agency to invest significant resources and manpower performing repetitive technical reviews and evaluations in order to develop individual draft permits for all CAFOs, even though federal and state experience establishes that permits for most CAFO facilities should contain basically uniform technical requirements. The agency was criticized by applicants, local economic development organizations, agricultural commodity groups, local chambers of commerce, and legislators for taking too long to process applications under the previous Subchapter B. Such criticism indicated that the long timeframe for processing applications under the previous Subchapter B, and the differing technical requirements from the existing EPA Region VI general permit, were combining to force potential CAFO facilities to locate in other states, depriving our state of economic development opportunities and made it difficult and burdensome to obtain the necessary state and federal authorizations. Partially in response to these expressions of concern, the TNRCC adopted Subchapter K. By judgement rendered in ACCORD Agriculture, Inc. v TNRCC (Cause No. 96-00159), 353rd Judical District of Travis County (Accord) in May 1998, Subchapter K was set aside due to procedural defects in its adoption. These amendments to Subchapter B have been developed and adopted both to address the substantive problems Subchapter K was created to ameliorate and to correct the defects in the adoption of Subchapter K cited by the court.

The commission and other state agencies have been required through the appropriations process in the last several legislative sessions to reduce the number of their employees and overall costs of conducting their various programs. Since its consolidation in 1993, the commission has continued to evaluate its programs to find ways to reduce its overall human resources costs and associated expenses, while providing for the continued protection of the quality of the state's resources under its jurisdiction. The commission identified CAFOs as one of the number of types of facilities for which it is appropriate to modify the commission's authorization procedure from entirely an individual permitting process to one that partly utilizes permits-by-rule, so as to provide a performance-based system with a less time-consuming and labor-intensive administrative process while maintaining a high level of protection for the environment.

To permit each facility individually would lead to a backlog of such permitting actions, similar to occurrences before the implementation of permits by rule through the former Subchapter K. Of the 46 major amendment applications received between 1992 and 1994, 21 applications exceeded a technical review time of 180 days and thus considered in backlog. Of the 119 new applications received between 1992 and 1994, 41 applications exceeded a technical review time of 180 days and thus considered in backlog. Overall, there was a 38% backlog of new and major amendment applications received between 1992 and 1994. The commission believes its resources would be better spent conducting full individual permitting procedures mostly for those facilities that regularly discharge waste into surface waters, and thereby have a greater potential for pollution, while regulating by uniform rule or general permit most facilities that are not allowed to discharge into a stream or water body unless there is a rainfall greater than a 25-year, 24-hour event. Such action is consistent with the provisions and

philosophy of the EPA Region VI General Permit for CAFOs. The adopted amendments to Subchapter B together with the new general permit will provide a process of gaining authorization similar in nature and structure to that used by EPA Region VI. They also bring the technical requirements of the state program up to the those of the federal program, allowing the CAFOs in the state to achieve a single set of standards and providing the basis for the state to quickly and efficiently assume administration of the NPDES CAFO program upon authorization of the program from EPA.

In addition to the previous provisions of Subchapter B, an applicant wanting to construct a new CAFO facility or amend or renew an authorization for an existing facility was required to obtain a separate air quality authorization from the Commission through a separate and distinct process under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). The adopted amendments to Subchapter B are consistent with the provisions of the EPA Region VI General Permit for CAFOs and go even further by including additional requirements which address the commission's concerns and responsibilities for protection of both groundwater resources and of air quality.

The adopted amendments to Subchapter B provides a process under which CAFOs will gain coverage or authorization fully protective of both air and water quality through a single process. This will give commission the ability to combine processes and save limited resources and manpower. Amendments to Subchapter B are being adopted, in part, to replace the judicially nullified Subchapter K and to make state requirements for new facilities consistent with existing federal EPA requirements contained in

40 CFR Part 122, relating to concentrated animal feeding operations. In addition to providing more consistency with the federal permit, the adopted amendments to this subchapter will enable the commission to regulate these facilities in a manner that conserves scarce resources, and will relieve burdens on the commission and the CAFOs by consolidating air and water quality authorization requirements into a single process.

The adopted amendments to Subchapter B allow a CAFO to obtain an air quality standard permit through the procedures identified in this amended subchapter, regardless of whether its water quality authorization takes the form of an individual permit, registration under the permit by rule or coverage under the proposed general permit. Section 382.0518 (a) of the Texas Clean Air Act (TCAA) states that a permit is required to construct a new facility or to modify an existing facility that may emit air contaminants. As authorized by TCAA §382.051(b)(3), the standard permit under this subchapter satisfies the TCAA requirements for these facilities, that would otherwise be subject to §382.0518, so that a separate air quality authorization will not be necessary. The CAFO standard permit is not a new requirement, but provides an alternative to the New Source Review permit process of Chapter 116, Subchapter B. The standard permit alternative specifies design, location, operational, and maintenance requirements that are typically included in an air quality permit under Chapter 116 and are adequate to protect the public's health, safety, and use of physical property. The air quality requirements of this subchapter essentially reflect the control technology that would be required as BACT for a facility applying for an individual permit, including the requirement to develop and operate under a pollution prevention plan, design criteria for lagoons, operational requirements for single and multi-stage lagoon systems, requirements for wastewater irrigation practices and waste application practices, maintenance

scheduling and reporting requirements for solids removal from lagoons, requirements for manure stockpiling, minimum buffer distance for nighttime application of liquid and solid waste, flushing and scraping schedules for manure, maintenance and design of earthen pens, operational requirements for settling basins, dead animal disposal limitations, and inspection requirements. Many of these requirements affect both air and water quality, and are required regardless of whether an owner/operator seeks separate air authorization. Those that are required only when seeking air authorization are identified as "(Air quality only)" in this subchapter. In addition, §321.46 outlines minimum buffer distances and the requirement to submit an odor control plan for certain CAFOs. As adopted, §321.46 states that a CAFO is entitled to an air quality standard permit authorization in lieu of the requirement to obtain a separate air quality authorization under Chapter 116 (relating to Control of Air Pollution by Permits for New Construction or Modification) if it either (1) meets all of the requirements for registration or individual permit outlined in this subchapter, or (2) meets all of the requirements for operating under a CAFO general permit and satisfies all the applicable air quality only requirements including any applicable buffer distances and the odor control plan. If an applicant cannot meet the air quality criteria of this amended subchapter, or if the CAFO is a major source or major modification as defined in Chapter 116 of this title, then a separate air quality permit will be required.

The amended registration or permit by rule process will relieve the commission of the unproductive burden of processing individual permit applications for those CAFOs that either do not qualify for, or choose not to be, covered by an adopted general permit, but are nevertheless appropriately regulated if they comply with the requirements of the permit by rule. These adopted amendments also preserve the commission's flexibility to require any facility to apply for and obtain an individual permit, for any

reason that within the commission's judgment makes it necessary or appropriate that they do so. In this way, the commission will be able to use its resources efficiently to concentrate individual attention more directly where it is needed. This type of efficiency is possible in the regulation of CAFOs because, as reflected in this amended permit by rule, most CAFOs, if designed and operated properly in conformity with uniform standards, will avoid discharging into surface water except under exceptional circumstances. Those that fall outside of that group will still receive individually tailored permits and provisions.

For registrations, these amendments adopt a public participation procedure similar to that used by the commission for registrations under Chapter 312 of this title, (relating to Sludge Use, Disposal and Transportation). These include notice of technically complete applications both published in the locality of the proposed operation and mailed to potentially affected landowners and other interested persons and governmental authorities, opportunity for public comment, consideration by the executive director of such comment timely received, and procedures for commenters or the applicant to ask the commission for reconsideration of the executive director's action on a registration application. For those who have exhausted their administrative remedies and otherwise have standing, there is then the ability to appeal the commission's final decision to state district court under Texas Water Code, §5.351. Thus, these amendments provide for full public notice, scrutiny and input, as well as commission and judicial review, while reserving for those cases where an individual permit is appropriate the full contested case hearing provided for under §26.028 of the Water Code. Mindful that even the most simple contested case hearing costs the agency several thousand dollars in staff time alone, the

commission has adopted these amendments, in part, as a way to devote such resources only to those cases where circumstances make an individual permit necessary for effective regulation.

EXPLANATION OF ADOPTED RULE

As adopted §321.31, Waste and Wastewater Discharge and Air Emission Limitations, provides the general restrictions or limitations to the discharge of wastewater from a CAFO. These limitations are consistent with existing federal requirements for CAFOs. The adopted rule also provides that facilities must be operated in such a manner as to prevent a nuisance or a condition of air pollution as provided by Texas Health and Safety Code, Chapters 341 and 382.

As amended §321.32, Definitions, reflects a significant number of additional terms being defined, a small number being deleted and a few existing definitions being modified to reflect the consistency between state and federal programs.

As adopted §321.33, Applicability, provides that any existing CAFO holding an individual permit issued either under Subchapter B or under other authority prior to the effective date of these amendments shall continue to be regulated under such individual permit. It also provides that any animal feeding operation may be required by the executive director to file an application to obtain an individual permit under circumstances identified in this amended section. Any CAFO which does not gain coverage under an adopted CAFO general permit or does not hold an existing individual permit or other currently valid TNRCC authorization must file an application for registration in accordance with the provisions of §321.35 of this title, (relating to Procedures for Making Application for Registration).

CAFOs in the Dairy Outreach Program Areas having greater than or equal to 300 animal units but less than 1000 animal units are required to file an application for registration under this subchapter and meet the education requirements of §321.41 of this title, (relating to Other Requirements). Any CAFO which is not required to file an application for registration or an individual permit under the provisions of this subchapter shall comply with all the requirements under §§321.38-321.42 of this title, (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements).

This amended section also prohibits new facilities on the Edward's Aquifer recharge zone.

The changes also allow certain CAFOs to obtain an air quality standard permit authorization by meeting air quality criteria contained in this amended subchapter. Qualification for the air quality standard permit authorization will be determined in the consolidated review and authorization process provided by §321.34, Procedures for Making Application for an Individual Permit or §321.35, Procedures for Making Application for Registration. However, certain CAFOs are prohibited from using the standard permit authorization and must obtain a separate air quality permit. Any CAFO which cannot meet the air quality criteria in this amended subchapter must obtain a separate air quality authorization under Chapter 116 of this title. Any CAFO which is a new major source or major modification as defined in Chapter 116 of this title must obtain an air quality permit under Chapter 116 of this title. Additionally, animal feeding operations that are not required to obtain a CAFO permit under this amended subchapter may be required to obtain air quality authorization under Chapter 116 of this title (certain operations may qualify for an exemption from air quality permitting requirements).

Regardless of any authorization granted pursuant to this amended subchapter, CAFOs must comply with any applicable federal air quality regulations including, but not limited to, National Emission Standards for Hazardous Air Pollutants ("NESHAPs") or New Source Performance Standards ("NSPS"). Additionally, any CAFO that constitutes a major source as defined in Chapter 122 of this title must obtain a federal operating permit under that chapter.

The adopted changes also exempt from this amended subchapter any existing AFO which is operating under a certified water quality management plan or any facility which qualifies and obtains such a plan from the Texas State Soil and Water Conservation Board, unless the AFO or facility is referred by the Board to the commission for non-compliance pursuant to Texas Agriculture Code §201.026.

This section also creates a mechanism for transition to coverage under Subchapter B for facilities that obtained authorization under Subchapter K and whose authorizations were not terminated by the judgement in Accord. Provided they are in good standing with regard to compliance with the technical requirements of Subchapter K, these facilities may transfer their Subchapter K registration to a Subchapter B registration without reapplying. A Subchapter K facility seeking such a transfer must file a request with the Executive Director. The Commission will notify those persons who would be entitled to receive mailed notice of an application by the facility for registration under §321.35 of this title (relating to Procedures for Making Application for Registration). If no objection is received from anyone entitled to the notice, the transfer will be granted.

Finally, changes to this section provide that by written request of the owner/operator a facility currently authorized by an individual permit may request a transfer of authorization from an individual permit to a registration. Such a request and application will be processed in accordance with the provisions of §321.35 of this title, (relating to Procedures for Making Application for Registration).

As adopted Section 321.34, Procedures for Making Application for an Individual Permit, provides application content requirements and associated fees. Applications filed under this section will be processed in accordance with the applicable provisions of Chapter 305 of this title (relating to Consolidated Permits), unless specified otherwise in this amended section. Individual permits issued under this amended subchapter shall not exceed a term of five years.

In accordance with Texas Water Code §26.028(e), §321.34, Procedures for Making Application for an Individual Permit, provides that an application to renew a permit for a confined animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of disposal. In accordance with Texas Water Code §26.028(a), §321.34 also reflects the commission's judgment that no person will be affected by the renewal of a permit if no major amendment is proposed to the permit provisions and if the permittee has operated in compliance with its permit conditions throughout the term of the expiring permit.

In addition, the changes to this section require that an application for renewal of an individual permit be filed not later than the 180th day prior to the date the permit is to expire. The section also includes content requirements and associated fees. Finally, an application for renewal for an individual permit may be granted without a public notice if no change to the facility is being proposed and no formal enforcement action has been brought against the facility during the previous 36-month period. In order to qualify for the renewal process identified in the previous sentence and in addition to the provisions described in this paragraph, for renewal of an individual permit within a Dairy Outreach Program Area, an annual compliance inspection must have been completed within 12 months of the date the executive director declares the application for permit renewal administratively complete. An application for renewal of an individual permit failing to meet the above provisions will be processed as a new application.

As adopted, the changes to §321.35, Procedures for Making Application for Registration, set out application content requirements and associated fees. Registrations authorized under this amended subchapter shall not exceed a term of five years.

In addition, under the changes to this section an application for renewal of a registration must be filed not later than the 180th day prior to the date the authorization is to expire. This section also provides content requirements and associated fees for the renewal process. Finally, an application for renewal of a registration may be granted without a public notice if no change to the facility is being proposed and no formal enforcement action has been brought against the facility during the previous 36-month period. To qualify for this renewal process for renewal of an existing registration within a Dairy Outreach

Program Area also requires that an annual compliance inspection has been completed within 12 months of the date the executive director declares the application for renewal administratively complete. Any application for renewal of a registration failing to meet the above provisions will be processed as a new application.

As adopted changes to §321.36, Notice of Application for Registration, require applications for registration to be reviewed by the executive director for administrative and technical completeness within 30 working days of receipt. If the application is not complete, the executive director must notify the applicant within this review period and allow the applicant a maximum 30-day period to provide the necessary information. If the applicant does not timely submit such information, the application shall be returned.

This section also provides notice content requirements, a 30-day public comment period, notice published in a local newspaper and mailed notice to persons, including adjoining landowners, county judges, river authorities in the Dairy Outreach Program Areas, and where applicable, groundwater districts. These provisions are consistent with those for other types of applications covered by Chapter 305 of this title.

As amended, §321.37, Action on Applications for Registration, provides that any person may comment to the executive director within 30 days of the mailed notice. Comments will be considered by the executive director in determining whether the application meets the requirements of the rules and should be granted. The executive director may grant or deny the application, in whole or in part, deny with

prejudice, suspend an activity or modify a proposed activity requested by the applicant. The executive director will provide a copy of the determination in writing to the applicant and to any persons timely submitting written information on the application. Finally, this amended section provides that persons submitting timely written comments or the applicant may file a motion with the chief clerk requesting the commission to reconsider the final determination of the executive director. For efficiency of procedures, the commission will use and has cross-referenced the procedures in §50.39 (b-f) of this title (relating to Motions for Reconsideration) for the processing of such motions under this subchapter.

As amended, §321.38, Proper CAFO Operation and Maintenance, requires the owner/operator of any CAFO authorized by this subchapter to implement and document best management practices set out in §321.40 of this title as well as other necessary measures contained in the facility's pollution prevention plan as required by §321.39 of this title or a Natural Resources Conservation Service (NRCS) plan, whichever is applicable. Copies of records and plans shall be provided to the executive director upon request.

As amended §321.39, Pollution Prevention Plans, requires each facility, authorized under this amended subchapter, to develop and implement a Pollution Prevention Plan (PPP) providing pollution prevention and abatement measures as specified in the rule. Provisions contained in a NRCS plan may be adopted by reference in the PPP.

As amended §321.40, Best Management Practices, provides a list of best management practices that must be utilized by all CAFOs authorized under this amended subchapter, where reasonable and

appropriate, and based upon existing physical conditions. Where provisions in a NRCS plan are equivalent to or more protective than those provided by this amended section, such provisions may be substituted.

In accordance with §26.048 of the Texas Water Code, a CAFO authorized to discharge agricultural waste into a playa or to use a playa as a wastewater retention facility for agricultural waste before the effective date of §26.048 may continue such discharge provided water samples from wells at the site are tested for chlorides and nitrates. If the test results indicate a significant increase in the levels of these contaminants, the commission shall investigate the cause and require necessary corrective action. Amended §321.41, Other Requirements, contains the additional conditions for authorizations and individual permits including education and training (Dairy Outreach Program Areas only), inspections and recordkeeping, internal reporting procedures, and visual and site inspections. The owners/operators of CAFOs with greater than or equal to 300 animal units in the Dairy Outreach Program Areas and that are covered by this amended subchapter are required to: 1) within 12 months of becoming subject to the this amended subchapter, complete an eight hour course in animal waste management; and 2) complete an additional eight hours of continuing animal waste management education within each 24 month period after the initial course.

As amended §321.42, Monitoring and Reporting Requirements, requires the owner or operator of a facility authorized under this amended subchapter to report to the executive director any discharge from the CAFO to or adjacent to waters in the state. Such report must be made orally within 24 hours and in writing within five working days of the discharge. These provisions are consistent with those contained

in Chapter 305 of this title. In addition, the section prescribes the data and information that shall be maintained on-site and/ or submitted to the executive director.

As amended §321.43, Notification, requires all new animal feeding operations which plan or propose to confine more than 300 animal units or more than 300 head of any species not specifically listed under the definition of a CAFO in this amended subchapter to notify the executive director of the location and size of their operation. No fees will be imposed as the result of this notification. Facilities that have no potential to discharge into waters in the state are not required to notify the executive director.
As amended §321.44, Dairy Outreach Program Areas, designates those counties in the state which are involved in the Dairy Outreach Program as of the effective date of these rules. The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood and Rains. Such areas must be delineated by rule. This section of the rules shall be reviewed by the commission on at least a triennial basis to determine whether counties should be added or deleted from designation.

As amended §321.45, Effect of Conflict or Invalidity of Rule, contains a standard severability clause providing that the invalidity of any one provision shall not affect the validity of any of the remaining provisions. Additionally, to the extent of any irreconcilable conflict between the provisions of this amended subchapter and those outside the subchapter, the former shall control.

As amended §321.46, Air Standard Permit Authorization provides that a facility that locates and is managed in compliance with an authorization under a CAFO general permit, registration, or individual permit, and operates in compliance with all of the "(Air Quality Only)" requirements of this

subchapter, is entitled to an air quality standard permit in lieu of the requirement to obtain an air quality permit under Chapter 116. As adopted, for new CAFOs and expansions of new CAFOs, the applicant must submit evidence, at the time of the initial application, of either a minimum air quality buffer of one-quarter mile and an odor control plan, or a minimum air quality buffer of one-half mile from any occupied residence or business structure, school (and associated recreational areas), church, or public park unless the owner of such property gives written consent, in order to qualify for consolidated air quality standard permit and a water quality authorization (individual permit or application for registration). For expansion projects at existing CAFOs or at AFOs proposing to become CAFOs, the applicant must provide a minimum air quality buffer of one-quarter mile or an odor control plan.

FINAL REGULATORY IMPACT ASSESSMENT

The commission has reviewed the rulemaking in light of the regulatory analysis requirement of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. Although the intent of the rule is to protect the environment and to reduce risks to human health, this rule affects an industry and the individual facilities that are already regulated in substantially similar manner to that described in the rule. As set out in the fiscal note accompanying the proposal of these amendments, this rule will not have an adverse economic effect on small business. This is because potential cost increases to existing businesses will be mitigated by the cost savings realized due to the elimination of requirements associated with application for separate water quality and air quality authorizations, and because most of the cost increase that may result is attributable to the federal requirement to comply with the EPA general permit for concentrated animal feeding operations, and would occur regardless of

these amendments. Also, these rules provide an exception for most small facilities, which are eligible to operate under a certified water quality management plan from the Texas State Soil and Water Conservation Board. Therefore, this rule will have no material adverse effect on the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state. Further, this rule does not meet any of the four applicability requirements listed in §2001.0225(a). It does not exceed a standard set by federal law or an express requirement of state law, since standards for CAFO authorizations are required, but not set, by federal and state law; nor does it exceed a requirement of a delegation agreement or contract between the state and the federal government. There is currently no such agreement, and these rules do not exceed any requirement in the program. Finally, these rules are adopted under the specific authority of Water Code Section 26.040 and Health and Safety Code Sections 382.011, 382.012 and 382.051, as well as the general authority of Water Code Section 5.103 and Health and Safety Code Section 382.017.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment.
The specific purpose of the proposed amendments is to create, together with the proposed general permit, a variety of vehicles available for the regulation and authorization of air emissions and wastewater discharges by CAFOs, tailored according to regulatory needs including the sizes and natures of the facilities and their discharges, statutory requirements and the burdens both on the commission and on the discharges. Promulgation and enforcement of these adopted amendments will not affect private real property which is the subject of the rules.

COASTAL MANAGEMENT PLAN (CMP)

Under 31 TAC §505.11, permits for a new CAFO within one mile of a Coastal Natural Resource Area (CNRA) must be consistent with the applicable goals and polices of the CMP contained in Chapter 501, Subchapter B of Title 31. These amended rules would specifically require CAFOs within one mile of a CNRA to obtain an individual permit for the specific purpose of ensuring consistency with applicable CMP goals and policies.

The commission has reviewed this rulemaking for consistency with the CMP goals and policies in accordance with regulations of the Coastal Coordination Council and has determined that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the amended rules include the protection, restoration and enhancement of the diversity, quality, quantity, functions and values of CNRA 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 amended rules include the following: 1) discharges shall comply with water-quality-based effluent limits; 2) discharges that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development; and 3) to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas. Promulgation and enforcement of these amended rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because any new proposed CAFO located within one mile of a CNRA will be required to pursue an individual permit which will allow the commission to consider the effects of such a facility on the CNRA, establish effluent limits, if

necessary, on any discharges from the proposed facility to maintain applicable water quality standards and allow opportunity for notice, public comment and public hearing.

HEARINGS AND COMMENTERS

A public hearing was held on April 7, 1998. Oral testimony was received from thirty-one persons representing the following: Representative Warren Chisum (District 88); Representative David Swinford (District 87); ACCORD Agriculture, Inc.; North Plain Ground Water Conservation District; Greenbelt Municipal and Industrial Water Authority; City of Crowell; City of Childress; Childress Chamber of Commerce; Childress Economic Development Corporation.; County of Childress; City of Clarendon; Agri-Waste Technology, Inc.; Texas Poultry Federation; Texas Farms, Inc.; Dairy Farmers of America; Red River Authority; Texas Pork Producers Association; Texas Cattle Feeders Association; three individuals representing themselves as farmers/ranchers in Ochiltree County and one attorney representing several landowners and former city officials in Johnson and Ochiltree Counties. Oral comments provided by the Greenbelt Municipal and Industrial Water Authority; City of Crowell; City of Childress; Childress Chamber of Commerce; Childress Economic Development Corporation; County of Childress; and the City of Clarendon are listed in the analysis of testimony and comments under the name of Greenbelt Municipal and Industrial Water Authority.

The public comment period closed on April 13, 1998. One hundred-thirty two commenters submitted written comments. The Texas Pork Producers Association, Dairy Farmers of America, ProAg, and the Texas Poultry Federation either supported the rules as written or generally supported the rules with suggested changes. ACCORD Agriculture, Inc.; ACAFO; Lone Star Chapter of the Sierra Club;

Henry, Lowerre, Johnson, Hess and Frederick; City of Quanah, Childress County; Greenbelt Municipal and Industrial Water Authority; Red River Authority; Brazos River Authority; and 48 individuals from the Panhandle area of the state either opposed the rules as written or generally opposed the rules and recommended changes be made to the rules as proposed. Texas Farm Bureau; Texas Association of Dairymen; Farm Credit Bank; Continental Grain Company; Maddox and Sons; Agri-Waste Technology, Inc.; Rice Construction; Murphy Family Farms; DeKalb Swine Breeders, Inc.; Texas Cattle Feeders Association; Hereford Feed Yards, Inc.; Jennings Land and Cattle, Inc.; Perry Feeders, Inc.; Benzer Beef; Coyote Lake Feedyard; Dimmitt Feed Yard, Inc.; Morris Stock Farm; Tri-State Cattle Feeders; Canadian Feedyards, Inc.; Comstock Cattle Corp.; Farwell Feed Yards; Perryton Feeders, Inc.; Bartlett Cattle Co., L.P.; Stratford Feedyard; Sugarland Feed Yards, Inc.; McLean Feedyards, Inc.; Live Oak Feedlot, Inc.; Frontier Feedyards, Inc.; Bar-G Feedyard; Koch Beef Co. (Hale Center); Koch Beef Co. (Lubbock); Veribest Cattle Feeders, Inc.; Perryton Economic Development Corporation; Wrangler Feedyard; Jade Cattle Feeders; Pilgrim's Pride Corporation; Mahard Egg Farms, Inc.; North Plains Ground Water Conservation District No. Two; United States Department of Agriculture; NRCS; United States Department of Interior, Fish and Wildlife Service; Mayor, City of Perryton; Texas Agricultural Extension Service "TAEX"(College Station); Texas Agricultural Extension Service "TAEX" (Amarillo) and an attorney representing landowners in Johnson and Ochiltree Counties did not generally support or oppose the rulemaking, but suggested changes to the rules as proposed. Written comments provided by the ACCORD Agriculture, Inc.; ACAFO; Lone Star Chapter of the Sierra Club and Henry, Lowerre, Johnson, Hess and Frederick are listed in the analysis of testimony and comments under the name of ACCORD Agriculture, Inc.

A second public hearing on the air quality components of the rules was held on June 25, 1998, in order to fulfill the requirement of Section 382.017(b) of the Texas Health and Safety Code. Oral testimony was received from two organizations and one individual from Ochiltree County. The organizations represented ProAg, who supported adoption of the rules; and ACCORD Agriculture, Inc., who generally opposed the rules and recommended changes be made to the rules as proposed. The individual opposed adoption of the rules as proposed.

Nineteen additional written public comments were received in response to notice of the June 25, 1998, hearing, all of which were either opposed to the rules or generally opposed the rules and recommended changes be made. Many of these individuals had previously submitted comments, some of which, were reiterated in these comments.

ANALYSIS OF TESTIMONY AND COMMENTS

§321.31 Waste and Wastewater Discharge and Air Emissions Limitations

Texas Cattle Feeders Association suggested that in the last sentence of subsection (b), "process wastewaters" should be replaced with "process generated wastewaters" because "process wastewater" is the sum of "process generated wastewater" and the volume of runoff from precipitation.

The commission agrees that modification of the language in the subsection is appropriate for clarification purposes, and has changed the language of the last sentence as follows: "Retention

structures shall be designed in accordance with §321.39 of this title." In addition, the terms "process generated wastewater" and "process wastewater" will be redefined to maintain consistency with EPA.

Fifty individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc., ACAFO, Lone Star Chapter of the Sierra Club; Henry, Lowerre, Johnson, Hess and Frederick recommended that all or some of the following changes be made to the proposed rules: Add a requirement that owner/operator has to provide filters on fans in hog operating barns to prevent the emissions of odors and hydrogen sulfide; add standards for reducing the odors from lagoons; BACT should be a priority in the new rules; and swine CAFOs should be required to use dry waste disposal methods or use BMPs to be sure the waste and air emitted is safely treated.

The commission disagrees that the rules should be modified to require that filters be added to hog barns because this technology has not been established as Best Available Control Technology (BACT), and would not be required of a facility seeking an individual permit under §382.0518. However, the rules do not prohibit the use of filters or other controls to help control odors including hydrogen sulfide. The commission also believes that the design and operational requirements such as the weekly flush schedule requirement in §321.39(f)(24)(J), and the ASAE design criteria for single and two stage lagoons in §321.39(f) (7) and (13) would be required of swine operations seeking individual permits under §382.0518. In addition, §321.46 outlines minimum buffer distances and the requirement to submit an odor control plan for certain CAFOs. It should also be pointed out that CAFOs, like all facilities, remain subject to property

line standards for hydrogen sulfide in Chapter 112 of this title (relating to Sulphur Compounds). The commission agrees that anaerobic lagoons or innovative technologies are allowed under the air quality standard permit provided they are designed and constructed in accordance with proper engineering practices. The commission disagrees that BACT or any state or federal standard can be prioritized in the rulemaking process. The rule contains air pollution requirements that are substantially equivalent to BACT. The commission agrees that odors from swine operations are often perceived to be different than odors from cattle operations by off-site receptors and can have a different make-up of compounds that collectively form "odors" from waste handling operations. The use of dry waste disposal methods is not prohibited in the rules, however, this technology has not been established as BACT, and would not typically be required of a facility seeking an individual permit under §382.0518. In addition, the requirements outside of Texas referenced in the comments were not submitted for review by the commission. With the buffer requirements, odor control plan and design criteria in the rules, it is believed that air contaminants from animal confinement operations can be safely emitted without additional treatment or mandatory dry waste handling.

An individual from the Panhandle area requested that the commission inform him of the amount of chemicals being emitted, the amount of small particles from barns, and the effects that these have on his and nearby residences.

The commission responds that there is not sufficient or reliable data to calculate and report the expected amounts of the many compounds that may be emitted from CAFOs. In addition, there is

not a clear correlation between the detection of these compounds and the expected off-site odor detection level.

An individual from the Panhandle area recommended that these rules require no odors from CAFOs.

The commission disagrees with the presumed opinion that these regulations should allow "no odors." The Health and Safety Code §382.085 allows for air contaminants to be emitted, but only at levels that do not cause or contribute to a condition of "air pollution." In addition, the design criteria and buffer requirements in these rules along with good management practices will help to minimize odors for CAFOs operating under this subchapter.

USFWS recommended that more stringent standards be applied to facilities located in watersheds which contain multiple CAFOs, and that wastewater retention systems should be designed to contain a 50 to 100-year, 24-hour event.

The commission responds that as to potential cumulative impacts from multiple CAFOs within the same watershed, the agency has designated Dairy Outreach Program Areas (DOPA) in eight counties of the state. This designation was based on documented water quality problems that were being experienced in the Bosque and Lake Fork watersheds in the designated counties. Facilities located within these eight counties are required to meet more stringent requirements such as filing for registration for facilities with between 300 animal units and 1000 animal units, and obtaining training and education credits for owners/operators every two years. Implementing

a requirement for retention systems to be designed to contain a 50 to 100 year, 24-hour event would be more stringent than the standards and requirements of the EPA or other states.

§321.32. Definitions.

TAEX (College Station) recommended that the definition of *agronomic rates* be changed by replacing the word "needed" with "required."

The commission responds that the recommended modification would not change the interpretation or implication of the provision. If a recommendation for an application rate has been made, then that information must be used in the land application of the waste.

ACCORD Agriculture, Inc., ACAFO, Lone Star Chapter of the Sierra Club and Henry, Lowerre, Johnson, Hess and Frederick (ACCORD) recommends that the definition for *AFO* should be expanded to ensure that confinement areas that do not sustain vegetative growth throughout virtually the entire area are included in the definition. It is unclear what associated areas, in addition to the actual confinement area, fall within this definition.

The commission responds that the current definition of Animal Feeding Operation is consistent with the federal definition found at 40 CFR §122.23. This federal definition is applicable to state NPDES programs, therefore the commission declines to change this definition. The commission believes the definition of AFO as written is comprehensive enough in providing the agency staff

with the necessary elements in determining whether an individual facility is an AFO rather than a open-range type operation.

Greenbelt Municipal and Industrial Water Authority recommends that the definition of *AFO* be revised to clarify its applicability to facilities that feed individual animals for only a short period of time before moving them on to other locations.

The commission has reviewed the definition and determined that changes are not necessary to the definition. The commission interprets that the criteria used in determining whether a facility is an AFO or not as being based on the total number of animals in confinement for the time specified, regardless of whether the individual animals remain in confinement for a few hours or 365 days.

USFWS recommended that swine nursery facilities housing immature swine (less than 55 lbs) be defined as CAFOs and covered by this rule. Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that swine under 55 lbs should be covered by this regulation. Texas Pork Producers Association recommended that the definition for *animal unit* be modified to add a multiplier for weaned pigs weighing less than 55 pounds of 0.1.

The commission believes that the requested change would be a substantive change from the rules as proposed. However, due to the interest shown in this issue the commission is directing the executive director to study this and other identified issues related to CAFOs and provide the

commission with recommendations on suggested rules changes after the adoption date of these amendments.

TAEX (College Station) recommended that the definition for *Best Management Practices* be modified by adding "and conservation" after "management."

The commission agrees that conservation practices are a necessary part of any BMP utilized by the agricultural community, including CAFOs and has made the corresponding changes to the definition.

ACCORD Agriculture, Inc. recommended that the rules include a procedure and criteria for designating AFOs as significant contributors of pollution and a mechanism for adversely affected persons to initiate the process.

The commission responds that such a procedure already exists. Any person who believes they are adversely affected by the operation of an AFO may contact one of the commission's field offices to initiate a complaint. If the commission determines that an AFO is a significant contributor of pollution, the executive director will designate that facility as a CAFO. The commission believes that these rules and other rules and policies of the agency already provide well defined mechanisms for determining compliance with state rules and initiating procedures to obtain corrective action whether by issuance of a notice of violation (NOV) or by formal enforcement action. Such procedures and criteria are not amenable to the exact definition required by

rulemaking. Rather they should be flexible enough to accommodate the many different situations that will be encountered. The agency has traditionally responded and will continue to respond to legitimate complaints questioning whether a particular facility is compliant with the provisions of this subchapter or other applicable rules and regulations of the commission. The commission believes that this is the most appropriate process for making such determinations within existing fiscal and staffing constraints.

Agri-Waste Technology, Inc. recommended that facility size should not be a criteria for varying degrees of regulation. The TNRCC should adopt defined criteria that apply to all sizes of CAFOs.

The commission has developed performance related criteria in these adopted rules to apply uniformly to all animal feeding operations. All animal feeding operations must locate, construct and manage waste control facilities and land application areas in accordance with the technical requirements of §§321.38-321.40 of the title. Larger facilities are required under these rules to obtain authorization prior to operation due to their potential to discharge larger quantities of wastewater.

Texas Farm Bureau and Continental Grain Company recommended that Part C of the *CAFO* definition should include the opening sentence: "Provided, however, that no AFO is a CAFO as defined above if such AFO discharges only in the event of a 25-year, 24-hour storm event."

The commission responds that the suggested additional sentence would be contradictory to the intent of the rules to regulate all facilities above a certain size.

Texas Cattle Feeders Association recommended that the definition *Control Facility* be modified by deleting the words "collection and" from the second sentence.

The commission feels that the language provides sufficient clarification. The term "control facility" is meant to be a general term intended to cover all the facilities used in controlling manure and wastewater at the CAFO. The recommended change would significantly change the meaning and intent of this term as it is used in these rules.

Texas Farm Bureau and Continental Grain Company recommended that the definition *Feedlot* should be deleted since there is a definition for CAFOs.

The commission agrees this term is no longer necessary for these rules as amended.

Brazos River Authority recommended that the definition for *Land Application* should be revised to "….distribution and incorporation into the soil…"

The commission responds that it is not practical to require that in every case waste be incorporated into the soil, such as beneficial application on pasture land. The commission believes it is not necessary to limit the beneficial use of manure on a statewide basis to incorporation into

the soil. It can be beneficially used on pasture land with minimum effects, if it is properly applied and managed.

Texas Cattle Feeders Association recommended that the definition for *New Concentrated Animal Feeding Operations* does not recognize valid authorizations that were issued under Subchapter K. The CAFOs under these valid permits should not be considered "new CAFOs."

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the proposed general permit, if adopted, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify this, §§321.32(21), 321.33, 321.34 and 321.35 have been modified from the proposal. The definition of "New Concentrated Animal Feeding Operation" has been modified as follows: "A concentrated animal feeding operation which was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules." The commission believes that its responsibility to maintain effective and efficient regulation of the industry will best be served if those facilities that held unexpired, uncancelled Subchapter K authorizations are encouraged to convert expeditiously into Subchapter B. To that end, the proposed rules have been modified to allow most facilities that

have operated in compliance with and in reliance on Subchapter K to transfer to Subchapter B registrations through an expedited process.

Texas Cattle Feeders Association and Continental Grain Company recommended that the definition *No Discharge* should be applicable only to point sources; land application sites should be exempt from this definition.

The commission responds that Chapter 26 of the Texas Water Code prohibits any discharge of waste into or adjacent to waters in the state regardless of source, unless authorized by rule, permit or order of the commission.

Texas Farm Bureau recommended that the definition of *Permittee* should be modified to read: "any person issued an individual permit or order, permit-by-rule or granted authorization under the requirements of this subchapter."

The commission agrees with the comment and has modified the final rules to reflect the change. The commission has made the recommended changes plus additional clarifying language to provide a better description of all types of authorizations which have been or will be granted or recognized under this subchapter.

Texas Farm Bureau recommended that the definition for *Process Generated Wastewater* be changed to "processed wastewater."

The commission agrees with the comment and has modified the definition accordingly to maintain consistency with EPA. To clarify the use of the two terms as they are used in these adopted rules, the commission is adding the following definition for process-generated wastewater. ***Process-generated wastewater - Any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste; washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control) which is produced as wastewater.***

Farm Bureau recommended that the definition for *Recharge Feature* be changed to the one used under the original Subchapter K.

The commission responds that the Subchapter K definition has been modified to provide greater scope in the evaluation. Artificial features have been added to the definition to recognize the potential of recharge by way of various man-made conduits such as wells. Also, the term hydrologic connection has been replaced in the definition because it only refers to potential recharge from surface impoundments or retention structures.

North Plains Ground Water Conservation District No. Two recommended that the definition for *Recharge Feature* be reworded as follows: replace "where" with "which"; add "their existence" after "due to" delete "artificial means or surface and/or geologic features"; add "provide or create" before "a significant pathway"; delete "exists"; and delete "active, abandoned, or dry" at the end of the last sentence.

The commission agrees that the recommended changes makes this definition more precise and has made the changes to the rules accordingly.

Greenbelt Municipal and Industrial Water Authority recommended that the definition for *Qualified groundwater scientist* should be revised to ensure that non-engineers are not authorized to engage in the practice of engineering.

The commission responds that these amended rules do not authorize non-engineers to practice engineering. However, there are certain non-engineering activities under these rules that may be performed by a qualified groundwater scientist.

North Plains Ground Water Conservation District No. Two recommended that the definition for *Qualified groundwater scientist* be clarified to make it clear that it would include an engineer or scientist who has received the appropriate education, training and experience.

The commission agrees that the commenter's interpretation is correct, but believes that the current language of the definition already provides for the necessary education, training and experience of a scientist or engineer. No alternative language was suggested in the comment.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that the definition *Waters in the state* be modified to require that all penetrations on a piece of land be properly plugged.

The commission believes that all penetrations that are a potential conduit for contamination must either be properly plugged or protected from allowing any contaminated wastewater to reach a groundwater resource. The commission responds that the definition of *recharge feature* has been expanded under these adopted rules to include a reference to artificial penetrations and therefore need not be included in this definition.

Continental Grain Company recommended that the definition for *Well* should be modified to clarify that the definition would only cover penetrations into the ground surface that would create a significant hydrologic connection.

The commission responds that the proposed change would limit its evaluation to only those penetrations which would cause a hydrologic connection with surface waters only. The commission's intent in adding this definition is to make it clear that any penetrations through the earth's surface which would create a conduit to groundwater or surface water must be addressed in the manner identified under these rules.

North Plains Ground Water Conservation District No. Two recommended that the definition for *Well* be reworded as follows: "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: 1) Excavation designed to explore for, produce, capture, recharge or recover water, any mineral, compound, gas, or oil from beneath the land surface; 2) 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; 3) Excavation designed to inject or place 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 4) Excavation designed to lower a water or liquid surface either temporarily or permanently for any reason."

The commission agrees with the recommended changes and adopts the suggested language with minor changes. The recommended changes provide a more simplified definition of the term.

§321.33. Applicability.

Texas Cattle Feeders Association recommended that this section should recognize the validity of final permit authorizations issued under Subchapter K and applications for Subchapter B permits submitted prior to the effective date of these rules.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted

operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified from the proposal. The first sentence of subsection (a) has been modified as follows: "A CAFO operating under a currently valid authorization granted prior to the effective date of these amended rules shall continue to be authorized and regulated in accordance with the terms of its existing authorization. Any application… (no change)." The commission agrees with the recommended changes and adopts the suggested language.

ACCORD Agriculture, Inc. recommended that the term "existing feedlot" in subsection (a) is not a defined term and should be eliminated.

The commission agrees that this term is no longer necessary, and has replaced it with "CAFO."

Texas Farm Bureau and Continental Grain Company commented that the language of the second sentence of subsection (a) is unclear as to whether additional requirements will be placed on existing permitted CAFOs following renewal, amendment or transfer. Suggest a third sentence as follows: "No new conditions, provisions or requirements will be placed upon existing CAFO that submits an application for renewal, amendment or transfer, if the existing CAFO was authorized under this subchapter prior to the effective date of these rules.

The commission responds that its intent in this subsection is to require all facilities to meet the basic technical requirements of these rules. This includes existing facilities renewing their existing permit and/or expanding their operations in the future. However, it is not the intent of the

commission to require existing facilities to modify their existing control facilities, unless they expand or are ordered to do so through an enforcement action of the agency. The commission believes that its regulation of CAFOs in the state should be consistent for all facilities similar in nature to the EPA Region VI CAFO NPDES general permitting program since the agency is in the process of obtaining authorization to administer the NPDES program. One reason the state is seeking NPDES delegation is to end the duplicative and burdensome "dual permitting" situation in which Texas dischargers must seek and comply with both a state and a federal authorization for the same operation. It would be counter-productive for these rules to be substantially different from the federal NPDES requirements.

Texas Cattle Feeders Association recommended that in subsection (b)(2) the term "fresh water" should be replaced with "waters in the state"; and ACCORD Agriculture, Inc. recommended that this same standard should not be limited to protection of fresh water. Salt water also should be protected from pollution that would result in adverse effects.

The commission agrees with both comments and will modify language of subsection (b)(2) to replace "fresh water" with "waters in the state." The change will maintain consistency with Chapter 26 of the TWC.

ACCORD Agriculture, Inc. commented that subsection (d) does not appear to provide any limit on facilities that legally could be covered by a "certified water quality management plan." This exemption

is not authorized by statute. Section 26.121 exempts from regulation only discharges of "other wastes."

The commission responds that this provision recognizes a Memorandum of Understanding (MOU) developed between the commission and the Texas State Soil and Water Conservation Board (TSSWCB) memorialized in 30 TAC 7.102. The MOU specifies which facilities the TSSWCB can work with to provide technical and financial assistance. In addition, the MOU and statutes are clear that the commission has the authority to enforce against any animal feeding facility which does not maintain compliance with a certified water quality management plan approved by the TSSWCB. This provision is authorized by §201.026 of the Texas Agriculture Code and §26.1311 of the Texas Water Code.

ACCORD Agriculture, Inc. commented that proposed language of subsection (f) seems to preclude a CAFO owner or operator from applying for an individual permit. That option should still be available.

The commission agrees that a CAFO should not be precluded from applying for an individual permit. The commission has added language to the subsection to enact that intent.

ACCORD Agriculture, Inc. recommended that the language in subsection (g) be revised to clarify as follows: change "or" after "general permit" to "nor," insert the word "which" before the phrase "is located in," and substitute the word "which" for the word "that" before the phrase "is designed to stable…"

The commission agrees with this comment and has made the suggested changes for the purpose of clarification.

ACCORD Agriculture, Inc. recommended that the language in subsection (h) should require a PPP for an AFO in a DOPA.

The commission disagrees with the comment. The commission has defined any AFO with more than 300 animal units in a DOPA as being a CAFO and therefore subject to the requirements of this subsection as adopted. This is a more stringent requirement than that imposed by the current EPA Region VI CAFO General Permit. The commission feels that these rules articulate in subsection (e) that all AFOs are required to "locate, construct and manage waste control facilities" in accordance with the standard and technical requirements in these rules. This subsection does not require AFO operators to actually develop a PPP, but it does hold them to the general standards for waste discharge and air emissions required under §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emissions Limitations) of facilities authorized in this subchapter.

ACCORD Agriculture, Inc. recommended that the language in subsection (i) be amended because it is inconsistent with §382.0518 of the Health and Safety Code.

The commission disagrees that §382.0518 is applicable for air standard permit authorization. However, the commission feels that prior authorization is needed and the final rules have

incorporated changes to subsection (i) to require written authorization prior to construction for those CAFOs seeking the air quality standard permit under this subchapter.

ACCORD Agriculture, Inc. recommended that the language in subsection (j) be changed to read simply that a CAFO having an existing, valid air emissions permit need not obtain other authorization.

The commission responds that the intent of the opening sentence in (j) is to clarify that the air quality standard permit contained under this subchapter is an optional authorization in lieu of obtaining traditional air authorization (such as an individual air quality permit under Chapter 116), and that the design, location, and operational requirements that make up the standard permit are not applicable if the facility currently holds a Chapter 116 authorization. The statement "…does not have to meet the air quality criteria of this subchapter" is not intended to suggest that certain CAFOs are exempt from the prohibition against creating a nuisance in §321.31(c), since that prohibition would also be required by §101.4 of the TNRCC General Rules. In addition, the commission does not agree that "valid air emissions permits" adequately describes the various types of air authorizations that are available to operators (for example: exemptions, standard exemptions, special exemptions, other standard permits, and "grandfathered" facilities as defined in Chapter 116).

Continental Grain Company recommended that subsection (j) should be amended to allow existing CAFOs to obtain air quality standard permit authorization under this subchapter, suggesting adding the words "or existing" in the second sentence, between words, "new" and "CAFO."

The commission agrees with this recommended change and has deleted the term "new" to remove the implied limitation. It is not the commission's intent to prohibit existing CAFOs either with or without Chapter 116 authorizations from voiding their existing air authorizations and substituting combined air and water authorizations under this subchapter.

Dekalb Swine Breeders, Inc., Pilgrim's Pride, Inc., Texas Poultry Federation, Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Dimmitt Feed Yard, LLC. and Texas Cattle Feeders Association recommended that under subsection (j) the commission issue a combined water and air quality authorization. Creating a separated air permit would be an unnecessary bureaucratic addition to the system.

The commission disagrees that separate air quality permits for certain facilities which cannot meet the air quality criteria of this subchapter are unnecessarily burdensome on the regulated community. The air quality standard permit in Chapter 321 is intended to authorize only those facilities that meet predetermined design, location, and operational requirements considered standard for the industry, as identified in these rules. Those operations that cannot satisfy these requirements can apply for case-by-case permit authorization under Chapter 116. Prohibiting this avenue for individual permit authorization would be an unreasonable limitation on the commission's ability to tailor the type of regulation to the circumstances of a particular situation.

Continental Grain Company and Texas Cattle Feeders Association recommended that the language of subsection (k) be clarified so a that "major modification" does not result in a CAFO losing coverage under the air provision of this subchapter and require a Chapter 116 permit. What is the difference in "major modification" and "major amendment" as used in this subsection?

The commission disagrees that a "major modification" should be allowed under Chapter 321. A "major modification", defined in Chapter 116.12(11) of this title, typically means any new construction or modification to an existing facility which results in emissions increases above the significant levels as defined in federal rules (i.e., Prevention of Significant Deterioration (PSD), Nonattainment (NA), Maximum Achievable Control Technology (MACT)…). The commission believes that all "major sources" are significant and should be reviewed under the case-by-case permit application process in Chapter 116. The terms "major modification" and "major amendment" are not synonymous within the context of this subsection. This subsection covers only air quality related changes and not those associated with the water quality aspects of the facility."Major amendment" is defined in §305.62 of this title as an amendment that changes a substantive term, provision, requirement, or limiting parameter of a permit. A major amendment to a permit does not necessarily require a Chapter 116 permit.

ACCORD Agriculture, Inc. commented that subsection (l) offers no justification for waiving the requirements of these rules for facilities that are transferred in from individual authorizations, suggesting that facilities may not be authorized by these rules unless they meet the requirements of the rules, both for air and water quality purposes.

The commission believes that for facilities with prior water and/or air quality authorization applying for transfer into this subchapter, it is reasonable to waive certain requirements. The commission further believes that requiring operators to retrofit existing facilities by making structural changes and/or acquiring additional buffer distances would be cost prohibitive and/or could force some existing owners/operators to go out of business. However, as stated in (l), any transfers that would not otherwise satisfy this amended subchapter would include all special conditions/provisions from the existing permit.

Brazos River Authority recommended that subsection (l) should recognize compliance history and siting conditions in respect to surface and groundwater as factors in allowing transfers.

The commission does not agree the proposed change is necessary because the rule currently gives the commission the flexibility to consider compliance issues. The rule allows the commission to impose additional conditions on facilities previously authorized under this subchapter that wish to transfer from an individual permit to a registration if there is substantial modification to the facility or to address compliance problems with the facility.

Texas Farm Bureau and Continental Grain Company recommended that subsection (l) should allow transfers without hearing and notice. In addition, this subsection should not require the implementation of §§321.39(f)(1)(B) and 321.39(f)(32) of this subchapter.

The commission disagrees that transfers should be allowed under these rules without hearing and notice. The commission's view is that such transfers must meet the basic procedural and technical requirements in order to gain coverage under these amended provisions. This transfer provision is at the election of the permittee. If the permittee wishes to remain under their existing authorization, they may do so until the permit is up for renewal. In addition, the commission responds that its intent in this subsection is to require all facilities who transfer their existing authorization to meet the basic technical requirements of these rules. This would include existing facilities that renew their existing permit and/or expand their operation (without the need to construct additional control facilities). However, it is not the intent of the commission to require physical changes to the facility if it was properly constructed according to the rules in place at the time of construction, unless ordered to do so through an enforcement action of the agency or required to do so because of a proposed expansion which would require additional or new construction. The commission believes that its regulation of CAFOs should be consistent for all facilities, similar in nature to the EPA Region VI CAFO NPDES general permitting program since the agency is in the process of obtaining authorization to administer NPDES. A CAFO covered under an EPA NPDES CAFO General Permit is required to develop and implement a PPP similar to what is required under these rules. The two provisions for which an exemption is requested are not included in the EPA General Permit because it does not cover air quality or protection of groundwater. The commission agrees that facilities with prior authorization under this subchapter which hold an existing Chapter 116 permit and request to transfer authorization under this amended subchapter should not be required to submit an odor control plan required in

§321.46 unless the project includes an expansion of the facility. As adopted, the requirements to submit an odor control plan (previously termed odor abatement plan) are listed in §321.46.

Brazos River Authority recommended that subsection (n) be modified to require CAFOs located within a DOPA to meet the same stricter standards as being located within one mile of Coastal Natural Resource Area.

The commission responds that facilities located within the DOPA are required to meet stringent requirements such as filing for registration between 300 animal units and 1000 animal units, and obtaining training and education credits for owners/operators every two years. New CAFOs within one mile of a Coastal Natural Resource Area are required to obtain an individual permit because under the CMP any such facility which discharges must have effluent limitations established through an individual permitting process.

Greenbelt Municipal and Industrial Water Authority proposed adding a new subsection (o) establishing a water quality buffer zone to protect surface water bodies used for municipal water supply. In addition, it suggested that any new or expanding CAFO must be located at a distance greater than 10 miles upstream from the conservation level of the surface water body. Also proposed a reduction in the total number of animals allowed at a CAFO qualifying for the streamlined process. Red River Authority and Greenbelt Municipal and Industrial Water Authority proposed adding a new subsection (o) which would require any CAFO located within the drainage area 10 miles upstream of reservoir used to store municipal water supply shall only apply for and obtain an individual permit and may not

commence physical construction and/or operation of any waste management facilities w/o first obtaining a final effective permit. Texas Cattle Feeders Association recommended that in reference to a comment at the public hearing asking for the TNRCC to set a 10 mile buffer zone around municipal surface water impoundments, no concept for such a setback requirement was published in the proposed rules and therefore should not be considered in the final rules. Significant study of this important issue is needed before establishing policy and permit requirements.

The commission believes that to add such a provision as requested to the rules would constitute such a substantial change to the proposed rules as to make it necessary to repropose them before adoption. The commission is interested in this issue and will direct the executive director to study the recommended actions and provide a recommendation to the commission after the adoption of these rules.

Greenbelt Municipal and Industrial Water Authority proposed that new subsections be added which would prohibit CAFOs if: 1) any CAFO levee would put one person at risk; 2) embankment materials used for the levee are dispersive soil or contain sufficient quantities of soluble gypsum; and 3) the pond or levee is situated in a 100-year floodplain.

The commission responds that under these rules CAFO facilities must be constructed with good engineering practices; facilities located within the 100-year floodplain must meet the National Flood Insurance Program requirements for participating communities and must be protected from inundation by the 100-year flood. Any structures, located in the floodplain must be certified by a

licensed Professional Engineer as designed appropriately and adequate to protect the facility from damage and failure.

Agri-Waste Technology, Inc., Pilgrim's Pride Corp., Texas Poultry Federation, Wrangler Feedyards, Bezner Beef, and Coyote Feedyard recommended that the commission allow existing Subchapter K permits to continue in effect until such permits are amended or expire; or in the alternative that current holders of Subchapter K permits be allowed to operate under the new revised Subchapter B permit, without submitting any additional documentation.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

An individual from the Panhandle area recommended that a distinction should be made between swine, cattle, and other animals regulated by these rules. Odors from a swine CAFO is of a different kind and intensity than other CAFOs.

The commission disagrees that swine operations should be regulated differently because they produce "different" odors. However, these rules do contain conditions that will routinely apply only to swine operations due to differences in design technology typically associated with swine operations (such as weekly scraping of pens and weekly flushing of pits). These rules utilize ASAE standards, which were intended for use nationwide, for designing anaerobic treatment lagoons to minimize odors. These standards do take into account species-specific factors for manure production and the number of confinement hours per day in calculating the total daily waste generated, and calculate the necessary treatment volume based on geographic factors. For example, a hog operation and a dairy farm with the same number of head, utilizing the same technology and located in the same area of the state, would likely result in differently sized treatment ponds for the two facilities. Where common technologies such as the anaerobic treatment lagoons described above are utilized, the commission believes that common design criteria should be used for a given amount of waste, regardless of species type.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the rules be modified such that the following feedlots/CAFOs facilities would be not eligible for application for registration: A facility that is subject of an unexpired enforcement order or other order issued by the commission in response to an alleged violation; a facility that is subject to an unresolved notice of

violation (NOV), a pending enforcement referral, a pending executive director's report and petition, or other formal enforcement action involving the actual or potential release of discharge of pollutants; a facility that has been constructed and operated without prior written authorization of the commission (including an operation that has maintained more animals than authorized); a facility deemed by the executive director to be in substantial noncompliance; a facility that has been the subject of two or more enforcement or remedial commission orders at any time or the subject of an enforcement referral to the Office of the Attorney General; a facility whose operations have resulted in the unauthorized release or discharge of pollutants onto the property of another in the last five years; or a facility whose operation have resulted in the pollution of groundwater or surface water during the past five years or whose continued operation are likely to result in the pollution of surface or ground waters. An attorney representing landowners in Johnson and Ochiltree Counties recommended that the rules be modified such that the following owners/operators of feedlots/CAFO facilities are ineligible for coverage for an application for registration: An owner/operator who has been the subject of two or more enforcement referrals from the TNRCC regional offices during the past 36 months; An owner/operator whose operations in the state during the past five years have been subject to two or more enforcement or referral commission orders or whose operations have been the subject of an enforcement referral to the Office of the Attorney General; An owner/operator whose operations have resulted in the unauthorized release or discharge of pollutants onto the property of another in the past thirty-six months; or a facility whose operation have resulted in the pollution of groundwater or surface water during the past thirty-six months.

The commission does not agree with these comments and has not changed the rule. As adopted, these rules give the executive director the discretion to require an individual permit application from owners/operators with a poor compliance history. These rules are intended to complement the proposed general permit, the availability of which is proposed to be more limited. This rule is designed to provide the executive director with more flexibility to determine the type of authorization a particular facility will be required to seek. The commission does not believe that the executive director should be limited by the suggestions provided by the commenter.

§321.34. Procedures for Making Application for an Individual Permit.

Brazos River Authority proposed that subsection (a) be amended to add specific criteria whereby the commission may extend the permit term.

The commission agrees that the section needs clarification and has removed "unless stated otherwise in the permit or extended by order of the commission" to provide for such clarification.

ACCORD Agriculture, Inc. recommended that subsection (a) in its reference to any "person" should be clarified as referring to any owner or operator of a CAFO.

The commission does not agree with this comment and has made no change to this comment. The commission believes the term "person" is reasonably interpreted to include owners and operators

of CAFO's. The commission's definition of the term "person" in Chapter 3 of this title (relating to Definitions) would provide further clarification of the use of this term.

Texas Farm Bureau proposed under subsection (a) that the commission's recognition of an applicant's permit under Subchapter K should be recognized and application under Subchapter B should be transferred with the least amount of technical review.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§ 321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

It was the commission intent to include the reference to all applicable fees for CAFOs in this subchapter for easy reference in subsection (a) of this section. CAFOs are subject to a Clean Rivers Program fee.

The commission has added language to subsection (a) to clarify that CAFO obtaining authorization under this section will be subject to a fee under §220.21 of this title (relating to Water Quality Assessment Fees).

Brazos River Authority recommended that language in subsection (b) be modified from "major enforcement actions" to "no major violations."

The commission does not agree with this comment and has made no change to the rule. The commission believes that the term "major enforcement actions" is more specific and applicable than the term "major violations" which is a very broad term susceptible to a variety of subjective interpretations. This term is consistent with the commission's recent adoption of rules in Chapter 205 of this title (related to General Permits for Waste Discharges).

ACCORD Agriculture, Inc. recommended that subsection (b)(2) must be amended to address compliance history for other violations of air requirements such as property line standards for dust regardless of whether the violation is considered to constitute a nuisance. In addition, some form of public participation process is needed for renewals of permits.

Although emissions from CAFOs have been historically compared to the nuisance rule to determine compliance with applicable standards, the commission agrees that any violation of an applicable property line standard or nuisance should be considered a violation subject to major enforcement action when renewing a permit under this subchapter. The adopted version of the

rule has been modified to reference nuisance and "any violation of a state property line standard or federal ambient air quality standard." The commission does not believe that additional public participation is required for renewals of individual permits in which there are no changes in terms and which are not under enforcement by the commission. The renewal procedures for CAFO's are similar to existing procedures and criteria for renewals of other water quality permits issued by the commission.

Texas Farm Bureau and Continental Grain Company recommended that language in subsection (b)(2) be amended by changing the words "any other changes" in the first sentence to read: "any other major change or modifications."

The commission responds by clarifying the language as follows: "any changes which constitute a major amendment as defined in Chapter 305 of this title or major source or major modification as defined in Chapter 116 of this title."

Texas Cattle Feeders Association proposed that subsection (f) be modified to require that the notice of expiration should be sent by certified mail-return receipt requested.

The commission agrees with this comment, and has changed the rule accordingly.

Texas Cattle Feeders Association recommended that language in subsection (g) be amended as follows: the phrase "which is not authorized by an individual permit according to this section" should be added between the words "operator" and "shall"

The commission agrees in part with the comment and has clarified the language of subsection (g) by changing "that a permit is required" to "that an individual permit is required."

Continental Grain Company proposed that a new subsection be added which states that a major amendment of an individual permit authorized by this permit shall also constitute a renewal of the individual permit. The amended permit should not have to be renewed for 5 years. Texas Cattle Feeders Association proposed adding new subsections (h-k) as follows:

(h) If an application for renewal requests a major amendment, as defined by 305.62 of this title (relating to Amendment), of the existing individual permit, an application shall be filed in accordance with subsection (a) of this title.

The commission agrees that major amendments can be authorized for an additional five years, in accordance with §305.62(h) of this title, because a thorough review takes place prior to issuance of the amendment and the applicant has paid the appropriate fee. This has been the policy of the commission under the previous Subchapters B & K.

(i) If renewal procedures have been initiated before the individual permit expiration date, the existing individual permit will remain in full force and effect and will not expire until action on the application for renewal is final.

The commission agrees with this comment, this change will be made for the purpose of clarification.

(j) The Executive Director may deny an application for renewal for the grounds set forth in 305.66 of this title (relating to Revocation and Suspension).

The commission responds that a application for renewal may be denied for a variety of reasons, including but not exclusively of the grounds set forth in §305.66 of this title.

(k) A major amendment or transfer of an individual or permit by registration authorized under this subchapter shall also constitute a renewal of the individual or permit by registration. This will ensure that permits are reauthorized for five years when major amendments or transfers are approved.

The commission agrees that major amendments can be authorized for an additional five years because full application procedures, including public notice and comment, are required and the applicant has paid the appropriate fee. The commission disagrees that a transfer should allow the expiration date to be changed, since full application procedures are not required.

The Mayor of the City of Perryton recommended that local groundwater districts should receive a complete copy of the application for review and comment. The groundwater district and TNRCC regional office should visually inspect the proposed site prior to, during and after completion of construction. Operations should not begin prior to the TNRCC's and the groundwater district's final inspection.

The commission does not agree with this comment and has made no change to the rule. The rules currently require operations located within the jurisdiction of a groundwater district to mail notice of application to that district. The commission does not have the authority to require a local groundwater district to visually inspect a proposed site prior to, during and after completion of construction.

Greenbelt Municipal and Industrial Water Authority recommended that additional technical requirements [mandatory liners, underground monitoring devices, annual sampling (sample taken on same day each year and results reported to TNRCC)of lagoons] should be required of any CAFO locating within a water quality buffer zone to prevent releases or minimize the impact of releases.

The commission does not agree with this comment and has made no change to the rule. The commission believes that the requirements in these rules for liners, monitoring and sampling are equal to or more stringent than existing federal requirements and are protective of surface and groundwater quality. The commission is interested in the concept of a water quality buffer zone

and will direct the executive director to study the need for such and provide a recommendation to the commission in the future.

§321.35. Procedures for Making Application for Registration.

ACCORD Agriculture, Inc. recommended that language in subsection (a) should be amended to refer to any owner or operator of a CAFO. Current language improperly fails to provide the option for CAFOs to be regulated by individual permit.

The commission does not agree with this comment and has made no change to the rule. The commission believes the term "person" is reasonably interpreted to include owners and operators of CAFO's. In addition, the commission believes the rules are clear that a CAFO may be required or choose to obtain an individual permit.

Texas Farm Bureau and Texas Cattle Feeders Association suggests that current language of subsection (a) does not recognize current permit by rule authorizations under Subchapter K.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require

that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§ 321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

Texas Cattle Feeders Association suggests that subsection (c) be modified by deleting the requirement of providing the TNRCC regional office with "one additional copy of the application with attachments to the appropriate…" To what extent does the regional office utilize the complete application? Would the time and resources of the regional office staff, permittee and engineering consultant be better served if a complete copy of the application was not sent to the regional office since it is available at a location for public review?

The commission responds that regions offices utilize the document in any communication with the Agriculture Section during the authorization process, during any inspection or complaint and having the document available for public review. No change was made in response to this comment.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that subsection (c) be amended to add the following: Each groundwater district, river authority, and city/county government shall be provided a complete copy of the application by the applicant (proof of service required) no later that the date of filing with the executive director. The applicant shall allow the

groundwater district, river authority and city/county government to inspect the propose site during normal business hours or as otherwise agreed. The groundwater district, river authority, city/county government should be allowed to submit written comments, including any objections and formal recommendations to the executive director (with a copy to the applicant). The executive director shall respond in writing to any objections and recommendations prior to the executive director's final decision. The groundwater district shall be notified in writing at least 48 hours prior to the plugging of any artificial penetration and may inspect and oversee such activity. The facility shall comply with all applicable rules and other requirements of the groundwater district concerning plugging and the protection of groundwater.

The commission does not agree with this comment. The commission does not believe it is efficient to require applicants to submit copies of the application to groundwater districts, river authorities, and city and county governments. Instead, the commission rules require that notice of application be mailed to city and county governments, river authorities (for those applications in the Dairy Outreach Program) and groundwater districts (for applications located in an area within the jurisdiction of such a district). Notice of application will allow river authorities, local governments, and water districts to make a determination whether they wish to obtain a copy of an application. This commission has no authority to grant any entity the authority to enter onto a facility covered by these rules.

An attorney representing landowners in Johnson and Ochiltree Counties further recommended that subsection (c) be amended to add the following: The appropriate regional office shall be provided a

complete copy of the application no later than the date of filing with the executive director. The regional office shall conduct an inspection of the proposed site to confirm general accuracy and completeness of the information provided in the application. A permit can not be approved until such inspection has occurred. The regional office shall be notified in writing at least 48 hours prior to the plugging of any artificial penetration and may inspect such activity. The facility shall comply with all applicable rules and other requirements of the TNRCC concerning plugging and the protection of groundwater.

The commission agrees that the regional office should be sent a copy of the application at the time of filing with the executive director and this is already a part of the requirements under this section. However, the commission does not believe that it is necessary for these rules to require the regional office to inspect a facility prior to an authorization being approved. Such inspections will be left to the discretion of the executive director based upon a case-by-case review and the availability of manpower in a regional office to perform such functions. These rules require that the applicant locate all artificial penetrations at the site and submit a plan to address how the applicant will address the protection of the associated groundwater resource. The commission believes this sufficient notification of what the applicant will do to protect the groundwater resources. Any facility under these rules is already required to comply with the TNRCC regulations for plugging and the protection of groundwater.

ACCORD Agriculture, Inc. suggested that language in subsection (c)(5) does not make clear, what is intended by "land operated or controlled by the applicant."Needs further definition. The rules should

make clear that storage areas for all wastes must be included in the site plan. Information on adjacent landowners falling within the appropriate buffer zone should be included in order to assess buffer zone compliance.

The commission disagrees with the comment and believes that "land operated or controlled by the applicant" clearly refers to land owned or leased by the applicant and used as part of the CAFO. The subsection requires all types of control or retention facilities to be included in the site plan including storage areas. For air quality applications, §321.35 (c)(12) requires submittal of an area land use map identifying residences, animal feeding operations, businesses or occupied structures within a mile of the permanent odor sources. The buffer zone requirement in §321.46 is modified to apply to air authorizations only.

Texas Cattle Feeders Association recommended that language in subsection (c)(5) needed further clarification. A "final" site plan cannot be submitted with confidence. The word "final" should be replaced with the word "proposed" because the construction of a facility has not yet begun and may be many months from "final." A facility certification is submitted by a professional engineer upon completion of construction, and as such can reflect any changes to the proposed site plan and can verify the proposed site plan as final.

The commission agrees in part and has changed the language to add the word "proposed" to assure there is no confusion on what is required from the applicant.

ACCORD Agriculture, Inc. recommended that additional language be added to subsection (c)(7) which would require that additional information should be provided for areas downstream of any part of the facility where waste materials are, or may be, present. One mile is not an appropriate cut-off for larger facilities. They have a greater potential to cause significant problems for many miles downstream.

The commission responds that the one mile distance is an appropriate cut-off for facilities designed for no discharge and the requirements for these facilities are the same as other no-discharge municipal and industrial wastewater facilities.

ACCORD Agriculture, Inc. recommended that the second sentence in subsection (c)(9) should be rephrased. It needs to say that the requirement does not apply to land not owned, operated or controlled by the applicant that is used solely for the off-site application of manure that has been sold or given to others for beneficial use, provided the owner/operator is not involved in the application of the manure.

The commission agrees with the comment and has adopted the following language "….beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure." The language provides clarification to prevent misunderstanding of this provision.

An attorney representing landowners in Johnson and Ochiltree Counties proposed that subsection (c)(10) be amended to include that all potential recharge features existing on and within a 500 foot radius of the proposed site be plotted on a grid map, visually inspected by a registered professional

engineer, assigned an identifying number and properly evaluated by providing a specific list of technical information related to ten specified items.

The commission responds that the rules require that any recharge features located on the CAFO property must be identified on the site plan. This commission has no authority to require an adjoining landowner to allow an applicant access to their property to perform a visual inspection. A visual inspection or research of all available records may still not locate all features at a proposed site, especially those hidden just below the surface of the earth. A plan to prevent impacts from any recharge feature located on the site must be prepared and submitted by the applicant for each identified feature, even if these features are identified after construction begins. The requirements provide for a thorough evaluation of the site. Plus, any discharges of waste or wastewater onto a neighbor's property would violate the authorization and be subject to enforcement.

Texas Cattle Feeders Association proposes that a new subparagraph (A) be added to subsection (c)(10) as follows: "The following records and/or maps shall be reviewed to locate artificial recharge features (abandoned wells): (1) Railroad Commission, (2) Groundwater Conservation District, if site is within a district, (3) Water Well Drillers Board, (4) Farm Service Agency and (5) Engineer site inspection." Dekalb Swine Breeders, Inc., Agri-Waste Technology, Inc. and Texas Poultry Federation recommended that the rules be modified to specifically define the sources of that discovery so it is clear when the search and discovery procedure is adequately completed.

The commission agrees in part with the comments and has modified the suggested revision and added it to the final rules as follows: "At a minimum, the records and/or maps of the following entities/agencies shall be reviewed to locate any artificial recharge features: (1) Railroad Commission; (2) Groundwater District, if applicable; (3) Texas Water Development Board; (4) TNRCC; (5) Natural Resource Conservation Service; (6) previous owner of site, if available, and (7) on-site inspection of site with a NRCS engineer, licensed professional engineer or qualified groundwater scientist. This modified provision will provide a basis by which a certification can be developed to determine whether a recharge feature exists on the site proposed under an application.

North Plains Ground Water Conservation District No. Two proposed deleting subsection (c)(10) and rewording subsection (c)(11) as follows: "The applicant shall document the presence or absence of recharge features on the tracts for which an application is being filed. The final site plan shall also indicate the specific location of recharge features that have been documented and/or located on any property owned, operated or controlled by the applicant and utilized under the application as certified by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist. Documentation, by the certifying party shall identify the sources and/or methods used to identify presence or absence of recharge features. The applicant shall also submit a plan, developed by a NRCS engineer or licensed professional engineer, to prevent impacts on any located recharge feature and associated groundwater formation which may include the following: (A) Installation of the necessary and appropriate protective measures for each located recharge feature such as impervious cover, berms or other equivalent protective measures; or (B)[no change]; or (c) Any other similar method or

approach demonstrated by the applicant to be protective of any associated recharge feature; and (D) Any method or approach to be used by the applicant to identify previously unidentified and/or undocumented recharge features that may be discovered during the time of construction."

The commission agrees in part with the recommendation. The commission has modified the existing language of subsection (c)(10) and (11) to reflect the substance of the changes recommended by the commenter. Such changes further clarify the intent of the commission to assure the recharge features are properly located at the time of application or during construction and that the appropriate plans are developed and implemented to assure that such features do not become conduits to the underlying groundwater resources. Appropriate changes have been made to the subsection.

ACCORD Agriculture, Inc. recommended that language in both subsections (c)(11)(B) and (c)(11)(C) be modified as follows: monitoring should be required in addition to the installation of appropriate control measures not as an alternative to use of such measures; and language is too broad, there needs to be some standard to measure protectiveness against.

Monitoring of groundwater may be an appropriate practice in a plan to protect recharge features. However, we disagree that in all cases, monitoring is necessary to protect recharge features. A licensed professional engineer will determine the elements of each plan on a case-by-case basis.

ACCORD Agriculture, Inc. recommended in subsection (c)(12) that the use of "should" rather than "shall" is inappropriate. A one-mile radius is not adequate for considering air impacts. Parks and other recreational areas need to be included.

The commission agrees with the proposed language change and has modified (c)(12) to reflect the use of the word "shall" instead of "should." The commission, however, disagrees that the "1 mile" reference needs to be increased when the air quality buffer requirements in §321.46 is less than one mile. The 1 mile radius referenced in this paragraph was not intended for use in considering air impacts; rather, as a tool to ensure compliance with any applicable buffer requirements in §321.46. Requiring a land use map with a 1 mile radius is believed to be sufficient for determining compliance with the requirements in §321.46. The commission also agrees that the language should be modified to include "public park" to be consistent with the requirements in §321.46. The commission does not agree that "other recreational areas" needs to added because this term is considered too broad and difficult to define. In addition, this subsection has been modified by adding the phrase "to show compliance with §321.46" to the end of first sentence to clarify the intent of this requirement.

ACCORD Agriculture, Inc. recommended in subsection (c)(13) that a copy of the application should always be available at a local library or other public site in the county where the CAFO is located. Interested persons must be allowed to examine and copy an application in relative privacy.

The commission agrees that interested persons should have the opportunity to review a copy of an application in relative privacy. The commission has changed the rule in response to this comment.

North Plains Ground Water Conservation District No. Two recommended in subsection (c)(13) to replace "regular" with "normal" in second sentence, and add the following new sentence between the second and third: " For the purposes of this section, normal business hours shall be at a minimum of: from 9:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday allowing for the observance of state and/or federal holidays."

The commission agrees with this comment and has changed the rule accordingly.

It was the commission intent to include the reference to all applicable fees for CAFOs in this subchapter for easy reference in subsection (d) of this section. CAFOs are subject to a Clean Rivers Program fee.

The commission has added language to subsection (d) to clarify that CAFO obtaining authorization under this section will be subject to a fee under §220.21 of this title (relating to Water Quality Assessment Fees).

ACCORD Agriculture, Inc. recommended in subsection (f) the basis that would be considered appropriate for extending effectiveness of a registration beyond five years should be provided.

The commission agrees with this comment and has changed the rule for the purpose of clarity by removing the language related to extension.

ACCORD Agriculture, Inc. recommended in subsection (g) The structure of this provision is unclear. A one-size fits all approach simply is not appropriate. Although ½ mile may be adequate for small facilities, very large facilities will require buffer zones of several miles. The term "public recreation area (e.g., golf course)" should be substituted for public park. It is not clear in measuring buffer zones if playgrounds and outdoor sports facilities at schools are appropriately considered. A buffer zone must be determined based on the odor potential of the individual facility.

As adopted, §321.46 outlines buffer requirements and odor control plans required for new CAFOs and expansion of existing CAFOs. The commission believes that a ½ mile separation distance or 1/4 mile separation with an odor control plan for new CAFOs is reasonable and intends it to be the minimum distance required. Likewise, the commission believes it is appropriate for expansion of existing CAFOs to either submit an odor control plan or provide a 1/4 mile separation distance. In addition to these requirements, the proposed rules contain several provisions which aid in minimizing odors such as pond sizing, application limitations, manure scraping schedules, and manure handling requirements. It would be difficult to establish a relationship between herd size and needed buffer zones for different animal species and different waste management designs. The compliance history established by the TNRCC (and TACB) on existing animal feeding operations does not support different buffer zone distances for different herd sizes. Regardless of

buffer distances, operators are still required to adhere to the general prohibition against "nuisance."

The commission disagrees that the term "public recreation area" should be substituted for the term "public park," because it is too broad. §321.46 has been modified to clarify that recreational areas associated with a school will be considered along with schools in the list of included items. In the commentor's example, a golf course would be considered either a public park or a business, depending on whether it is open to members of the general public. In addition, the requirements under this subsection, as proposed, has been moved to §321.46 to clarify that this requirement is only applicable to applications seeking both air and water authorization.

Farm Credit Bank of Texas suggested in subsection (g) that the ½ mile buffer requirement will adversely effect the ability of financial institutions to extend credit to CAFOs because compliance with this regulation will require a disproportionate amount of capital investment relative to expected return.

After review of the comments submitted regarding buffer zones, the commission has modified the language of §321.46 to state that new CAFOs shall provide either a half-mile air quality buffer; or shall provide a quarter-mile air quality buffer and submit an odor control plan. For expansion of existing CAFOs, §321.46 has been modified to require either a quarter-mile buffer or an odor control plan. The commission agrees that requiring a ½ mile buffer zone for all facilities could add a financial burden on the owner/operator of the facility; however, the rules do not specify

that the buffer zone be owned by the owner/operator of the facility. The applicant also retains the option of 116 authorization which has no established minimum buffer distance.

Greenbelt Municipal and Industrial Water Authority suggested in subsection (g) for reasons of law and policy, the TNRCC should not allow individuals to "consent" to violations of the public rights created by the TCAA.

The commission disagrees that allowing land owners to consent to CAFOs, regarding siting criteria, is a violation of any rights created by the TCAA. The commission believes that under some circumstances, with input from adjacent land owners, the buffer requirements should be optional.

Fifty individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that all or some of the following changes be made to the buffer zone requirements: increase the buffer anywhere from two to five miles; two miles is the requirement set by recent Oklahoma and Kansas legislation, and this is much more reasonable; set the distance for hog operations, which emit more hydrogen sulfide and odors than other CAFOs at two miles unless landowner affected gives written consent. An individual in the Panhandle area suggested in subsection (g) the setback requirements should be much greater, more in accordance with other states. Feel that a setback of even 5 miles from any residence or state park or church from a facility of 50,000, 100,000 or even 300,000 is completely inadequate. The odor from these facilities are intensive, travel far and affect a wide area.

The commission is aware of recent legislation passed in the states of Oklahoma and Kansas that would require up to a 2 mile buffer zone for certain CAFOs. However, the commission does not believe it would be appropriate or necessary to require a 2 mile buffer zone for Texas CAFOs, based solely on species type. A buffer zone of this magnitude would severely limit where CAFOs could locate in the state. The commission believes that design and operational requirements outlined in these rules combined with smaller buffer zones and/or odor control plans, when applicable, will adequately protect the health and welfare of the public.

An individual in the Panhandle area requested that in subsection (g) the buffer zone between a feedlot and a home on adjoining land be ½ mile. An individual in the Panhandle area suggested in subsection (g) that one mile is too close to be healthy. The commenter lives one mile from a Texas Farm facility and the odor is too strong. Sixteen individuals from the Panhandle reported experiencing odors at their residences, which are located between ½ and five miles away from nearby CAFOs. Nine individuals from the Panhandle area state concerns regarding health effects associated with CAFO emissions.

The commission believes that the buffer distances established in this rule, when applicable, are reasonable for properly designed and operated CAFO facilities seeking air authorization under this subchapter. Regardless of the manner in which air authorization is obtained, the §101.4 Nuisance rule is applicable and anyone adversely affected by emissions from a facility should report the conditions to the TNRCC regional office in their area. The commission believes that facilities constructed and operated in accordance with the rules as adopted will not adversely

affect human health or welfare at offsite receptors. Although odors will be experienced at times by individuals living in close proximity to certain CAFOs, these odors are not expected to be of such concentration and such duration as to adversely affect human health or welfare.

Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Farwell Feed Yards, Perry Feeders, Inc., Dekalb Swine Breeders, Inc. and Texas Cattle Feeders Association suggested in subsection (g) the ½ mile buffer distance is acceptable, but should not be made retroactive to units built prior to the requirement. Texas Farm Bureau suggests in subsection (g) the ½ mile separation distance is acceptable. An individual in the Panhandle area suggested in subsection (g) that the rule should be adopted. It is unjust for existing landowners and homeowners to be subjected to a feedlot within ½ mile of their homestead. TAEX (Amarillo) suggested in subsection (g) the change to ½ mile separation distance is an improvement. It could be increased to a greater distance in site specific circumstances at the discretion of the TNRCC. However, it is not practicable or desirable to apply this subsection to expansions of existing operations.

The commission agrees that it is reasonable to distinguish between new, existing, and expanding facilities when establishing buffer zone requirements. The adopted rules require that new CAFOs either satisfy the ½ mile buffer requirement, or satisfy a 1/4 mile buffer requirement and submit

an odor control plan. For existing CAFOs with previous air authorization obtained under Subchapter K or through an individual air quality permit under Chapter 116, authorization may be transferred into this subchapter without acquiring additional buffer and without making structural changes to the site. However, owners and operators utilizing this option will be required to operate under the special provisions/conditions of their previous authorization being transferred. For facilities that can satisfy the buffer requirements in this subchapter, the special provisions/conditions of their previous authorization do not have to be met, and instead, such facilities may operate under the provisions of this subchapter similar to a new facility. For expansion of existing CAFOs, the adopted §321.46 requires either a 1/4 mile buffer or submittal of an odor control plan. Expansion of new CAFOs would have the same requirements as a new CAFO in §321.46.

Rice Construction suggested in subsection (g) that the 1/4 mile set back is sufficient for CAFOs. The Phillips refinery in Borger does not have such requirements. Approximately 25% of the population (12,000) of Borger is closer than ½ mile to the refinery. Believe ½ mile is unnecessary, and would have the effect of excluding reasonable sites from registration. Mahard Egg Farms, Inc., Pilgrim's Pride, Inc. and Texas Poultry Federation urged TNRCC to adopt 1/4 mile requirement as previously established.

The commission does not believe that it is appropriate to compare the nuisance potential of a CAFO and a refinery and to establish a buffer zone for CAFOs based on that comparison. The types of air contaminants expected from these two industries are different, and the manner in

which climatic conditions affect CAFO emissions do not support common regulatory requirements However, the commission agrees that the 1/4 mile buffer for some facilities is appropriate. As adopted, §321.46 outlines various options for buffer zone requirements and/or the submittal of an odor control plan. See comments above.

Texas Association of Dairymen and Dairy Farmers of America suggested in subsection (g) with respect to the expansion of existing facilities, TNRCC should eliminate the ½ mile buffer zone requirement and reduce the requirement to 1/4 mile with respect to construction of new facilities. Twenty-seven poultry producers are opposed to ½ mile air quality buffer. Odors can be alleviated when producers incorporate BMPs.

As stated earlier, the commission agrees that it is reasonable to consider expansion of existing CAFOs differently than new CAFOs or expansion of new CAFOs in determining buffer zone requirements. The adopted version of the rule reduces requirements for expansions of existing facilities (see responses to related comments above). In addition, the commission agrees that for new, CAFOs when an odor control plan is submitted, which encompass BMP's, the buffer zone requirement will be reduced to 1/4 mile.

Brazos River Authority recommended that in subsection (h) in reference to renewal occurring without public notice, if the facility has had no "major enforcement actions" this should be changed to "no major violations."

Reviewing the referenced language, the commission determined that it should emphasize and more precisely describe the types of compliance problems that will prevent automatic renewals. The rule has been changed from the proposal to do so. In the commission's view the term "formal enforcement action," coupled with a description of the exact subject matter and procedural status of such an action, is more specific than either "major enforcement actions" or "major violations."

ACCORD Agriculture, Inc. recommended in subsection (h)(1) other violations of air requirements such as property line standards for dust must be addressed with respect to compliance history regardless of whether the violation is considered to constitute a nuisance. Some form of public participation process is needed for renewals of permits.

Although emissions from CAFOs have been historically compared to the nuisance rule to determine compliance with applicable standards, the commission agrees that any violation of an applicable property line standard or nuisance should be considered a major violation when renewing a permit under this subchapter. The adopted version of the rule has been modified to clarify that any violation of a state property line standard under this title, or federal ambient air quality standard shall be considered a major enforcement action in addition to violations of the nuisance rule.

On the issue of public participation, the commission feels that once an applicant has gone through either the initial individual permit or application for registration procedure, which includes public

participation through notice, comment and either a contested case or motion for reconsideration process, they should be given an incentive to remain in compliance with their authorization. These amendments provide a more streamlined renewal process for facilities that do not have any major enforcement actions over the past 36 months and do not plan any changes to the facility. The commission notes that this is an issue that may require reexamination after assumption of the federal NPDES program.

Texas Farm Bureau, Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (h)(1) the end of the first sentence should be clarified as follows " granted by the executive director without public notice, comment or a public hearing."

The commission responds that the rule is clear and does not need to be changed. Registration renewals which propose no changes to the existing authorization and where there has been no related formal major enforcement action against the facility during the last 36 months may be granted by the executive director without public notice. However, if the executive director receives information, via a comment or otherwise, indicating that the facility does not quality for renewal under this provision (e.g., changes have occurred at the facility which are inconsistent with the existing authorization), the executive director may consider this information and act accordingly.

ACCORD Agriculture, Inc. recommended that in subsection (h)(3) renewals should never be automatic. The executive director should have the discretion to require an individual permit, if determined to be appropriate.

The commission responds that the rule is clear that renewal will not be automatic in all cases. The executive director has the authority under these rules to require a facility to submit an application for an individual permit. However, if a facility is compliant with the provisions of these rules and is not making substantial changes, an expedited process is sufficient for renewal since the applicant went through a more thorough review at the time of the original application.

ACCORD Agriculture, Inc. recommended that in subsection (h)(5) the language should make it clear that the failure of the executive director to provide notice does not excuse the registrant's obligation to submit a timely application. Applications should never be allowed to be submitted less than at least one month before the expiration date. Texas Cattle Feeders Association recommended in subsection (h)(5) that the notice of expiration should be sent by certified mail, return receipt requested.

The commission believes that registrants are responsible for timely submitting an application for renewal. The commission agrees that the notice of expiration should be sent by certified mail, return receipt requested, and has changed the rule accordingly.

Greenbelt Municipal and Industrial Water Authority proposes a reduction (to 300 animal units) in the total number of animals allowed at a CAFO qualifying for the registration process.

The commission disagrees that an individual permit is required for all facilities which have more than 300 animal units. There are certain situations which do require an individual permit. The commission has seen no link through it enforcement processes in the number of animals confined to the number of violations for a particular size facility. The registration process gives the public opportunity to comment on the application. The commission believes that these rules are consistent with similar provisions of the EPA Region VI General Permit for CAFOs.

Greenbelt Municipal and Industrial Water Authority suggested that TNRCC should revise its proposal to prevent installation of multiple CAFOs in a given area under the authority of the registration process.

The commission does not agree with this comment and has made no change to the rule. The commission does not believe that it is necessary, for the purposes of environmental protection, to restrict the number of CAFOs in a given area provided that the CAFOs are being operated in a manner consistent with these rules. Further, the commission does not have any statutory authority to limit land use development except through its authority to limit discharges in accordance with state law.

An individual in the Panhandle area recommended that all soil penetrations should be identified and plugged before any construction begins.

The commission responds that the applicant is required under these rules to identify all artificial wells, excavations, and penetrations located on the site in the recharge feature evaluation. If

features are identified, a plan to protect the feature must be prepared and submitted by an engineer. In addition, if any recharge features are found during the construction process, the applicant is responsible for having the feature located and a plan prepared and submitted by an engineer on how it will be addressed and not become a conduit for any pollutants to groundwater or surface water.

The Mayor of the City of Perryton proposed that the applicant should be required to formally locate and identify on the initial application all active, abandoned and inoperative wells, oil and gas wells and any other artificial penetrations as determined by the TNRCC within ½ mile of the boundaries of the proposed facility in addition to the site itself.

The commission disagrees with the comment and believes that the requirements for identification of wells, penetrations, etc. under the adopted rules are comprehensive and protective and also maintain consistency with other current commission rules. The regulations require that the applicant identify all private water wells (abandoned or in use) and public wells located within 500 feet of the land application areas, open lots and control facilities whether or not the wells are located on the property. The applicant is required to identify all wells and excavations located on the property in the recharge feature evaluation.

Agri-Waste Technology, Inc. recommended that all penetrations that may be identified during construction should be appropriately plugged by licensed professionals. Any changes to the site plan

due to identification of penetrations discovered during construction should be reported to the TNRCC by the applicant.

The commission responds that the applicant is required under these rules to identify all artificial wells, excavations, and penetrations located on the site in the recharge feature evaluation. If features are identified, a plan to protect the feature must be prepared and submitted in accordance with §321.35(c)(11). In addition, if any recharge features are found during the construction process, the applicant is responsible for having the feature located and a plan prepared and submitted in accordance with the above referenced subsection on how it will be addressed and not become a conduit for any pollutants to the groundwater or surface water.

The Mayor of the City of Perryton recommended that the rules be modified to require the applicant to locate playa lakes and recharge features in the initial application.

The commission agrees with the comment and would note that the applicant is required under §321.35 of these rules to identify and locate all playa lakes on the USGS topographic map(s) and all recharge features located on the site in the recharge feature evaluation.

The Mayor of the City of Perryton recommended that the rules be modified to require the applicant to locate any municipal and public water supply sources within one mile of the proposed facility. Facilities near water supply sources should have to meet a higher design standard.

The commission is interested in this issue and will direct the executive director to study the recommended action and provide a recommendation to the commission.

The Mayor of the City of Perryton suggested that TNRCC should ask Texas A&M University or another research center to conduct a study on the possible adverse effects on the Ogallala from the existence of numerous artificial penetrations. The focus of such study should be on the increased potential for migration of contaminants from large-scale swine production facilities.

The commission responds that the initiation of a study is beyond the scope of these rules.

The Mayor of the City of Perryton proposed that the rules be modified to require applicants to fully uncover and disclose all material facts in their applications. The burden of proof must rest with the applicant not the adjacent landowners. Applicants are not penalized for submitting incomplete or inaccurate applications. Applicants are allowed to fix discrepancies. Applications should be correct and properly certified when submitted.

The commission responds that an application will not be declared administratively and technically complete until all required information is submitted by the applicant. If an application is not complete, a letter of deficiency will be sent to the applicant requesting additional information. Any registration which was approved based on incorrect information is subject to review, and possible revocation, by the commission. The commission agrees that applications must be accurate. The applicant is required to certify to the accuracy of the application in accordance

with 30 TAC 305.44 of this title. Penalties may be assessed for knowingly submitting false information.

Agri-Waste Technology, Inc. recommended that the rules be modified to specify amounts of time that can be taken by the executive director to review and comment on application materials.

The commission notes that applications under this subchapter will be processed in accordance with the provisions herein and Chapters 281 and 305 of this title. Chapter 281 specifically references timeframes for processing applications.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the following be added to this section: For facilities utilizing synthetic liners with leak detection and/or groundwater monitoring capability: a waste management unit at a feedlot shall not be located within 500 feet of any existing public water supply source nor within 150 feet of a private water source without the written consent of the property owner; or a waste management unit at a CAFO shall not be located within 1000 feet of any existing public water supply source nor within 500 feet of a private water source without the written consent of the property owner. For facilities utilizing in situ or compacted clay liners without leak detection and/or groundwater monitoring capability: a waste management unit at a feedlot shall not be located within 1000 feet of any existing public water supply source nor within 500 feet of a private water source without the written consent of the property owner; a waste management unit at a CAFO shall not be located within 2000 feet of any existing public water supply source nor within 1000 feet of a private water source without the written consent of the property owner;

or the application shall be accompanied with a professional determination and engineering certification the liners are sufficient to protect the quality of any existing public water supply located within ½ miles radius and any private water supply within 1/4 mile radius of the facility.

The commission agrees that buffer zones between potential pollutant sources and water wells are necessary. The buffer zones are protective and consistent with other state requirements. The regulations require a 150-foot buffer zone for private water wells and a 500-foot buffer zone for public water supply wells. All retention structures constructed with a liner must have engineer certification submitted prior to utilization of the facilities to ensure that the facilities are properly constructed.

§321.36. Notice of Application for Registration.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that subsection (a) amended to add the following: the executive director may deny coverage under the application for registration and require the applicant to pursue an individual permit, if the applicant fails to submit an administratively and technically complete application. Definition for administratively complete application: " is one that contains all of the items required by the commission's rules to be included with the application. Inadvertent omission that are remedied through the submission of previously developed information(e.g. a missing attachment) within one week following a request by the executive director shall not render an application administratively incomplete." A technically complete application is one that is administratively complete and which reasonably demonstrates that the proposed facility

will be sited, designed, constructed and operated in accordance with the commission's rules. The failure to address a material issue in the siting, design, construction or operation of the proposed facility will render the application technically incomplete, if the applicant either knew or reasonably should have known about the issue (e.g. material omission or misrepresentation of a material fact). The submission of an administratively or technically incomplete application and the failure to timely correct such deficiency shall result in a denial of coverage. The executive director determination of administrative or technical completeness establishes a rebuttable presumption that the application is administratively or technically complete and may be challenged during the applicable comment period.

The commission responds that these rules allow the executive director to require any animal feeding operation to obtain an individual permit under §321.33 (b). These rules give the executive director some discretion in determining which facilities should be required to obtain an individual permit. The commission believes this is preferable to adopting rules which require facilities to obtain an individual permit regardless of the circumstances.

ACCORD Agriculture, Inc. proposed that subsection (b) be amended to require that the notice must always include the proposed size of the facility as well as a description of the receiving waters for any discharge.

The commission agrees that notice should include the proposed size of the facility and has changed the rule to include the requested additional information in the notice. This information will be

useful for those individuals who receive notice of application and will assist those individuals who intend to submit comments to the commission.

Continental Grain Company and Texas Cattle Feeders Association recommended that the language in subsection (b)(7) be clarified as follows: The words "not" and "less than" should be deleted to avoid confusion about the length of the comment period.

The commission agrees with this comment and has changed the rule accordingly. This change provides clarity and a better description of the commission's intent on this provision.

ACCORD Agriculture, Inc. recommended that subsection (e) be modified to include the following: mailed notice should be provided to any owners or operators of any public drinking water source located within five miles of the proposed facility. The county judge and health officials of the county immediately downstream should also be notified. River authorities should always receive notice. The rules should provide that a registration will not be granted if notice requirements have not been met.

The purpose of the notice requirements is to notify those individuals who are most likely to be affected by a facility. The commission does not believe that owners or operators of public drinking water facilities are likely to be affected. However, the rule provides that notice may be sent to persons who may be affected in the judgement of the executive director. Similarly, persons who request to be on the mailing list will be sent notice. The rules require that notice be sent to the county judge and the health officials of the county in which the facility is located or in which

waste will be disposed of. The commission does not believe it is also necessary to notify the county judge and health officials of any counties downstream, as they are less likely to be affected by a facility.

§321.37. Actions on Applications for Registration.

ACCORD Agriculture, Inc. recommended that the rules be modified to require the executive director to provide a written response to all significant comments received.

The commission agrees with this comment, and has made the change.

Dekalb Swine Breeders, Inc. recommended that the rules be modified to require that the application process should limit a motion for reconsideration to those who originally supplied public comment and the applicant and the commission should set a time limit on this motion and on action to be taken by the executive director.

The commission agrees generally that motions for reconsideration should only be available to those individuals who have originally supplied public comment to the executive director. However, an exception should be made in the case where an individual who should have been sent notice was not noticed. Under §50.39 of the commission's rules, the commission must take action on a motion for reconsideration within ninety days. As to establishing a time limit on the executive director's response to comments, the commission feels that it is not appropriate at this time to establish a hard time limit since it is difficult to project how many comments will be submitted

and how much time the executive director will need to evaluate such comments, perform any research or collect information and whether an investigation would be necessary to render a complete and accurate decision.

Agri-Waste Technology, Inc., Texas Poultry Federation, Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Farwell Feed Yard and Perry Feeders, Inc. proposed that the rules be modified to clearly identify who should be considered as an affected party and what time lines for which comments can be received by the agency. In addition, the issues that the TNRCC should consider from affected parties should be clearly defined.

Other current rules (Chapter 55 of this title relating to Request for Contested Case Hearings; Public Comment) define how the commission will determine whether someone is an affected person for hearing purposes. Affected person status is not a prerequisite for eligibility to comment on an issue to the commission.

Pilgrim's Pride, Inc. requested that the commission assure that the final administrative process requirements are fair to all parties.

The commission believes that these rules will provide a fair and equitable process for all parties and will be protective of the environment.

Continental Grain Company suggested that the following sentence in subsection (a) "Only written comment received within the 30 day period are considered timely" is ambiguous because there is no explanation of how timely comments will be handled differently than untimely comments. The word "are" should be changed to "will be" and the word "timely" should be deleted.

The commission agrees with this comment and will make this change to provide clarification of its intent under this provision.

Continental Grain Company and Texas Cattle Feeders Association recommended that subsection (c) modified as follows: the word "timely" should be deleted and the words "received within the 30 day comment period "added after the word "comments."

The commission agrees that subsection needed clarification. This subsection has been modified and expanded to further define and clarify the requirements and process for a motions for reconsideration.

Brazos River Authority suggested that in the proposed language motions for reconsideration provide little procedural protection for protestants because the executive director makes both the initial decision and decides the appeal.

The commission responds that the Motions for Reconsideration, which are filed pursuant to these rules, are not considered by the executive director. The commission has delegated this responsibility to the general counsel of the commission. Once a Motion for Reconsideration has been filed on an executive director's action, the general counsel's office determines whether to set an item on the commission's agenda or let the Motion For Reconsideration expire as a matter of law. Motions For Reconsideration are an effective means for protestants to state their objections to an executive director's action.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that this section be modified to add that the executive director may deny a request for coverage or revoke under the application for registration on the basis of a determination of good cause, which is to include the criteria suggested for addition in the Applicability section. Anyone denied coverage shall apply for and obtain a final individual permit prior to beginning operation of the facility. Anyone whose coverage has been revoked for reasons other than the actual or likely release or discharge of pollutants or the actual or likely pollution of surface or ground water sources may continue to operate until such time as a final decision is rendered by the commission and such application is filed within sixty days following notification of revocation of coverage.

The commission responds that the proposed change is not necessary because the executive director may approve or deny an application for a registration in whole or in part, deny with prejudice and suspend a registration under §321.35 (e). An applicant who is denied coverage always has the option to apply for an individual permit under these rules.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the language in this section be modified to add that any affected person may file a complaint and petition with the executive director citing good cause to deny or revoke coverage under the application for registration. The executive director shall respond in writing to the petition within thirty days with a preliminary determination. Final action shall be completed by the executive director within sixty days with written notice provided to the petitioner and the facility operator. The executive director decision to deny or revoke coverage under an application for registration is not subject to a contested case proceeding but is reviewable upon the filing of a motion for reconsideration, however, this shall not extend any proposed applicable deadlines for the filing of an individual permit application.

The commission responds that the §321.37 (a) allows a person to provide the commission with written comments on any applications for registrations for which notice was issued. This rule states that the executive director shall review any written comments when they are received within 30 days of mailing the notice. The commission agrees that the executive director should respond in writing and has changed the rule in response to this comment. The commission agrees that the executive director's decision is reviewable upon the filing of a motion for reconsideration, and this is reflected in §321.37 (c).

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the language in this section be modified to add that a facility owner/operator that has been denied coverage or had his coverage revoked for a general permit may make an application for registration unless the basis for denial or revocation was due to: the issuance of multiple enforcement/remedial orders; the unauthorized

release or discharge of pollutants onto the property of another person within the recommended time frame state above; or it resulted from the actual or the potential pollution of surface or ground water.

The commission does not agree with this comment. The commission does not believe it should limit the ability of an applicant to be eligible for a registration because an applicant was not eligible for a general permit. The level of review is higher for a registration than for a general permit, and the commission has the discretion to require an applicant with a poor compliance history to apply for an individual permit.

§321.38. Proper CAFO Operation and Maintenance.

The Mayor of the City of Perryton recommended that in this section engineering certification requirements for permit applications be expanded to include post construction statements that the facility has been constructed in strict accordance with the approved application and permit, the engineer has personally inspected all waste management facilities and that the facility is in full compliance and ready for operation.

The commission responds that the recommendation would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed. The commission notes that it may in response to an inspection of the facility or complaint investigation determine compliance with the provisions of the rules.

ACCORD Agriculture, Inc. recommended that the commission needs to make a determination about the adequacy of NRCS management plans. The rules must provide a process and the standards against which those plans will be measured. Further, ACCORD Agriculture, Inc. recommended that in §321.39 (b) the commission may not simply delegate its responsibilities to another agency. The discussion of what plans NRCS " considers" to be adequate is meaningless. The permit must establish explicit, enforceable requirements. It is not acceptable for TNRCC to say it will base its regulatory decisions on what another agency "considers" adequate.

The commission disagrees with this comment. The commission believes that this provision is sufficiently clear that NRCS animal waste management plans may be submitted for the BMPs and PPP requirements as long as the NRCS plan has applicable and equivalent measures. These rules further specify that the executive director can request a copy of a PPP, evaluate such PPP and require the owner to change such plan if the executive director determines that such plan does meet the requirements of these rules. The commission by adoption of these rules has determined that NRCS management plans are adequate in accordance with provisions of §321.39(b) and is consistent with the current Region VI CAFO General Permit.

TAEX (College Station) recommended that BMPs should retain the same definition as they suggested it be redefined in the definitions section of the rules.

The term "BMPs" as utilized in this section is defined in §321.32 "Definitions." The definition of "BMPs" in §321.32 has been modified in response to the commenter's suggestion and applies throughout the subchapter.

§321.39. Pollution Prevention Plans.

TAEX (College Station) suggested that the terms [Pesticide Use] be deleted in title.

The commission agrees that these terms should be deleted. The Texas Register uses brackets in its publications to indicate all text that will be deleted.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that the language in subsection (a) be modified to address the following: The statement "should include measures necessary to prevent…." does not require anything. This statement must be changed in order to protect the waters of the state and to prevent nuisance and odor conditions to read: "PPPs shall be prepared in accordance with good engineering practices and must include measures necessary to prevent the discharge of pollutants to waters in the state and nuisance conditions and minimize odor conditions. This plan must be approved by the TNRCC and by an independent engineer before the permit can be allowed. Greenbelt Municipal and Industrial Water Authority recommended that subsection (a) be modified to require the PPP to be prepared and sealed by a licensed professional engineer.

The commission agrees in part on the first issue that measures are required, therefore the word "should" has been replaced with "shall." However, the commission does not believe that the plan must be approved by a professional engineer. Certain components of the plan which directly involve engineering are required to be sealed by an engineer, but the plan includes many components which are not engineering-related.

ACCORD Agriculture, Inc. recommended that subsection (a) be modified as follows: the use of the verb "should" in the last sentence of this subsection is inappropriate, it needs to be changed to "shall" to avoid enforceability issues.

The commission agrees and has changed the rules accordingly to provide enforceability.

ACCORD Agriculture, Inc. suggested in subsection (d) it is not clear how PPP reviews relate to actions on registration applications. Registration applications without adequate PPPs will be denied. The executive director should have authority to require changes more quickly than 90 days if the risks are significant enough to support it.

The commission responds that a PPP which is considered adequate at the time of application may become inadequate at a later date because of a number of reasons such as substantial changes to the facility. This provision allows the executive director authority at any time, such as during an inspection, to notify the permittee of deficiencies in the plan. The provision does not restrict the

executive director authority to request that changes be submitted during a time frame other than 90 days.

ACCORD Agriculture, Inc. proposes that the current language of subsection (e) suggests that the general objectives of the PPP include creating nuisance conditions rather than avoiding them.

The requirement to submit an odor control plan has been relocated to §321.46, therefore the reference to nuisance conditions has been deleted from the adopted subsection (e). However, the intent of the proposed language was to ensure that the PPP include provisions to prevent nuisances not "create" nuisances.

Five individuals from the Panhandle commented that the commission's complaint and investigation procedures are not adequate in protecting citizens against nuisance conditions. Their comments suggest that complaints are not responded to quickly enough to enable the investigator to document nuisance conditions, and therefore, odor problems are not resolved. Three commenters do not believe it is appropriate that only odors at a house can be reported, and assert that this removes the right of adjacent landowners who do not have a house at their property to report nuisance conditions.

The commission responds that in certain cases it may not be possible for a TNRCC investigator to travel to the area being complained of in time to document the complaint. This is an unfortunate reality that results from the extremely large area of our state, rapid changes in climatic conditions that affect the dispersion of air contaminants, and the agency's limited resources. However,

TNRCC regional offices are diligent with regard to complaint responses, and investigators make every effort to respond to complaints in a timely manner.

The general prohibition against nuisance does not require that the complaint be generated from a house or other permanent structure. As the term "nuisance" is defined in the TNRCC Rules, consideration must be given to the ways in which the normal use and enjoyment of property is being affected. The issue of whether a permanent dwelling is present is typically considered in determining whether an individual's property rights have been interfered with, as opposed to brief exposures to odor conditions that may occur in public places such as roads, undeveloped property such as farm land, and facilities with similar emissions. It should also be noted that the intent of these rules is not to establish new procedures for complaint investigations, but to provide an alternative means of authorization for certain CAFOs. Facilities that construct and operate pursuant to these rules continue to be subject to the general prohibition against nuisance and the public is urged to continue to report any nuisance odor conditions to the appropriate regional office.

ACCORD Agriculture, Inc. suggests that the second sentence of subsection (f)(1) is too vague to be useful. The rule should establish at least a nonexclusive list of activities that are known to be potential sources. The term "should" is not adequately enforceable.

The commission responds that the subsection already includes a nonexclusive list of activities that are known to be potential sources. However, the commission does agree that the word "should" should be replaced with the word "shall" and has made the change accordingly.

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(1) the word "significant" should be inserted in the first sentence before the word "potential." In addition, a sentence should be added between the first and second sentences which states: "A list of significant materials that are used, stored or disposed of at the CAFO should be included in the PPP. Everything following the sentence "An evaluation of potential pollutant…" should be deleted because it creates more confusion than clarity.

The commission responds that changes are necessary since potential pollutant sources are defined in the next sentence. The commission further believes that the recommended additional language is confusing and that the current language clarifies the process and requirements for evaluating pollution sources.

Texas Farm Bureau recommended that subsection (f)(1) adds excessive details that are unnecessary, prefer old Subchapter K language.

The commission responds that the excessive details as indicated by the commenter are necessary and that these details clarify the process and requirements for evaluating pollution sources.

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(1)(A) the site plan/map should be limited to the CAFO property. Insert the word "CAFO" before "property."

The commission agrees in part that the site plan/map should be limited to the property related to the operation; however, size should not be a factor. The commission believes that the language in this section already provides for that requirement.

Texas Cattle Feeders Association recommended that in subsection (f)(1)(A) the words "beneficial utilization on land owned, operated or controlled by the CAFO" should be substituted for "disposal activities of the concentrated animal feeding area." Animal manure and wastewater are fertilizers and soil amendments which are beneficially used for crop production, not "disposed" of as waste with no value.

The commission agrees that "disposal" is not an appropriate term and has replaced "disposal" with "utilization" which better describes the intent of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(1)(C) the reference to the effective date of these rules is unclear. Does it refer to the initial rules or these amendments. A facility should be required to maintain a list of all spills occurring since the facility was subject to regulation.

The commission responds that it would be unreasonable to require a facility which began operation in "1990" to maintain records from that date when the rules were not effective until 1998.

ACCORD Agriculture, Inc. recommended that in subsection (f)(2) the reference to identified sources of nuisance is unclear. How is the decision made regarding what management controls are "appropriate for the facility"? This sentence is so vague and ambiguous that is virtually meaningless. The rules should at least require that controls be included to address all sources of pollutants and air emission at the CAFO.

As previously stated, the requirement to address air quality issues through an odor control plan has been relocated to §321.46. Due to this relocation, any references to nuisance in (f)(2) have been deleted. However, the commission believes that the language regarding appropriateness of controls is not meaningless. Permittees must develop management controls which are appropriate for each site. TNRCC staff can evaluate each plan to determine if controls are appropriate and adequate. The intent of the second sentence in (f)(2) was to ensure that the PPP include control strategies for both water pollutants and air contaminants specific to the facility. As adopted, only those CAFOs which apply for air quality authorization and are subject to submitting an odor control plan are required to submit information on "sources of air contaminants."

ACCORD Agriculture, Inc. recommended that in subsection (f)(3) the term "structural control" needs to be defined. Who must perform this inspection? Unless the inspection is performed by a knowledgeable person, it would serve no useful function.

The commission responds that the term structural control does not need defining. This term is a commonly used term throughout this industry and others. The commission does agree that clarification on who can inspect structural controls for integrity and maintenance is needed. The commission will require that the individuals responsible for inspection should be those identified in the PPP as responsible for development, implementation, maintenance, and revisions of the plan.

ACCORD Agriculture, Inc. recommended that in subsection (f)(4) there should be a standard identified in the permit to measure the analysis against. Can anyone perform a "hydrologic needs analysis" or is an engineer required?

The commission responds that an engineering degree is not needed to perform a hydrologic needs analysis. The commission believes that the minimum components required in a hydrologic needs analysis are included in this section.

ACCORD Agriculture, Inc. recommended that in subsection (f)(5&6) the use of "should" rather than "shall" is not acceptable.

The commission agrees that the word "should" should be replaced with the word "shall" the corresponding changes have been made.

Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(6) be revised with regard to the minimum freeboard requirements, to account for settlement and slope stability and require initial freeboard to exceed two feet and include a 10-foot minimum width at top of levee with a slope no less than 3:1.

The commission agrees with the comment in part and has added the following language: "not less than" was added prior to "two feet" and "and in no case less than one foot" was deleted. A second sentence was added "Freeboard shall account for settlement and slope stability of the materials used at the time of design and construction." These additional requirements will only apply to new facilities constructed after the effective date of the rules. The commission responds that the recommendation to include limits on the levee width and slope would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed.

ACCORD Agriculture, Inc. recommended that in subsection (f)(7) the inclusion of the option to use "other site-specific data" does not establish an enforceable standard.

The commission responds that site-specific data provide for greater accuracy in designing treatment lagoons. Any site-specific data used in the development of the PPP is subject to review

by the executive director at any time. If the review reveals that such data does not meet the minimum requirements of this subchapter, the owner/operator must amend the plan.

Five individuals from the Panhandle recommended additional requirements for ponds and methods for waste treatment, including covering lagoons to recapture gasses for use at the operation, using aerobic lagoons, and using lagoon additives.

The commission responds that the rules do not preclude CAFOs from utilizing innovative technologies that go beyond the requirements of the rule. As adopted, the rules already contain design and operational criteria for anaerobic and evaporative pond systems, which are the most common methods for treatment of waste at Texas CAFOs. The use of aerobic ponds, covered ponds with vapor recovery systems, and the utilization of additives in pond systems have not been established as BACT and absent additional scientific data it would be considered unreasonable to require these measures for all CAFOs, or certain CAFOs based solely on species type.

ACCORD Agriculture, Inc. recommended that in subsection (f)(8) there is not an adequate standard for the hydrologic needs analysis.

The commission believes that the minimum components required in a hydrologic needs analysis are included in this section.

ACCORD Agriculture, Inc. recommended that in subsection (f)(9) the use of the word "should" is inappropriate. The general types of site specific information to be used must be specified.

The commission disagrees with the comment and responds that the existing language allows the applicant to utilize best available information when site-specific information is not available.

Greenbelt Municipal and Industrial Water Authority recommended that subsection (f)(10) should be revised to require that embankments be designed in accordance with NRCS, Corps of Engineers, Bureau of Reclamation and ASCE requirements. Greenbelt Municipal and Industrial Water Authority further recommended that subsection (f)(10)(C) clarify that required certification include: use of proper testing methods; determination that compaction of the embankment was done in accordance with design standards; and that the certifying engineer was on site and witnessed the testing.

The commission responds that embankment design and construction should be in accordance with appropriate engineering standards as specified in the rules. The commission will add language to include engineer certification of embankment design in accordance with NRCS, Corps of Engineers, Bureau of Reclamation or American Society of Civil Engineers (ASCE) requirements and post-construction certification of compaction testing with accompanying test results and documentation. Such language will be added in (f)(10)(C) by removing "Site specific variation in" and by replacing "certification by a licensed professional engineer, or" with "and."

ACCORD Agriculture, Inc. recommended that in subsection (f)(11) the requirement that dewatering equipment must be available whenever needed is inadequate as an enforceable standard. The rules should require the dewatering equipment to be there to avoid a violation. The rules should establish a deadline for restoring capacity after rainfall events.

The commission responds that the provision is enforceable and disagrees that equipment must be on-site to provide adequate environmental protection. The commission responds that the recommendation to establish a deadline would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed. The commission notes that it may in response to an inspection of the facility or a complaint investigation determine compliance with the provisions of the rules.

ACCORD Agriculture, Inc. recommended that in subsection(f)(12) the use of the term "impracticable" is too vague to establish an enforceable requirement.

The commission agrees that the term "impractical" may be vague and will amend the language as follows: "…periods where the net effect of evaporation and rainfall would require the addition of fresh water to maintain the treatment volume."

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(12) it is unnecessary for a CAFO that is operated by means of a total evaporation system to maintain and record the level(s) in retention facilities. Instead they suggested adding a sentence to this

subsection which states: "A permanent marker (measuring device) is not required for a CAFO that has been properly designed, constructed and maintained as total evaporation only."

The commission responds that monitoring the level of wastewater is a necessary management tool that should be used by the owner/operator of any retention facility.

ACCORD Agriculture, Inc. recommended that in subsection (f)(14) the permit should provide that the frequency of monitoring and log recordation must be no less than every 24 hours.

The commission responds that 24-hour monitoring of rainfall is necessary to meet the intent of the provision. However, the commission feels that it is overly burdensome to require that the facility operator record a non-event in their on-site records. This provision does clearly make it a requirement that any rainfall event occurring at the facility must be recorded.

ACCORD Agriculture, Inc. recommended that in subsection (f)(16) the term "significant amounts of pollutants" should be defined. Without a definition, the certification requirement is not very meaningful.

The commission believes that the existing language is not consistent with provisions in §321.31 and will amend the language as follows: replacing "leakage of significant amounts of pollutants into" with "a significant hydrologic connection between the contained wastewater and."

ACCORD Agriculture, Inc. recommended that in subsection(f)(17) the rules need to require certification of construction in compliance with these requirements. The use of the term "should" is inappropriate.

The commission agrees with the comment in part and will replace "should" with "shall." The commission disagrees with the recommendation to require a construction certification. The commission feels this is an unnecessary expense since these rules require that the facilities be designed and constructed in accordance with good engineering practices and the facilities are subject to the inspection of the executive director at any time. If any discrepancies are found, the owner/operator is subject to enforcement, penalties and the appropriate repairs to the facility to achieve compliance.

During the pendency of this rulemaking, it came to the commission's attention that the NRCS technical reference in (f)(17) to SCS Technical Note 716 has been replaced with an updated technical document known as Appendix 10d of the NRCS Agricultural Waste Management Handbook. The rules as published made reference to the old standard yet indicating that if a more current standard existed it would apply.

The commission changed the reference from "SCS Technical Note 716" to "Appendix 10d of the NRCS Agricultural Waste Management Handbook."

Thirty-nine individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that in subsection (f)(18) all new operations be required to use plastic liners in addition to tamped clay liners in their lagoons.

The commission disagrees that synthetic liners should be required for all facilities. The rules require the applicant to certify lack of hydrologic connection for each retention structure. Lack of hydrologic connection can be achieved by utilizing in-situ materials, or the placement of a liner. Liners may be constructed of earthen materials or may be composed of synthetic material. The licensed professional engineer will determine the appropriate construction methods on a case-by-case basis.

Rice Construction recommended that in subsection (f)(18) the construction requirements and specifications for the waste lagoons of the CAFOs are equally as stringent as those we construct for hazardous chemicals. They suggested the agency not promulgate regulations which will impose a higher burden on this agricultural industry than is reasonable.

The commission believes that the construction and liner requirements are reasonable and adequate for the type of waste and wastewater that is being generated at CAFOs.

Agri-Waste Technology, Inc. suggested that in subsection (f)(18) liner criteria for many states are less than what TNRCC has had in place. The criteria proposed by TNRCC meets or exceeds that found in EPA Region VI General Permit for CAFOs.

The commission agrees that the criteria in these rules meet and/or exceed that found in EPA Region VI General Permit for CAFOs and most other states.

An individual in the Panhandle area recommended that in subsection (f)(18) facilities should be inspected during and after construction by an independent engineer. Under no circumstances should the engineer who constructed the site be named in the PPP.

The commission feels this is an unnecessary expense since these rules require that the facilities be designed and constructed in accordance with good engineering practices and the facilities are subject to the inspection of the executive director at any time. If any discrepancies are found, the owner/operator is subject to enforcement, penalties and the appropriate repairs to the facility to achieve compliance.

Thirty-nine individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that subsection (f)(18) be amended to include under lagoon monitoring systems, which represent a very minor cost and insure that lagoon leaks can be identified quickly before underground water is affected.

The commission responds that leak detection systems are not appropriate for all retention structures. If a significant potential exists for the contamination of waters in the state or drinking water, leak detection systems or other monitoring systems may be required.

An individual for the Panhandle area recommended that subsection (f)(18) be amended to require installation of leak detectors under the lagoons and inspection of lagoons before and after they are built and to require some means of clean-up after the owners/operators have finished using the lagoons.

The commission responds that leak detection systems are not appropriate for all retention structures. If a significant potential exists for the contamination of waters in the state or drinking water, leak detection systems or other monitoring systems may be required. In response to lagoon clean-up, the commission requires the removal and proper disposal of all solids, sludges, manure and other pollutants as a Best Management Practice under §321.40 and also requires the submission of a plan under §321.42 when ceasing all operations after loss of control or ownership.

ACCORD Agriculture, Inc. recommended that in subsection (f)(18) the term "shall" needs to be substituted for "will" to make clear that a mandatory requirement is being imposed. The use of the first year's monitoring data for establishing a baseline does not make sense if monitoring has not been required for a facility since it was first constructed. If monitoring wells are not established until the groundwater already has been polluted, baseline values must be determined in another location unaffected by pollution.

The commission agrees and has replaced the word "will" with "shall." The commission agrees in part that in certain circumstances, the first year's sampling may not be an appropriate baseline to use for comparisons and has revised the language to include "unless otherwise provided by the executive director" at the end of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(A) it is not clear what "discharge or drainage of irrigated wastewater" is referring to. Does this language mean that irrigated wastewater may be allowed to drain off of an irrigated field even if drainage is adjacent to waters in the state as long as it does not run directly into waters in the state. Irrigated wastewater simply should not be allowed to discharge or drain from an irrigated field.

The commission agrees that clarification of the provision is necessary to remain consistent with §321.31 of this title and Section 26.121 of the Texas Water Code. The phrase "of pollutants into or adjacent" has been added after "will result in a discharge."

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(B) phosphorus levels should be measured periodically regardless of known water quality issues. The frequency of such monitoring should be increased when phosphorus is a known water quality risk.

The commission responds that as required in §321.39(f)(28)(F), phosphorus is analyzed on an annual basis regardless of any known water quality problems and that under these rules the commission has the authority to establish through a public hearing process any greater frequency or sampling analysis.

TAEX (College Station) recommended that in subsection (f)(19)(B) delete "needed" should be deleted and after crop uptake the following should be added: ", based upon crop and realistic yield goal."

The commission agrees with the comment and has made the recommended revisions. This revision will clarify the intent of the rules.

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(D) irrigation practices should be required to avoid, rather than just reduce or minimize, contamination of waters in the state or nuisance conditions. Such contamination and nuisance conditions must be prohibited.

The intent of this paragraph was to insure that nuisance conditions be prevented while irrigating. The commission agrees with this comment and has clarified the language by adding the word "prevents" before the phrase "…the occurrence of nuisance conditions" and changing the term "contamination" to "pollution" which is a defined term.

Dairy Farmers of America recommended that in subsection (f)(20) the notice of solids removal from the treatment lagoon is unnecessary.

The commission disagrees with the comment. Solids removal from lagoons is not a common, routine activity. There is the potential for increased odors, improper disposal of solids and liquids, as well as pond liner damage if not done properly. Notice provides the opportunity for technical assistance to the facility owner/operator as well as for monitoring a potentially problematic activity.

ACCORD Agriculture, Inc. and Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(21) the term "significant pollutants" needs to be defined or clarified. It is not clear whether it is intended to be a category or pollutants of a quantative limitation.

The commission agrees that the term "significant" is unclear and the language has been revised to be consistent with §321.31. The language will be revised as follows: remove "significant."

TAEX (College Station) recommended that in subsection (f)(22) the commission should change "any" to "all" ; delete "needed" and add after crop uptake ", based upon crop and realistic yield goal."

The commission agrees with the comment and has made the revisions to clarify the intent of the provision.

TAEX (College Station) recommended that in subsection (f)(23) the commission should change "any" to "all."

The commission disagrees with the comment. The commission believes the use of the term "any" in this subsection has the same meaning as "all." No change will be made.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(A) the term "adequate" as it refers to manure storage capacity needs to be defined and that there needs to be a standard for determining

what constitutes adequate berms or other structures. Land application should not be allowed in the 100-year floodplain.

The commission agrees the term "adequate" is unclear in the context of the referenced subsection and it will be removed. On the other recommendations the commission responds that adequate berms or other structures refers to protection from the 25-year, 24-hour rainfall event. There are many cases where land application of manure is beneficial within the 100-year floodplain.

TAEX (College Station) recommended that in subsection (f)(24)(A) the commission should change "agricultural" to "agronomic"

The commission agrees that the term "agronomic" better describes the intent of this paragraph and has made the revision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(B) the commission should require that at least at large facilities, manure stockpile areas must be lined as must areas collecting runoff from such areas.

The commission responds that if manure stockpiling is managed according to these rule requirements, downward migration of contaminants will be minimized similar to open lots.

TAEX (College Station) recommended that in subsection (f)(24)(D) the commission should add "agronomic" before "rates."

The commission agrees with the comment and has made the revision to clarify the intent of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(F) the permit should establish some minimum width for grassed strips and for determining when land is subject to excessive erosion.

The commission responds that the recommendation to establish a minimum width for grassed strips would constitute a substantive change to the rules. The additional requirement is beyond the scope of the rules as proposed. The commission notes that the width of an edge-of-field, grassed strip shall be determined appropriately on a site-specific basis, but if the plan proves to be ineffective in controlling pollutants in discharges or preventing a nuisance condition, the commission will require amendments to the plan to achieve those objectives. The applicant is already required to identify areas which have a high potential for erosion and to submit a plan identifying measures used to limit erosion on those lands.

Two individuals from the Panhandle recommended that (f)(24)(J) be modified to require daily flushing of pits.

The commission disagrees that it is necessary or reasonable to require that all buildings with flush systems be flushed on a daily basis. The rule stipulates that buildings with flush systems be required to flush at least once per week, or as often as necessary to maintain the design efficiency. This would not preclude operators from designing a system that requires daily flushing. Daily flushing has not been established as BACT.

Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(25) changes should be made to require that levee maintenance must be in accordance with TNRCC "Guidelines for Operation and Maintenance of Dams in Texas"

The commission disagrees with the comment. The commission does not want to limit maintenance to just the referenced document. The consulting engineer may have specific maintenance requirements that has been identified for the owner that should be adhered to based on the engineer's design criteria. The commission would certainly recommend the referenced document or other such documents provide the owner and/or consulting engineer with recommendations on how a maintenance schedule and program for their structure should be implemented.

Brazos River Authority recommended that in subsection (f)(28) it is assumed that the language "land owned or operated by permittee" would include land not owned by the permittee but that is operated by others on behalf of the permittee. If this is not the case, then this wording should be clarified.

The commission disagrees with the interpretation of the commenter. The commission interprets the language to indicate that land owned or operated by the permittee refers to land actually owned, leased or controlled in some fashion by the applicant and used as part of the CAFO.

ACCORD Agriculture, Inc. recommended that in subsection (f)(28)(C) the word "similar" be added prior to "management practices" to make clear that a separate analysis is needed for similar soils if different management practices will be used on that particular tract.

The commission generally agrees with the comment and has revised the language to add "similar" to clarify the intent of the provision.

TAEX (Amarillo) and Texas Cattle Feeders Association recommended that in subsection (f)(28)(F) the rules should not require only one selection of phosphorus extraction method. If the commission chooses to limit the extractant, they prefer Mehlich III. Dairy Farmers of America requested that in subsection (f)(28)(F) the phosphorus test be the Mehlich III or P1 Weak Bray rather than the TAMU extractant. Mahard Egg Farm, Inc., Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Hereford Feed Yards Co., Farwell Feed Yards and Texas Farm Bureau recommended that in (f)(28)(F)(ii) the commission state there is no technical basis for limiting analytical methods for phosphorus to the TAMU extractant. Suggest

consistent use of extractant versus generalized limitation. Pilgrim's Pride, Inc. and Texas Poultry Federation suggests that the existing rule allowing use of TAMU, Bray and Mehlich should be continued until more definitive data is available to indicate which test method clearly provides the most accurate data. Agri-Waste Technology, Inc. suggested that for phosphorus testing a widely accepted testing extractant such as Bray P1 or Mehlich III should be adopted.

The commission agrees in part with the comments and has modified the language to include the Mehlich III method.

TAEX College Station recommended that in subsection (f)(28)(F)(ii) the commission add "see Section 321.39(28)(G)" after "ppm" for a table being proposed at that location and add under TAMU extractant "Bray I (soils < pH 6.8); Mehlich III; Olson"

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

TAEX (College Station) recommended that in subsection (f)(28)(F) the commission should add (ix): Copper (extractable, ppm, for poultry and swine); (x): Zinc (extractable, ppm, for poultry and swine); (xi): Boron (extractable, ppm, for poultry).

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

TAEX (College Station) recommended that in subsection (f)(28)(G) the commission should delete "200 ppm of" and replace with "concentrations"; add after "extractable phosphorus" "shown in Table (G)(I) below and after "Zone 1" "(0-6 inch increment or weighted average of the 0-2 and 2-6 inch increments."

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

Agri-Waste Technology, Inc. recommended that in subsection (f)(28)(G) any phosphorus regulation should be restricted to locations where phosphorus contamination to surface water and groundwater represents some reasonable potential. Texas Cattle Feeders Association recommended that in subsection (f)(28)(G) this paragraph should not apply to areas of the state which are not susceptible to phosphorous loading due to a lack of surface water. Where land application sites are isolated from surface waters and no potential exists for phosphorous runoff to reach any waters in the state, the soil levels of extractable phosphorous may exceed 200 ppm upon approval by the Executive Director.

The commission responds that when levels of phosphorus exceed certain thresholds in the soil, potential exists for runoff containing phosphorus to reach waters in the state. In addition, higher levels of phosphorus negatively affect most crop production rates, thereby defeating the use of the waste or wastewater as a beneficial reuse product.

Mahard Egg Farm, Inc. recommended that in subsection (f)(28)(G) additional sampling for topically applied manure is unnecessary and should not be adopted. Twenty-seven poultry producers suggested that in relation to subsection (f)(28)(G) the Texas A&M Extension Service has developed guidelines on soil sampling which recommends samples be taken at 0-6 inch depth. The scientific community and NRCS are in the process of developing guidance for phosphorus based animal waste management plans. If application limits are to be based on phosphorus, then NRCS and scientific research community should be the leaders on the issue, not a regulatory agency.

The commission responds that phosphorus movement in the soil is extremely inhibited. Without incorporation, phosphorus has a greater tendency to remain in the upper two inches, thereby increasing the potential for erosion and phosphorus loading in surface waters. Recent research has shown that there is a greater potential for topically applied manure compared to manure which is incorporated into the soil, and that a 0-2 inch soil test will better reflect whether this potential exists.

TAEX (College Station) recommended that a new table be established in subsection (f)(28)(G) setting different concentrations of phosphorus as a function of the pH of the soil and for each different

extractant method. TAEX (College Station) recommended that in subsection (f)(29) the commission add "Also copper and zinc for swine and copper, zinc and boron for poultry.

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

ACCORD Agriculture, Inc. recommended that in subsection (f)(31) samples should be required from all wells subject to the control or management of the owner or operator, and located within the general area of the operation, rather than just those providing water for the facility.

The commission responds that the provisions of this subsection are consistent with the requirements found in Section 26.048 of the Texas Water Code.

Texas Farm Bureau and Texas Cattle Feeders Association recommended that subsection (f)(31) should be modified by deleting the words: " At a minimum," at the beginning of the last sentence. Requirements in these rules should be consistent with §26.048 of the Water Code.

The commission responds that the language in question is consistent with the intent of the requirements found in §26.048 of TWC. This language only reflects that this is the minimum that is required.

ACCORD Agriculture, Inc. recommended that in subsection (f)(32) it is essential that a plan for odor abatement be developed for each facility and the requirement also must include criteria against which to measure the adequacy of such a plan. TAEX (Amarillo) recommended that in subsection (f)(32) the requirement for an odor abatement plan is not sufficiently clear and, in fact, may be off-target. You should specify "odor reduction methods" and state that these should cover such things as facility design, manure collection, manure and wastewater storage and treatment, land application, dead animal recovery/disposal and other feature that contribute to odor reductions. Pilgrim's Pride Inc. suggests that in subsection (f)(32) odors cannot be abated. Name should be changed to "Odor Control Plan."

The commission agrees that the term "odor abatement plan" does not accurately describe the intended purpose of this requirement, and has been replaced with the term "odor control plan", to be consistent with similar requirements in other states. Because the requirement to submit an odor control plan has been relocated to §321.46, (f)(32) has been deleted and the requirements contained in that subsection relocated to §321.46. As adopted, §321.46 has been modified to reflect certain items that must be addressed in the plan, when required. At a minimum, the plan would identify all maintenance and operational practices associated with storage, treatment, and land application of manure and wastewater, manure collection, dead animal handling, pen maintenance, and dust control. The commission disagrees that each facility should be required to develop an odor control plan. The commission believes odors can be adequately controlled with additional buffer requirements as outlined in §321.46.

Texas Cattle Feeders Association recommended that in subsection (f)(32) the PPP requirements in the proposed rules already contain many provisions and requirements that address management practices related to reduction of odor and nuisance conditions. The provision for an odor abatement plan should be removed.

The commission agrees that many of the provisions in this amended chapter address the control of odors, however, the requirement to provide an odor control plan is believed to be reasonable and necessary for certain facilities. Section 321.46 has outlined options for CAFOs depending on available buffer and whether they were existing prior to adoption of these amended rules. In addition, any CAFO required to submit an odor control plan under this Chapter maintains the option of obtaining air quality authorization under Chapter 116 in lieu of satisfying the air quality standard permit in this subchapter. The odor control plan is intended to allow CAFOs the flexibility to design and operate a facility that incorporates the appropriate technology to maximize the control of emissions from their facility.

Rice Construction recommended that in subsection (f)(32) the commission not institute regulations which are unreasonable and cost prohibitive in the area of odor control unless the TNRCC is prepared to implement these regulations on a state-wide basis to all industries. CAFOs should not be singled out. OSHA regulations establish levels of hydrogen sulfide which are harmful based on temporary and continuous exposure. No hydrogen sulfide regulations are needed for the state.

The commission develops and enforces regulations that deal with off-property emissions as opposed to OSHA which regulates emissions on-site. These rules do not contain any new hydrogen sulfide regulations. The commission does not agree that the adopted regulations are unreasonable or cost prohibitive. Our experience suggests that odors are one of the primary concerns relating to CAFOs. These regulations do not impose additional prohibitions for CAFOs, rather it offers an alternate method for obtaining authorization. As adopted, §321.46 only requires an odor control plan for those CAFOs applying for air authorization. In addition, certain expansion projects and certain CAFOs with additional buffer distances may not be required to submit an odor control plan.

Agri-Waste Technology, Inc. recommended that in subsection (f)(32) a separate odor abatement plan is not needed. Issues surrounding odor minimization are best handled through prudent site selection, conservative lagoon/waste treatment facility design and BMP implementation. The commission should require that lagoons/waste treatment facilities be managed as designed. Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Morris Stock Farm, Hereford Feed Yards Co., Dimmitt Feed Yard, LLC. and Perry Feeders, Inc. suggested that to create a separate odor abatement plan would merely mimic the requirements and BMPs in the PPP and would create an unnecessary and unjustified burden on permittees.

The commission believes that an "odor control plan" is appropriate even though the rules already contain several BMPs and design criteria aimed at reducing odors. In certain circumstances, additional measures to address the control of odors may be necessary to ensure that nuisances will not be created. It is intended that the odor control plan be more detailed and describe the day to day operation of the facility and not merely commit to compliance with the pre-determined operational requirements in the rules. As adopted, §321.46 only requires an odor control plan for those CAFOs applying for air authorization. In addition, certain expansion projects and certain CAFOs with additional buffer distances may not be required to submit an odor control plan.

Texas Poultry Federation proposes that in relation to subsection (f)(32) the Texas Poultry Federation has BMPs currently in effect that reduce odors.

The commission commends the Poultry Federation for developing BMPs to be utilized by its constituency and recognizes that such BMPs may be appropriate for inclusion in an odor control plan. However, the commission believes that it is necessary that certain CAFOs, as required by §321.46, develop and implement a site specific odor control plan for their facility. These rules were not intended to prohibit associations or organizations from developing a recommended list of BMPs as long as those standards do not conflict with the requirements in this subchapter.

Dairy Farmers of America suggests that in subsection (f)(32) an odor abatement plan utilizing BMPs would be a sensible way to address odor concerns rather than increasing the buffer requirements.

The commission agrees that an odor control plan utilizing BMPs can help minimize odors at CAFOs, and has modified the rule to include the plan in conjunction with reduced buffer zones and certain expansion projects.

USFWS recommended that all wastewater retention systems be constructed with an appropriate exclusion methodology to prevent access to migratory avian species and any other wildlife.

The commission disagrees with the comment and responds that the suggested modification is beyond the scope of these rules and the requirements for these facilities are the same as other no-discharge municipal and industrial wastewater facilities.

§321.40. Best Management Practices.

ACCORD Agriculture, Inc. recommended that the qualification of the requirement for use of BMPs, as appropriate, based upon "existing physical and economic condition, opportunities, and constraints" makes the requirement illusory. The BMPs set out in this section are basic design and construction or operational requirements, not BMPs. These types of basic requirements may not be waived.

The commission disagrees with the comment and responds that the listed practices are recognized as Best Management Practices (BMPs). To establish new practices and standards as BMPs would constitute a substantive change to the rules and is beyond the scope of the rules as proposed.

ACCORD Agriculture, Inc. recommended that in (2) the commission should make clear that an amendment application must be submitted and approved before expansion occurs.

The commission responds that BMPs are for all facilities, regardless of whether they are operating under permit, registration, or by-rule. The commission agrees that facilities operating under permits and registrations are required to obtain approval prior to expansion.

ACCORD Agriculture, Inc. suggested that under (3) the rules need to include an additional requirement that such ditches, dikes, berms, terraces, or other structures be maintained to meet design standards.

The commission agrees with the comment and would note that this requirement is already in the pollution prevention plan requirements (see §321.39(f)(25)).

ACCORD Agriculture, Inc. recommended that in (4) no CAFO that has been built in a "stream, river, lake, wetland, or playa lake" should be authorized by any mechanism other than an individual permit, if it is authorized at all. Special conditions would be essential to provide adequate protection in such situations.

The commission disagrees with the comments. The provisions in these rules related to the location of facilities in relation to a stream, river, lake, wetland or playa lake are consistent with the requirements in the current EPA Region VI CAFO General Permit. The rules provide a

distinction between existing versus new construction in a manner similar to the federal requirements.

Greenbelt Municipal and Industrial Water Authority recommended that in (4) the terms "stream, river, lake, wetland and playa lake" should be defined.

The commission disagrees that these terms should be defined in these rules. These terms are commonly used terms which are either defined in this title or by statute.

ACCORD Agriculture, Inc. recommended that in (5) the commission require facilities to be designed and located so that waters in the state do not come into contact with waste materials at a CAFO facility.

The commission agrees with the comment and believes that the regulations already provide for such design requirements and that any discharges to waters in the state can only occur in accordance with provisions described in these rules or in accordance with a general permit issued by the commission.

ACCORD Agriculture, Inc. recommended that in (6) if retention ponds are going to be allowed within the 100-year floodplain, the permit must provide specific performance standards for ensuring that failure of those structures will be prevented. A general requirement that they be protected from damage is inadequate.

The commission responds that any structures designed in the floodplain must be certified by a licensed professional engineer that the design is appropriate and adequate to protect the facility from damage and failure.

Greenbelt Municipal and Industrial Water Authority requests that in (6) the location of a levee or retention pond within a 100-year floodplain be prohibited. The term "100-year floodplain" should be defined.

The commission responds that the recommendation would constitute a substantive change to the rules. The additional limitation is beyond the scope of the rules as proposed. The commission notes that any structures designed in the floodplain must be certified by a licensed professional engineer that the design is appropriate and adequate to protect the facility from damage and failure. The commission responds that the term "100-year floodplain" is a commonly used term which is defined under Chapter 301 of this title and is so referenced in a change to this section.

ACCORD Agriculture, Inc. recommended that in (7) the indicated proximity to water wells is inadequate to provide adequate protection and should be 1000 feet from public water supply wells and 300 feet from private water wells. If facility seeks to locate more closely, an individual review of the potential for pollution is needed. Brazos River Authority suggests that in (7) the standard that waste management facilities be located a minimum of 150 feet from all water wells, if practicable, is weak. Other improvements to the rules would make siting of recharge facilities mandatory.

The commission responds that the buffer distances in these rules are consistent with such distances in Chapter 238 of this title (relating to Water Well Drillers Rules) and Chapter 290 of this title (relating to Water Utilities).

ACCORD Agriculture, Inc. suggests that (8) is so general as to be virtually meaningless. It fails to provide useful guidance, what state guidelines are being referred to?

The commission disagrees that this section is meaningless. It does provide general guidance to the facility owner/operator in development or utilization of any management practices. Such practices cannot create a nuisance or health hazard, result in contamination of drinking water or be in non-compliance with agency regulations. The commission does agree that the use of the term "guidelines" is not needed and has been removed.

ACCORD Agriculture, Inc. recommended that in (9) the commission define the term "significant pollutants" needs to be defined.

The commission agrees in part with the comment and will clarify the meaning by removing the "significant."

ACCORD Agriculture, Inc. recommended that in (10) the prohibition of the creation of a nuisance should include, but not be limited to, air issues. The definition of the term limits it to air issues.

The commission disagrees with the comment and responds that this nuisance prohibition was only intended to address air quality issues, since there is already a prohibition against unauthorized discharges into the waters of the state.

ACCORD Agriculture, Inc. recommended that in (11) the reference to "proper disposal" of dead animals is too general to be meaningful. The permit must set out the specific procedures to be followed for disposing of dead animals.

The commission responds that this requirement needs modification to require proper disposal within 48 hours to be consistent with air quality permitting requirements and to reduce the potential for nuisance conditions. Proper disposal may include rendering, burial, or other methods which do not cause a nuisance or detrimental impact to water quality.

ACCORD Agriculture, Inc. recommended that in (12) the reference to "recognized practices of good agricultural management" is too general to be meaningful.

The commission disagrees that the comment is not meaningful and responds that the wide scope of the provision demands a general reference to agricultural management practice.

ACCORD Agriculture, Inc. recommended that in (13) this requirement belongs in the PPP and must be reviewed as part of the approval process.

The commission responds that these requirements are best management practices and will be considered in meeting the technical and administrative requirements in the approval process.

USFWS recommend that vegetated buffer zones at least 50 meters wide be added as a BMP.

The commission responds that the recommendation to establish a minimum width would constitute a substantive change to the rules. The additional requirement is beyond the scope of the rules as proposed. The commission notes that the width of a vegetated buffer zone shall be determined appropriately on a site-specific basis, but if the plan proves to be ineffective in controlling pollutants in discharges or preventing a nuisance condition, the executive director will require amendments to the plan to achieve those objectives.

§321.41. Other Requirements.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that in subsection (c) the authorized person in the PPP must be a person who was not used as an engineer in building the facility nor should it be a person from the TNRCC. This independent authorized person must be able to make on-site inspections and file reports that will have weight with both the TNRCC and the owner of the operation. This would include large financial penalties which would make such inspection cost minimal. ACCORD Agriculture, Inc. recommended that in subsection (e) the report documenting inspections should be verified to make to the owner or operator the significance of falsifying any entries.

The commission responds that the agency will conduct separate inspections which may include the review of any site inspection required under these rules. The commission believes it would create an undue economic burden on the facility to require independent third party inspections.

Brazos River Authority suggests that the guidance given in this section that the permittee is responsible for determining appropriate training frequency for personnel is vague and weak. The approved PPP should determine the employees to be trained.

The commission disagrees with the comment and responds that different personnel completing different tasks at each facility will require different levels of training and at different frequencies. The owner/operator of the facility should be able to determine training frequency on a case-by-case basis. The requirements of the PPP identify those employees, responsible for work activities which relate to compliance with this subchapter, and therefore who must be trained.

§321.42. Monitoring and Reporting Requirements.

ACCORD Agriculture, Inc. recommended that in subsection (a)(4) monitoring should be required for any discharges to waters in the state from the facility regardless of whether they are from the retention facilities.

The commission disagrees with the comment. Under these rules, storm water runoff from all contaminated areas of the CAFO are required to be directed into the retention facility. Any storm water runoff from non-contaminated areas are outside the scope of these rules, and therefore, the agency does not require CAFO operators to sample these non-contaminated storm water discharges every time it rains. This would put an undue burden on the facility operators.

ACCORD Agriculture, Inc. recommended that in subsection (a)(7) to ensure enforceability, the commission should rewrite this provision should be rewritten to require sample collection for all discharges and then create an exception for adequately documented situations where sample collection was not possible.

The commission does not agree with this comment and has not made any change to the rule. The rule requires sampling for all discharges except under conditions where the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples. The commission believes this exception is necessary to account for dangerous conditions when sampling cannot take place.

ACCORD Agriculture, Inc. recommended that in subsection (b) the commission should require discharge information to be routinely submitted to the TNRCC. If the number of discharges are so large that TNRCC cannot deal with the information then it is clear that the design and operation standards are not adequate.

The commission disagrees with the comment. This section of the rules requires that the agency is to be notified by the owner of any discharges that occur when the design capacity is exceeded. In addition, this section clearly describes when and how sampling of the discharge is to occur, and that all records and data shall be maintained at the facility. It further provides that the executive director can, at any time, require that such data and information be provided to the agency. This type of process provides the agency with the needed tools and flexibility it needs in monitoring compliance, while at the same not being overly burdensome on the TNRCC or regulated entities.

Texas Farm Bureau and Texas Cattle Feeders Association suggest that in subsection (g) the commission increase the 60 days to 120 days to prevent non-compliance by an owner/operator due to action outside of his control (e.g. backlog of samples at the laboratory).

The commission disagrees with the comment. The commission believes that a 60 day timeframe will give ample time to take samples, have them analyzed and submit the necessary reports. If the only reason for non-compliance with this provision is due to actions outside the control of the owner/operator of the facility, the executive director will exercise the necessary enforcement discretion in approaching any enforcement.

§321.43. Notification.

No comments

§321.44. Dairy Outreach Program Areas.

ACCORD Agriculture, Inc. recommended that the statement that the DOPAs "involve" all of the listed counties is ambiguous. The provision should simply state that all portions of those counties are included. The provision should also make clear the commission can designate additional areas at any time.

The commission agrees with the comment and has modified the language to clarify that the designation includes all the area within those counties in the DOPAs. It was the clear intent under this provision that the commission at any time may through the rulemaking process add or delete areas from the DOPA designation. Language will be added to this section to make that intent clear.

Texas Association of Dairymen request the TNRCC eliminate these subjective designations. These designations were not based upon science. Dairy Farmers of America request the deletion of the DOPAs.

The commission disagrees with the comments. These areas of the state are currently being evaluated through an intensive enforcement effort and legislative directive. If after all data and information has been assimilated, evaluated and there is a determination by the commission that such a designation is no longer the needed, the commission will consider such.

§321.45. Effect of Conflict or Invalidity of Rule.

No comments

§321.46. Air Standard Permit Authorization for a CAFO General Permit.

Greenbelt Municipal and Industrial Water Authority recommended that the proposed air quality standard permit must be published in a newspaper.

The commission agrees that Section 382.017 of the Texas Clean Air Act requires notice of a hearing on air quality rules having statewide effect to be published in at least three newspapers, the combined circulation of which will, in the commission's opinion, give reasonable circulation throughout the state. The commission published notice of the air quality portions of this subchapter as required by Section 382.017, and held another hearing on June 25, 1998, for the purpose of soliciting public comment on the air quality portions of this subchapter, in accordance with this requirement. Comments were received in response to this notice and responses have been incorporated in this adoption package.

ACCORD Agriculture, Inc. recommended that the prerequisites for an air quality standard air permit must be set out in the rules. The rules must ensure BACT and avoidance of conditions of air pollution. That requirement may not be met by reference to a general permit that will not be issued through the rulemaking process and which has not even been adopted. Section 382.051 does not authorize that.

The commission agrees that the prerequisite for obtaining an air quality standard permit in combination with either a registration or individual permit for water quality is not clear. Section 321.46 has been modified to include a statement that a CAFO is also entitled to an air quality standard permit if all of the requirements of this subchapter for registration or individual permit are met. In addition, the heading for this section has been modified by deleting the phrase "for a CAFO general permit" to clarify this point. The commission disagrees that §382.051 does not authorize the creation of an air quality standard permit such as the one in this subchapter. Section 382.051 (b)(3) authorizes the commission to create standard permits by rule for numerous similar facilities subject to §382.0518. Additionally, the commission believes that the air quality requirements of this subchapter essentially reflect what would be required of similar facilities seeking individual permits under §382.0518, and will protect the public's health and safety and use of physical property.

Eight individuals from the Panhandle commented that the rules should require best available control technology, or should require the "latest technology" to reduce odors, regardless of cost.

The commission believes that the requirements in the rule substantially reflect the application of best available control technology. The commission disagrees, however, that cost should not be a factor in determining the appropriate level of control technology. It should be pointed out that because this is a permit by rule, there will not be a case-by-case determination for BACT for each facility seeking authorization under this rule. These are minimum requirements which must be satisfied in order to obtain authorization under an air quality standard permit; if circumstances

warrant, additional controls may be necessary to ensure that conditions of air pollution are avoided, and the commission encourages operators of CAFOs to implement any measures designed to control odors.

General Comments

Thirty-seven individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that public hearings under an impartial judge be allowed, as they were in Subchapter B. Rules should be changed to "The commission must hold public hearings before an impartial judge in the county of the site listed in the permit application if objections to the permit are received." Two individuals from the Panhandle area and Brazos River Authority recommended that adjacent or affected landowners should be able to request a contested case hearing under these rules.

The commission agrees that contested case hearings should be available to affected persons who object to the issuance of an individual permit via a reasonable hearing request. However, for registrations, public participation includes mailed notice of technical completeness, opportunity for public comment, consideration by the executive director of such timely received comments and opportunity to file motions for reconsideration for those who have timely filed comments. Thus the rules provide for significant public participation while reserving for those cases where an individual permit is appropriate the opportunity for a contested case hearing provided for under §26.028 of the Water Code.

Thirty-seven individuals from the Panhandle area, Mayor of the City of Perryton, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended the rules should require inspections on an annual or semi-annual basis of these facilities to see that the structures are properly maintained. The requirement for an annual inspection should be a minimum standard. An individual from the Panhandle area suggested that each proposed permit site be inspected before permitting is allowed by the TNRCC and adjoining landowners. What is on paper is not always how the site really is!

The commission disagrees with the comment. It is impractical for the agency to mandate annual inspections or inspections prior to authorization for CAFOs. The agency is responsible for thousands of domestic, municipal, industrial and other types of facilities across the state related to the different programs it manages. The agency will perform inspections in all its various programs as the commission determines its priorities on an annual basis and in relation to the resources that it has available.

An individual from the Panhandle area suggested that any company who comes to operate in the Panhandle be required to do their part to keep our groundwater safe and clean.

The commission agrees with this comment and believes that the rules contain many provisions which are intended to preserve groundwater quality. For example, §321.39(f)(1)(B) requires the pollution prevention plan to identify the specific location of any recharge features identified within any tracts of land that will be utilized and to locate and describe the function of all measures

installed to prevent impacts to identified recharge features. Pursuant to the definition in §321.32(32), recharge features include both natural and artificial features. Section 321.39(f)(16) requires that the pollution prevention plan include documentation that the facility does not contain any significant hydrologic connection between the contained wastewater and waters in the state, which includes groundwater. If this cannot be documented the facility's ponds, lagoons, and basins of the retention facilities must have liners which will prevent the potential contamination of surface and ground waters. The specific liner requirements are set out in §321.39(f)(17). In addition, pursuant to §321.39(f)(18), the executive director may require the installation of a leak detection system or monitoring wells if significant potential exists for the contamination of drinking water or waters in the state, which includes groundwater.

An individual from the Panhandle area suggested that property owners whose land, air and water should have rights to protect their property. Even though they pay damages to the state, property owners should receive their damages too.

The commission responds that any property owners whose land, air or water is damaged by other property owners have the right to pursue legal action through the civil courts. Nothing in the commission's rules protects persons who damage another person's property interests.

An individual from the Panhandle area suggested that there should be a regulation on the number of hogs in any one county. There should be a maximum allowed.

The commission does not have the authority to enact zoning regulations which would be required to set a maximum limit. In addition, there is no evidence that a maximum limit is necessary to protect the environment.

Greenbelt Municipal and Industrial Water Authority suggests that the TNRCC has failed to cite statutory provisions adequate to authorize all portions of the proposed rules.

The commission agrees that in the rules as proposed, some of the relevant citations to the Texas Clean Air Act were omitted. In addition to citing §382.017, which contains the general rulemaking authority of the commission, the statutory authority cited should have included §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air; §382.051, which authorizes the commission to issue a standard permit developed by rule for numerous similar facilities; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air.

Greenbelt Municipal and Industrial Water Authority suggests that the proposed rules are a major environmental rule, which has been proposed without the required analysis.

The commission has reviewed the rulemaking in light of the regulatory analysis requirement of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. Although the intent of the rule is to protect the environment and to reduce risks to

human health, this rule affects only an industry and the individual facilities that are already regulated in substantially similar manner to that described in the rule. Therefore, this rule will have no material adverse effect on the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state. Further, this rule does not meet any of the four applicability requirements listed in §2001.0225(a). It does not exceed a standard set by federal law or an express requirement of state law, since standards for CAFO authorizations are required, but not set, by federal and state law; nor does it exceed a requirement of a delegation agreement or contract between the state and the federal government. There is currently no such agreement, and these rules do not exceed any requirement in the program. Finally, these rules are adopted under the specific authority of Water Code Section 26.040 and Health and Safety Code Sections 382.011, 382.012 and 382.051, as well as the general authority of Water Code Section 5.103 and Health and Safety Code Section 382.017.

Greenbelt Municipal and Industrial Water Authority suggests that the proposed rules are inconsistent with applicable statutory provisions (definition of air contaminant is inconsistent with statutory definition).

The commission agrees that the definition of "air contaminant" in the rules differs from the statutory definition in that the sentence "Water vapor is not an air contaminant." has been added. This addition reflects the commission's interpretation of its legislative mandate. The commission routinely offers further definition of statutory terms to provide the regulated community and

general public of a better understanding of what is and is not regulated within the context of a given statute.

Greenbelt Municipal and Industrial Water Authority suggests that there is a variance of language between preamble and rules (1/4 buffer requirement under 321.34).

The commenter is correct, there was a variance in language between the proposed preamble and rules related to the proposed air buffer requirement. The commission apologizes for any inconvenience or misunderstanding this may have caused. The referenced language has been changed in this adoption preamble and rules.

Greenbelt Municipal and Industrial Water Authority suggests that the proposal delegates (improperly) discretionary decision making authority to the executive director.

The commission disagrees with this comment. The proposed rules do not improperly delegate discretionary decision making authority to the executive director. The executive director's determination of whether to approve or deny an application for a new or amended registration is subject to review by the commission through a motion for reconsideration. Accordingly, although the determination to approve or deny an application is initially delegated to the executive director, the rules make such determination subject to review by the commission.

County of Childress recommends that the TNRCC enact whatever rules necessary to protect municipal water supplies from even a remote possibility of contamination by any type of confined livestock or poultry operation.

The commission believes that these rules do protect the municipal as well as domestic water supplies in the state. These rules provide a clear and definitive set of regulations under which a CAFO and AFO can operate in the state. If a CAFO or AFO does not comply with these requirements, the commission will use whatever enforcement powers it has at its discretion to assure that the water supplies of this state are protected.

Perryton Economic Development Corp. strongly encourages the TNRCC to adopt new rules that only considers public input that call attention to the failure of an applicant to meet the requirements of the permitting process.

The commission believes that these adopted rules do provide a streamlined process for granting an authorization to operate a CAFO which requires the executive director to evaluate the application itself and all comments received against all relevant requirements of this subchapter.

Murphy Family Farms found these rules to be consistent with other states in the region. It urges the TNRCC to work with Texas Pork Producers to understand how these rules will affect pork producers and other CAFO groups.

The commission agrees with the comment and is committed to working with both the public and livestock and poultry industry in implementing these rules.

Rice Construction suggests that Texas has some of the most stringent environmental regulations of any state in the U.S.

The commission believes that these rules are consistent with other states in the region and are protective of the state's natural resources.

Rice Construction recommended that reasonable penalties should be established to prevent abuse from the industry and from those who repeatedly file unsubstantiated complaints.

The commission responds that reasonable penalties are in place to prevent abuse from the industry and the commission does not believe it is necessary to establish penalties for individuals who file complaints. Such penalties would be extremely difficult to enforce and would discourage those individuals who wish to file bona fide complaints from doing so.

Rice Construction suggested that regulations previously implemented were more than sufficient for the CAFO industry and that new regulations be based on sound science. A permitting process that the CAFO industry can understand and which follows a reasonable schedule must be established.

The commission agrees that the rules should be easily understood and based on sound science and believes that these rules meet those requirements.

Twenty-seven poultry producers suggested that any measures developed must be supported by scientific findings. Experts such as Texas A&M Extension Service and NRCS have already developed conservation programs. These programs should be allowed to continue until new measures can be developed and implemented by all producers.

The commission believes that the measures and requirements of these rules are supported by scientific evidence and findings. The agency routinely works with the Texas A&M Extension Service and the NRCS on this and other agency programs and will continue into the future to solicit their input. For example, NRCS animal waste management plans are considered acceptable for inclusion into a PPP as long as such plan addresses the necessary components specified in this subchapter. These rules reflect the commission's mandate to assure that the quality of waters in the state and the air quality are protected. In addition, the requirements set out in these rules are consistent with those established by EPA Region VI in their current CAFO General Permit.

ACCORD Agriculture, Inc. suggested that the TNRCC does not have the authority for the creation of new permits-by-rule. The "savings clause" included in the recent amendment to Section 26.040 of the Water Code does not authorize the creation of these proposed new permits-by-rule whether they are created overtly or through the artifice of a rule amendment such as that proposed here. TNRCC lacks

the authority for the proposed standard air permits included in the proposed rules, and have not demonstrated that CAFOs meet the statutory prerequisites of Sections 382.051 (b)(3) and 382.0518 of the Health and Safety Code. There is no adequate mechanism for ensuring that BACT will be employed by each facility. Rules must ensure that each individual facility, as that term is defined in Section 382.003 of Health and Safety Act, making up an AFO will utilize BACT. In ensuring compliance with BACT requirements , TNRCC must demonstrate compliance with its own BACT guidance.

The commission disagrees with the comment. As the commenter points out, the savings clause continued the effectiveness of all the rules existing as of the date of the amendment, including both Subchapters K and B. The legislature unequivocally authorized the commission to continue to regulate by rule all the facilities that were so regulated prior to the amendments to §26.040. The savings clause just as clearly contemplates that the commission will continue to be able to amend its existing rules as circumstances require. Nothing in the APA or in the savings clause of §26.040 limits the agency's amendment authority as posited by the commenter. It is true that Subchapter K was judicially revoked after the effective date of the §26.040 amendments; however, the basis for that judgment was not that CAFOs could not have lawfully been the subject of permits by rule. Consequently, neither the Legislature in the savings clause nor the court in its judgment on Subchapter K refuted the commission's authority to continue to regulate CAFOs by rule and to amend the existing rules.

Even if the commenter's narrow interpretation of the savings clause were correct, it would not preclude adoption of these amendments. These amendments do not "bring whole new groupings of facilities into the permit-by-rule scheme." Subchapter B, as it read before today's amendments, provided that "[all feedlot operations may be regulated by rule…provided such operations comply with §§321.35 [through] 321.39 of this title. The provisions of this subsection are applicable to all feedlot operations, either housed or open lots, including beef cattle; dairy cattle or milk production areas; swine; sheep; goats; horses; chickens, including broilers, layers and/or breeders; turkeys, including breeders and/or feeders; and auction markets" (30 TAC §321.33(a)).

Former §321.33(d) set maximum numbers of animals above which an operator was required to obtain an individual permit. The amendments adopted today alter the standard under which a facility is automatically required to obtain an individual permit from one determined by number of animals to one determined by the location of the facility or its status as a source of air emissions. However, these amendments continue the scheme of the original Subchapter B by: (1) specifying which CAFO facilities can be regulated by rule and (2) setting out uniform terms for those facilities. As amended, Subchapter B continues to regulate by rule what the original Subchapter B called "feedlots;" it amends only the terms of the permit by rule to require higher standards both for operating practices and for registration, record keeping and reporting to the TNRCC.

The commission disagrees that case-by-case BACT determinations must be conducted in standard permits-by-rule. Texas Clean Air Act (TCAA) , Texas Health and Safety Code §382.051(b)(3) states that "the commission may issue: . . .; (3) a standard permit developed by rule for numerous similar facilities subject to §382.0518." The only reasonable interpretation of the language "subject to §382.0518" is that standard permits developed by rule are allowed for facilities that would otherwise be subject to §382.0518. The language of §382.0518 sets out requirements that logically apply to individual facilities seeking permits, including application of Best Available Control Technology (BACT), impacts review, and opportunity for hearing under §382.056(d). This type of case-by-case process is antithetical to the entire concept of permits by rule, since there would be no savings of effort, time or procedure by applicants or TNRCC staff. The Legislature could not have intended such an absurd result, and such a statutory reading flies in the face of the Code Construction Act's presumption that "a just and reasonable result is intended." Government Code §311.021(3). The TNRCC's long-standing "administrative construction of the statute" is also entitled to deference. Id. §311.023; State v. Public Util. Comm'n, 883 S.W.2d 190, 196 (Tex. 1994).

However, the commission is mindful of its obligation to protect human health and the environment. In light of this, the TNRCC has reviewed the control measures set forth by the proposed rule, and has confirmed that they essentially reflect the level of control technology that would typically be required of a similar facility seeking an individual air quality permit under §382.0518. The air quality requirements of this subchapter substantially reflect the application of best available control technology for CAFOs, including the requirement to develop and operate

under a pollution prevention plan, design criteria for lagoons, operational requirements for single and multi-stage lagoon systems, requirements for wastewater irrigation practices and waste application practices, maintenance scheduling and reporting requirements for solids removal from lagoons, requirements for manure stockpiling, minimum buffer distance for nighttime application of liquid and solid waste, flushing and scraping schedules for manure, maintenance and design of earthen pens, operational requirements for settling basins, dead animal disposal limitations, and inspection requirements. The commission also affirms that the proposed rule will be protective of human health and the environment, based upon the Commission's experience with Texas CAFOs.

Dairy Farmers of America requests that provision be made in the process to assist a producer who may wish to build a new facility on an existing operating dairy location. A new facility can be located on a more environmentally and neighborly friendly site than the old facility. It would make sense to allow this to occur without requiring a new permit for the relocation.

Although the commission sympathizes with the situation presented, the commission believes that it necessary under the provision of existing state law and the requirements of the federal NPDES program, for which the TNRCC has made application for delegation, that such a suggested relocation would require a new permit/authorization to be obtained. If such a situation would qualify for coverage under the TNRCC general permit for CAFOs, a more streamlined process would be available. Otherwise, it is necessary that such a relocation would require the need to develop a new PPP for the new location, perform the necessary recharge feature evaluations and

certification for the new site and meet the other siting, administrative and technical provisions of this subchapter.

ProAg offered support in concept for the amendments to Subchapter B. It is imperative that these rules be based upon technical merit, solid science, sound engineering, reason and common sense to provide predictable time frames for companies making huge investments in agriculture.

The commission agrees with the comment.

An individual from the Panhandle area recommended that regulations are needed which will protect the present landowners and make it possible for us to continue to produce agricultural products.

The commission agrees with the comment and believes the proposed rules satisfy the commenters concern.

An individual from the Panhandle area suggested that the public should be notified of circumstances such as the expansion of CAFO near them, which could have a negative economic impact on their home and they should be allowed to voice their opinion. It could be treated similar to a variance in urban areas where a person is notified and could refuse to allow a trailer house to be placed next to their brick home. ACCORD Agriculture, Inc. recommended that the TNRCC must extend the comment period at least 120 days and notify each and every adjoining property owner to these 56 permitted facilities and the 24 pending permits, to allow the affected persons the time to seek counsel and participate in the

adoption of the new rules. Their rights were adversely affected by Subchapter K and so their rights in part must be addressed by their notification via certified mail to allow for their participation in the rules now being considered by the TNRCC.

The commission believes that the rules provide for sufficient notice and opportunities for public participation to potentially affected persons of an application for a new or expanded CAFO. For example, pursuant to §321.36(e)(2)(A), notice of such applications are provided to all potentially affected landowners named on the final site plan submitted with the application. Pursuant to §321.35(c)(5) those would be all adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site (unless not owned, operated, or controlled by the CAFO operator) waste disposal areas. Notice is also provided to local city and county authorities pursuant to §321.36(e)(2)(B) and (C), and to any persons who request to be put on the mailing list pursuant to §321.36(e)(2)(G). Finally, §321.36(c) requires that notice of the application be published in a newspaper of general circulation within the county or area where the proposed facility is to be located. Pursuant to §321.37(a) a person may provide the commission with public comment on any application for registration for which notice has been issued within 30 days of mailing of the notice. Timely comments will be utilized by the executive director in determining what action to take on an application for registration. With respect to applications for an individual permit an affected person may participate through the contested case hearing process if they submit a reasonable hearing request pursuant to Chapter 55 of this title (Relating to Request for Contested Case Hearings; Public Comment).

The commission disagrees that the variance procedure described by the commenter is necessary. The rules already contain significant restrictions on the location of AFO's which may in the future seek to be registered or permitted as CAFOs. For example, pursuant to §321.46(1), an AFO constructed after the date of adoption of these rules, when seeking registration or an individual permit as a CAFO under these rules must show that they will not locate any permanent odor sources within 0.50 miles of an occupied residence or business structure, school, church, or public park without written consent and approval from the landowner unless they develop and implement an odor abatement plan in which case they may not locate any permanent odor sources within 0.25 miles of an occupied residence or business structure, school, church, or public park without written consent and approval from the landowner. In addition, pursuant to §321.46(2) any AFO constructed prior to the adoption of these rules, when seeking registration or an individual permit as a CAFO under these rules must either show that they will not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school, church, or public park without written consent and approval from the landowner or develop and implement a pollution abatement plan.

Finally, the commission disagrees with the commenters suggestion that notice and opportunity to comment on these rules should be expanded. Notice of the proposed rules was published in the Texas Register pursuant to the legal requirements set out in the in the Administrative Procedure Act. Persons had 30 days from the date of publication of the notice to submit written comment on the proposed rules. In addition, a public meeting was held in which the public was given an opportunity to submit oral comment on the proposed rules. Notice and opportunity to comment

on these proposed rules was ample as evidenced by the numerous comments that were received from interested persons.

North Plains Ground Water Conservation District No. Two suggested that the agency use groundwater as one word throughout the document.

The commission agrees with the comment and has made the suggested revision to the rules.

Rep. Warren Chisum asked that the commission listen to the concerns of constituents from his district. Let him know if the agency does not have enough authority to protect municipal water supplies.

The commission recognizes Representative Chisum and his concerns and will consider and respond to all concerned citizens that comment on the rules.

Rep. David Swinford urged the agency to come up with a set of rules that will allow the environment and agriculture to coexist and prosper.

The commission recognizes Representative Swinford and believes that these rules satisfy his concerns.

An individual from the Panhandle area urged the changing of the rules to require every CAFO to upgrade their facilities before a renewed permit is allowed.

The commission believes that all CAFO facilities should be operated according to the best available technology and management practices. If at any time, the facility's pollution prevention plan proves to be ineffective in controlling pollution, then the plan must be amended and the facility upgraded immediately.

ACCORD Agriculture, Inc. believes facilities seeking permits should have designated places for the waste (manure) product to be applied (people signed up and willing to take responsibility).

The commission agrees that operators which plan to do their own land application must have land available. Facilities which do not have land available are required to supply a contract hauler's agreement where the contractor agrees to haul the waste off-site. Some contractor's haul the waste to a facility for bagging and use within metropolitan areas. Currently, the need for manure as a fertilizer far exceeds the amount of manure generated.

ACCORD Agriculture, Inc. recommended that the TNRCC should adopt rules that only allow the development of the swine industry, as long as farmers are willing to contract their services to the industry.

The commission disagrees that the specie specific rules are needed to protect the environment. Contract growing of swine may be an option, but the commission does not have the authority to dictate the development of the CAFO industry.

ACCORD Agriculture, Inc. recommended that the TNRCC should not allow pollution control exemptions on equipment at the swine facilities.

The commission responds that this exemption was created by the 73rd legislature with the passage of HB 1290. The commission therefore must follows the directive of the legislature. If the commenters wish to change this law, they should contact their legislative representatives.

STATUTORY AUTHORITY

These amendments are adopted under the Texas Water Code, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment in 1997, and §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code §5.103. These amendments are also adopted under §26.028(c), 26.040 and 26.041 of the Texas Water Code and §§382.011, 382.012, 382.017 and 382.051 of the Texas Health and Safety Code.

SUBCHAPTER B : CONCENTRATED ANIMAL FEEDING OPERATIONS

§§321.31-321.46

§321.31. Waste and Wastewater Discharge and Air Emission Limitations.

(a) It is the policy of the Texas Natural Resource Conservation Commission that there shall be no discharge or disposal of waste and/or wastewater from animal feeding operations into or adjacent to waters in the state, except in accordance with subsection (b) of this section, any individual permits issued under this subchapter prior to the effective date of these rules, any CAFO general permits, or §305.1 of this title (relating to Scope and Applicability). Waste and/or wastewater generated by a concentrated animal feeding operation under this subchapter shall be retained and utilized or disposed of in an appropriate and beneficial manner as provided by commission rules, orders, registrations, authorizations, CAFO general permits or individual permits.

(b) Wastewater may be discharged to waters in the state whenever rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed and operated to contain process generated wastewaters plus the runoff (storm water) from a 25-year, 24-hour rainfall event for the location of the point source (facility authorized under this subchapter). There shall be no effluent limitations on discharges from retention structures constructed and maintained to contain the 25-year, 24-hour storm event if the discharge is the result of a rainfall event which exceeds the design capacity and the retention structure has been properly maintained. Retention

structures shall be designed in accordance with §321.39 of this title (relating to Pollution Prevention Plans).

(c) Facilities shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Texas Health and Safety Code, Chapters 341 and 382.

§321.32. Definitions.

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 wastes and/or wastewater at rates of application which provide the crop or forage growth with needed nutrients for optimum health and growth.

(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.

(3) **Animal feeding operation** - 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 residues in the normal growing season. Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other, or if they use a common area or system for the disposal of wastes.

(4) **Animal unit** - A unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle and dairy heifers multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses/mules multiplied by 2.0.

(5) **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.

(6) **Best Management Practices ("BMPs")** - The schedules of activities, prohibitions of practices, maintenance procedures , and other management and conservation practices to prevent or reduce the pollution of waters in the state. Best Management Practices also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(7) **CAFO general permit** - A general permit issued by the commission in accordance with Texas Water Code, §26.040 for the express purpose to regulate discharges from concentrated animal feeding operations on a statewide or geographic basis.

(8) **Chronic or catastrophic rainfall event** - For the purposes of these rules, these terms shall mean a series of rainfall events which would not provide opportunity for dewatering and which would be equivalent to or greater than the 25-year, 24-hour storm event or any single event which would be equivalent to or greater than the 25-year, 24-hour storm event. Catastrophic conditions could include tornados, hurricanes, or other catastrophic conditions which could cause overflow due to the high winds or mechanical damage.

(9) **Concentrated animal feeding operation ("CAFO")** - Any animal feeding operation which the executive director designates as a significant contributor of pollution or any animal feeding operation defined as follows:

(A) Any new and existing operations which stable and confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in any of the following categories:

(i) 1000 slaughter or feeder cattle;

(ii) 700 mature dairy cattle (whether milkers or dry cows);

(iii) 2500 swine weighing over 55 pounds;

(iv) 500 horses;

(v) 10,000 sheep;

(vi) 55,000 turkeys;

(vii) 100,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 30,000 laying hens or broilers when facility has a liquid waste handling system;

(ix) 5000 ducks; or

(x) 1000 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(B) Any new and existing operations covered under this subchapter which discharge pollutants into waters in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into the waters in the state, and which stable or confine and feed

or maintain for a total of 45 days or more in any 12-month period more than the numbers or types of animals in the following categories:

(i) 300 slaughter or feeder cattle;

(ii) 200 mature dairy cattle (whether milkers or dry cows);

(iii) 750 swine weighing over 55 pounds;

(iv) 150 horses;

(v) 3000 sheep;

(vi) 16,000 turkeys;

(vii) 30,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 9000 laying hens or broilers when facility has a liquid waste handling system;

(ix) 1500 ducks; or

(x) 300 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(C) Poultry facilities that have no discharge to waters in the state normally are not considered a concentrated animal feeding operation. However, poultry facilities that use a liquid waste handling system or stockpile litter near watercourses or dispose of litter on land such that stormwater runoff or flooding will be transported into surface water or groundwater may be considered a concentrated animal feeding operation. For the purposes of air quality, the term CAFO, as used in this subchapter, includes any associated feed handling and/or feed milling operations located on the same site as the CAFO.

(10) **Control facility** - Any system used for the retention of wastes on the premises until their ultimate disposal. This includes the collection and retention of manure, liquid waste, process wastewater and runoff from the feedlot area.

(11) **Dairy Outreach Program Areas** - The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood and Rains.

(12) **Edwards Aquifer** - That portion of an arcuate belt of porous, waterbearing predominantly carbonate rocks known as the Edwards (Balcones Fault Zone) Aquifer trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis and Williamson Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces

Formation, Devils River Limestone, Person Formation, Kainer Formation, Edwards Group and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.

(13) **Edwards Aquifer recharge zone** - Generally, that area where the stratigraphic units constituting the Edwards Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area delineated as such on official maps located in the appropriate regional office and groundwater conservation districts.

(14) **Flushwater waste handling system** - A system in which freshwater or wastewater is recycled or used in transporting waste.

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

(16) **Hydrologic connection** - The interflow and exchange between control facilities or surface impoundments and waters in the state through an underground corridor or connection.

(17) **Lagoon** - An earthen structure for the biological treatment for liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in series to produce a higher quality effluent.

(18) **Land application** - The removal of wastewater and waste solids from a control facility and distribution to, or incorporation into the soil mantle primarily for beneficial reuse purposes.

(19) **Liner** - Any barrier in the form of a layer, membrane or blanket, naturally existing, constructed or installed to prevent a significant hydrologic connection between liquids contained in retention structures and waters in the state.

(20) **Natural Resources Conservation Service ("NRCS")** - An agency of the United States Department of Agriculture which includes the agency formerly known as the Soil Conservation Service ("SCS").

(21) **New concentrated animal feeding operation** - A concentrated animal feeding operation which was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules (1998) .

(22) **No discharge** - The absence of flow of waste, process generated wastewater, contaminated rainfall runoff or other wastewater from the premises of the animal feeding operation, except for overflows which result from chronic or catastrophic rainfall events.

(23) **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 which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

(24) **Open lot** - Pens or similar confinement areas with dirt, concrete, or other paved or hard surfaces wherein animals 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. 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.

(25) **Operator** - The owner or one who is responsible for the management of a concentrated animal feeding operation or an animal feeding operation subject to the provisions of this subchapter.

(26) **Permanent odor sources** - those odor sources which 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 facilities, 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 application areas.

(27) **Permittee** - Any person issued or covered by an individual permit or order, permit-by-rule or granted authorization under the requirements of this subchapter.

(28) **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.

(29) **Process wastewater** - Any process generated wastewater directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste); washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control), and precipitation which comes into contact with any manure or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g. milk, meat or eggs).

(30) **Process generated wastewater**- Any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste; washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control) which is produced as wastewater.

(31) **Qualified groundwater scientist** - A scientist or engineer who has received a baccalaureate or post-graduate degree in natural sciences or engineering and has sufficient training and

experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certification, or completion of accredited university programs that enable that individual to make sound professional judgements regarding groundwater monitoring, contamination fate and transport, and corrective action.

(32) **Recharge feature** - Those natural or artificial features either on or beneath the ground surface at the site under evaluation which, due to their existence, provide or create a significant pathway between the ground surface and the underlying groundwater within an aquifer. Examples include, but are not limited to: a permeable and porous soil material that directly overlies a weakly cemented or fractured limestone, sandstone, or similar type aquifer; fractured or karstified limestone or similar type formation that crops out on the surface, especially near a water course; or wells.

(33) **Retention facility or retention structure** - All collection ditches, conduits and swales for the collection of runoff and wastewater, and all basins, ponds, pits, tanks and lagoons used to store wastes, wastewaters and manures.

(34) **25-Year, 24-Hour rainfall event/25-Year 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 developed therefrom.

(35) **Waste** - Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

(36) **Wastewater** - Water containing waste or contaminated by waste contact, including process-generated and contaminated rainfall runoff.

(37) **Waters in the state** - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, 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.

(38) **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) Excavation designed to explore for, produce, capture, recharge or recover water, any mineral, compound, gas, or oil from beneath the land surface;

(B) 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) Excavation designed to inject or place 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) Excavation designed to lower a water or liquid surface below the land surface either temporarily or permanently for any reason.

§321.33. Applicability.

(a) A CAFO operating under a currently valid authorization granted prior to the effective date of these amended rules shall continue to be authorized and regulated in accordance with the terms of its existing authorization. Any application that has been determined administratively complete prior to the effective date of these amendments will be reviewed and issued under the provisions of the rules in effect at the time the application was declared administratively complete. Any application for permit renewal, amendment or transfer for any permit issued under this subchapter prior to the effective date of these rules shall be reviewed and/or issued under the provisions of §321.34 of this title (relating to Procedures for Making Application for an Individual Permit).

(b) The executive director may designate any animal feeding operation as a CAFO and require it to comply with any of the requirements of this subchapter, including those to apply for, receive and comply with an individual permit under §321.34 of this title (relating to Procedures for Making Application for an Individual Permit), in order to achieve the policy and purposes enumerated in the Texas Water Code, §§5.120 and 26.003; the Health and Safety Code, Chapters 341, 361 and 382; and §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emission Limitations). Cases for which an individual permit may be required include, but are not limited to, situations where:

(1) (No Change.)

(2) compliance with standards in addition to those listed in this subchapter is necessary in order to protect waters in the state from pollution;

(3) the operation is not in compliance with the standards of this subchapter;

(4) the operation is under formal commission enforcement or has been referred to the commission for enforcement by the Texas State Soil and Water Conservation Board; or

(5) the owner and/or operator has submitted an application for registration or for a major amendment to a registration which does not comply with the requirements for administrative and technical completeness in §321.36(a)(1) of this title (relating to Notice of Application for Registration).

(c) New CAFOs are prohibited on the Edwards Aquifer recharge zone.

(d) Any facility which qualifies for, obtains and is operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board is not a CAFO for purposes of this subchapter and is not covered by the provisions of this subchapter, unless referred to the commission in accordance with the Texas Agriculture Code, §201.026

(e) Operators of animal feeding operations not required to submit an application for either a registration or an individual permit under this subchapter or authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit must locate, construct and manage waste control facilities and land application areas to protect surface and groundwaters and prevent nuisance conditions and minimize odor conditions in accordance with the technical requirements of §§321.38-321.40 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plan and Best Management Practices).

(f) Any existing, new or expanding CAFO which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit or authorized pursuant to subsections (a) or (b) of this section and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in the definition of CAFO in §321.32(9)(A) of this title (relating to Definitions) shall apply for registration in accordance with §321.35 of this title (relating to Procedures for Making Application for Registration) or individual permit in accordance with §321.34 of this title.

(g) Any existing, new or expanding animal feeding operation which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit nor authorized pursuant to subsections (a) or (b) of this section, which is located in areas specified in the definition of Dairy Outreach Program Areas in §321.32 of this title, and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the number of animals specified in the definition of CAFO in §321.32(9)(B) of this title, but less than or equal to the number of animals specified in the definition of CAFO in §321.32(9)(A) of this title shall apply for registration in accordance with §321.35 of this title or individual permit in accordance with §321.34 of this title.

(h) Any CAFO authorized under this subchapter must develop and implement a pollution prevention plan in accordance with the provisions of this subchapter.

(i) Any existing, new or expanding CAFO, which is required to submit an application for registration or an application for an individual permit in accordance with this subchapter, may not commence operation of any waste management facilities or the construction of any facility that has the potential to emit air contaminants without first receiving authorization in accordance with this subchapter or in accordance with a commission order.

(j) Any CAFO which has existing authority under the Texas Clean Air Act (TCAA) does not have to meet the air quality criteria of this subchapter. Upon request, pursuant to the TCAA, §382.051, any CAFO which meets all of the requirements of this subchapter is hereby entitled to an air

quality standard permit authorization under this subchapter in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Those CAFOs which would otherwise be required to obtain an air quality permit under Chapter 116 of this title, which cannot satisfy all of the requirements of this subchapter shall apply for and obtain an air quality permit pursuant to Chapter 116 of this title in addition to any authorization required under this subchapter. Those animal feeding operations which are not required to obtain authorization under this subchapter may be subject to requirements under Chapter 116 of this title. Any change in conditions such that a person is no longer eligible for authorization under this section requires authorization under Chapter 116 of this title. No person may concurrently hold an air quality permit issued under Chapter 116 of this title and an authorization with air quality provisions under this subchapter for the same site. Any application for a permit renewal, amendment or transfer for any permit issued under the TCAA shall be reviewed and/or issued under the provisions of Chapter 116 of this title.

(k) Any animal feeding operation authorized under this subchapter which is a new major source, or major modification as defined in Chapter 116 of this title shall obtain a permit under Chapter 116 of this title.

(l) By written request to the executive director, the owner/operator of any facility authorized by the commission may request a transfer of authorization from an individual permit to an application for registration. Such transfer shall be processed in accordance with the provisions of §§321.35-321.37 of this title (relating to Procedures for Making Application for Registration, Notice of Application for

Registration and Actions on Applications for Registration). If approved, such transfer under this subsection shall include all special conditions/provisions from the existing permit, and in addition, shall not impose any additional conditions or other requirements unless there is substantial modification to the facility constituting a major amendment as defined by §305.62 of this title (relating to Amendment) or to address compliance problems with the facility or its operations in accordance with a commission order or amendment. If approved, transfer of authorization under this subsection will require compliance with the appropriate provisions of §§321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements). If approved, such transfer shall not require any changes to existing structural measures which are documented to meet design and construction standards in effect at the time of installation .

(m) No person may concurrently hold an individual permit or approved registration under this subchapter and an authorization under a CAFO general permit in accordance with the notice of intent requirements of the general permit for the same site.

(n) Any new CAFO located within one mile of Coastal Natural Resource Areas as defined by §33.203(1) of the Texas Natural Resources Code shall apply for and obtain an individual permit in accordance with §321.34 of this title (relating to Procedures for Making Application for an Individual Permit). Any owner/operator who is required to obtain an individual permit under this subsection may not commence physical construction and/or operation of any waste management facilities without first having submitted an application and received a final effective permit.

(o) By written request to the executive director, the owner/operator of any facility holding an unexpired authorization granted under Subchapter K of this Chapter (relating to Concentrated Animal Feeding Operations) may request a transfer of their authorization to a registration under this subchapter. A Subchapter K authorization that has been specifically set aside by court order shall not be eligible for transfer under this subsection. Such request shall include:

(1) the name and address of the applicant(s);

(2) the TNRCC identification number the Subchapter K authorization to be transferred;

(3) any change that has occurred in the information contained in the application upon which the Subchapter K authorization was granted;

(4) the names and addresses of the potentially affected landowners required to be identified on the final site plan that would be required under §321.35 of this title (relating to Procedures for Making Application for Registration);

(5) certification that the facility is not the subject of an unexpired final enforcement order or of an unresolved TNRCC enforcement action in which the executive director has issued written notice that enforcement has been initiated;

(6) the signatures and certifications of the applicant(s) as provided in §§305.43 and 305.44 of this title (relating to Who Applies and Signatories to Applications); and

(7) the application fee required under §321.35(d) of this title.

(p) Within five working days of receipt of a complete and accurate request, the executive director shall prepare a notice of the receipt of the request that is suitable for mailing and forward that notice, together with a copy of the request, to the chief clerk. The notice shall include a statement that the request for transfer will be granted by the executive director unless within 30 days after the date the notice is mailed, the chief clerk receives a written objection from a person described in §321.36(e) of this title (relating to Notice of Application for Registration). The chief clerk shall transmit the notice and a copy of the request to the persons and in the manner described in §321.36(e) of this title. If no such objection is timely received, the executive director shall approve the transfer. If the transfer is disapproved, and not withdrawn by the applicant, the request for transfer shall be processed under §§321.35-321.37 of this title (relating to Procedures for Making Application for Registration, Notice of Application for Registration and Actions on Applications for Registration). If the request is approved either as a transfer or as a new registration under §§321.35-321.37 of this title, such authorization will require compliance with the provisions of §§321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements), except that no changes shall be required to existing structural measures which are documented to meet design and construction standards in

effect at the time of installation or to any buffer zone requirement satisfied under the prior Subchapter K authorization.

§321.34. Procedures for Making Application for an Individual Permit.

(a) A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules shall apply for an individual permit in accordance with the provisions of this section or shall apply for an application for registration in accordance with the provisions of §321.35 of this title (relating to Procedures for Making Application for Registration). Application for an individual permit shall be made on forms provided by the executive director. The applicant shall provide such additional information in support of the application as may be necessary for an adequate technical review of the application. At a minimum, the application shall demonstrate compliance with the technical requirements set forth in §321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plan, Best Management Practices, Other Requirements and Monitoring and Reporting Requirements and shall demonstrate compliance with the requirements specified in §321.35(c)(1)-(13) of this title (relating to Procedures for Making Application for Registration). Applicants shall comply with §§305.41, 305.43-305.44 and 305.46-305.47 of this title (relating to Applicability; Who Applies; Signatories to Applications; Designation of Material as Confidential and Retention of Application Data). Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each permittee as required by §305.503 and §305.504 of this title (relating to Fee Assessments and Fee Payments). An annual Clean Rivers Program fees is also required as required

under §220.21(d) of this title (relating to Water Quality Assessment Fees). Except as provided in subsections (b)-(e) of this section, each permittee shall comply with §§305.61-305.68 of this title (relating to Applicability, 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). Each permittee shall comply with §305.125 of this title (relating to Standard Permit Conditions). Individual permits granted under this subchapter shall be effective for a term not to exceed five years. To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title (relating to Air Standard Permit Authorization).

(b) Permit renewal will be according to the following procedure:

(1) An application to renew a permit for an animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of disposal.

(2) Except as provided by §305.63(3) of this title (relating to Renewals), an application for a renewal of a permit may be granted by the executive director without public notice if it does not propose any change which constitutes a major amendment as defined in Chapter 305 of this title or a major source as defined under Chapter 116 of this title. Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the permit in which the commission has determined that:

(A) a violation occurred that contributed to pollution of surface or ground water, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating to Nuisance) has occurred or any violation of an applicable state or federal air quality control requirement has occurred; and

(B) that such discharge or air emission violation was within the reasonable control of the permittee; and

(C) such discharge or air emission violation could have been reasonably foreseen by the permittee. In addition to the provisions of subparagraphs (A)-(C) of this paragraph, for any application for renewal of a permit within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions), an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.

(c) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees).

(d) - (f) (No Change.)

(g) Notice provided by the executive director under subsection (f) of this section shall be sent by certified mail, return receipt requested.

(h) A facility owner/operator shall submit a complete application within 90 days of notification from the executive director that an individual permit is required.

(i) If an application for renewal requests a major amendment, as defined by §305.62 of this title (relating to Amendment), of the existing individual permit, an application shall be filed in accordance with subsection (a) of this section.

(j) If a renewal application has been filed before the individual permit expiration date, the existing individual permit will remain in full force and effect and will not expire until action on the application for renewal is final.

§321.35. Procedures for Making Application for Registration.

(a) A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules shall apply for and receive registration under this section or shall apply for an individual permit in accordance with the provisions of §321.34 of this title (relating to Procedures for Making Application for An Individual Permit). A person who requests a registration or an amendment, modification, or renewal of such registration granted under this subchapter shall submit a complete and accurate application to the executive director, according to the provisions of this section.

(b) Applicants shall comply with the applicable provisions of §§305.43, 305.44, 305.46, and 305.47 of this title (relating to Who Applies; Signatories to Applications; Designation of Material as Confidential; and Retention of Application Data).

(c) Application for registration 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 headquarters in Austin, Texas, and one additional copy of the application with attachments to the appropriate Texas Natural Resource Conservation Commission regional office. The completed application shall be submitted to the executive director signed and notarized and with the following information:

(1) The verified legal status of the applicant.

(2) The payment of applicable fees.

(3) The signature of the applicant, in accordance with subsection (b) of this section.

(4) The maximum number of animals for which the facilities have been designed.

(5) A proposed final site plan for the facility showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of a CAFO, the locations of all pens, lots, ponds, disposal areas, and any other types of control or retention facilities, and all adjacent

landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site waste disposal areas, including their name, address and telephone number. As used in this subchapter, the term "disposal area" does not apply to any lands not owned, operated or controlled by the CAFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for beneficial use.

(6) A County General Highway Map (with graphic scale clearly shown) to identify the relative location of the CAFO and at least a one mile area surrounding the facility.

(7) One original (remainder in copies) United States Geological Survey 7 ½ minute quadrangle topographic map or an equivalent high quality copy showing the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots and control facilities, the location of all private water wells (abandoned or in use) and public wells and all springs, lakes, or ponds within one mile of the outer boundary of the retention facility and downstream of the facility.

(8) A copy of the pollution prevention plan for the CAFO for which the application is filed. Prior to utilization of wastewater retention facilities, documentation of liner certifications by a licensed professional engineer must be submitted (if applicable).

(9) A copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner/operator of any lands to be utilized

under the proposed CAFO. This requirement does not apply to any lands not owned, operated, or controlled by the applicant for the purpose of off-site land application of manure wherein the manure is given or sold to others for beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure.

(10) A certification by a NRCS engineer, licensed professional engineer or qualified groundwater scientist documenting the absence or presence of any recharge features identified on any tracts of land owned, operated or controlled by the applicant and to be used as a part of a CAFO. Documentation, by the certifying party shall identify the sources and/or methods used to identify the presence or absence of recharge features. The documentation shall include the method or approach to be used to identify previously unidentified and/or undocumented recharge features that may be discovered during the time of construction. At a minimum, the records and/or maps of the following entities/agencies shall be reviewed to locate any artificial recharge features:

(A) Railroad Commission;

(B) Groundwater District, if applicable;

(C) Texas Water Development Board;

(D) TNRCC;

(E) Natural Resource Conservation Service;

(F) previous owner of site, if available, and

(G) on-site inspection of site with a NRCS engineer, licensed professional engineer or qualified groundwater scientist.

(11) Where the applicant can not document the absence of recharge features on the tracts for which an application is being filed, the proposed final site plan shall also indicate the specific location of any and all recharge features found on any property owned, operated or controlled by the applicant under the application as certified by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist. The applicant shall also submit a plan, developed by a NRCS engineer or licensed professional engineer, to prevent impacts on any located recharge feature and associated groundwater formation which may include the following:

(A) Installation of the necessary and appropriate protective measures for each located recharge feature such as impervious cover, berms or other equivalent protective measures covering all affected facilities and disposal areas; or

(B) Submission of a detailed groundwater monitoring plan covering all affected facilities and disposal areas. At a minimum, the ground-water monitoring plan shall specify procedures to annually collect a ground-water sample from representative wells, have each sample analyzed for

chlorides, nitrates and total dissolved solids and compare those values with background values for each well; or

(C) Any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature.

(12) Area land use map (Air quality only). This map shall identify the property line, the permanent odor sources and the distance and direction to any residences, animal feeding operations, businesses, public parks or occupied structures within a one mile radius of the permanent odor sources to show compliance with §321.46 of this title (relating to Air Standard Permit Authorization). The map shall include the north arrow and scale of map.

(13) The applicant shall indicate in the application the location and times where the application may be inspected by the public. Within 48 hours of receiving notice of administrative and technical completeness, the applicant shall either make a copy of the application available for public inspection at the applicant's place of business during normal business hours, Monday through Friday, and shall provide a copy of the application to a public place within the county where the proposed facility is to be located so that the copy may be made available for inspection at a public place during normal business hours. For the purposes of this section, normal business hours shall be at a minimum of: 9:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday allowing for the observance of state and/or federal holidays. Such places may include, but are not limited to, public libraries; district, county, or municipal court offices; community recreation centers; or public schools.

(d) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each registrant as required by §305.503 and §305.504 of this title (relating to Fee Assessment and Fee Payment). An annual Clean Rivers Program fees is also required as required under §220.21(d) of this title (relating to Water Quality Assessment Fees). No fees under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) shall be required of an applicant for an authorization issued under this section.

(e) Each registrant shall comply with and is subject to the provisions of §§305.61, 305.64 and 305.66-305.68 of this title (relating to Applicability, Transfer of Permits, Permit Denial, Revocation and Suspension, Revocation and Suspension Upon Request or Consent, Action and Notice on Petition for Revocation or Suspension).

(f) Registrations approved under this subchapter shall be effective for a term not to exceed five years.

(g) (Air Quality Only) . To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title (relating to Air Standard Permit Authorization).

(h) Renewal of a registration under this section will be according to the following procedures:

(1) Except as provided by §305.63(3) of this title (relating to Renewals), an application for a renewal of a registration may be granted by the executive director without public notice if it does not propose any other change to the registration as approved. Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the registration in which the commission has determined that:

(A) a violation occurred that contributed to pollution of surface or ground water, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating to Nuisance) has occurred or any violation of an applicable state or federal air quality control requirement has occurred; and

(B) that such discharge or air emission violation was within the reasonable control of the registrant; and

(C) such discharge or air emission violation could have been reasonably foreseen by the registrant. In addition to the provisions of subparagraphs (A)-(C) of this paragraph, for any application for renewal of a registration within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions), an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.

(2) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees).

(3) A registrant submitting an application for renewal of a registration satisfying the criteria in paragraph (1) of this subsection will automatically be issued a renewal for the existing registration by the executive director.

(4) If the application for renewal of a registration cannot meet all of the criteria in paragraph (1) of this subsection, then an application for renewal of the registration shall be filed in accordance with subsection (a) of this section and processed in accordance with §§321.36-321.37 of this title (relating to Notice of Application for Registration and Action on Applications for Registration).

(5) Any registrant with an effective registration shall submit an application for renewal at least 180 days before the expiration date of the effective registration, unless permission for a later date has been granted by the executive director. The executive director shall provide the registrant notice of deadline for the application for renewal by certified mail, return receipt requested, at least 240 days before the registration expiration date. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing registration.

§321.36. Notice of Application for Registration.

(a) Administrative and Technical Review.

(1) Applications for registration or major amendments to such registrations under this subchapter shall be reviewed by the executive director for administrative and technical completeness within 30 working days of receipt of the application by the executive director. Upon determination that the application contains the information and attachments required under this subchapter, the executive director shall declare that the application is administratively and technically complete.

(2) Within five working days of declaration of administrative completeness, the executive director shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative and technical completeness which is suitable for publishing or mailing, under the requirements of §321.186(b) of this title (relating to Notice of Application), and shall forward that statement to the applicant.

(b) Notice of application. The notice of application for registration and administrative/ technical completeness shall contain the following information:

(1) the identifying number given the application for registration by the commission;

(2) the type of authorization being sought under the application;

(3) the name and address of the applicant;

(4) the date on which the application for registration was submitted;

(5) a brief summary of the information included in the application for registration, including but not limited to the general location of facilities and disposal areas associated with the application, the proposed size of the facility, a description of the receiving water for any discharge and the location where a copy of the application for registration may be reviewed by interested persons;

(6) the format for submission of a comment in accordance with this subchapter to the executive director regarding the application for registration; and

(7) the date, time, and place where all comments are to be received by the executive director in relation to the numbered application for registration, such comment period shall be 30 days from the actual date of publication

(c) Publication.

(1) The applicant shall cause the notice of application for registration and administrative/technical completeness approved by the executive director to be published once in a newspaper regularly published, and generally circulated within the county and area wherein the proposed facility is to be located, and within an adjoining county wherein any potential affected person may reside.

(2) The date of publication for notice of application for registration and administrative/technical completeness shall not be later than the date set by the chief clerk.

(3) The applicant is responsible for the cost of publication. The applicant shall notify the chief clerk verbally or by facsimile within 24 hours of the first available working day after the publication of the notice, and shall provide the chief clerk a certified copy of the publication, within 20 calendar days of the date established by the chief clerk for publication. If the applicant does not provide the chief clerk with the appropriate publisher's affidavit within 20 days of the date established by the executive director, the executive director shall cease processing and return the application.

(d) Application returned. If an application for registration is received which is not administratively/technically complete, the executive director shall notify the applicant of the deficiencies prior to expiration of the review period (30 working days) by certified mail return receipt requested. If the additional requested information is received within 30 days of receipt of the deficiency notice, the executive director will evaluate the information within eight working days and, where applicable, shall prepare a statement of receipt of the application for registration and declaration of administrative/technical completeness in accordance with subsection (a) of this section. If the requested information is not submitted by the applicant within 30 days of the date of receipt of the deficiency notice, the executive director shall return the incomplete application to the applicant.

(e) Notice by mail.

(1) The chief clerk will transmit the notice of application for registration and administrative/technical completeness by first-class mail to persons listed in paragraph (2) of this subsection and to other persons who, in the judgment of the executive director, may be affected. The

applicant is responsible for the cost of required notice. A record on file with the chief clerk which includes the list of persons to whom notice was mailed and the date of mailing, signed by a person with personal knowledge that the mailout occurred, shall create a presumption that notice was mailed in accordance with this section.

(2) the notice shall be mailed by the chief clerk to the following:

(A) the potentially affected landowners named on the final site plan submitted with the application;

(B) the mayor and health officials of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(C) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;

(D) the Texas Department of Health;

(E) the Texas Parks and Wildlife Department;

(F) the applicant;

(G) persons who request to be put on the mailing list, including participants in past commission proceedings for the facility who have submitted a written request to be put on the mailing list;

(H) state and federal agencies for which notice is required in 40 Code of Federal Regulations §124.10(c);

(I) for applications regarding operations located in an area specified in the definition of Dairy Outreach Program Areas in §321.32 of this title (relating to Definitions), notice shall be mailed to the river authority whose jurisdictional watershed includes that location; and

(J) for applications regarding operations located in an area within the jurisdiction of a groundwater district, notice shall be mailed to such district.

(3) the date of mailing for a notice of application for registration and administrative/technical completeness shall be established by the chief clerk.

(4) The notice shall include instructions regarding the requirements contained in §321.37(a) of this title (relating to Public Comment on Applications for Registration) providing the manner and timeframe for the submission of comments to the proposed application for registration.

§321.37. Actions on Applications for Registration.

(a) Public Comment on Applications for Registrations. A person may provide the commission with written comments on any applications for registration for which notice has been issued under this subchapter. The executive director shall review any written comments when they are received within 30 days of mailing the notice. Only written comments received within the 30 day period will be considered. The written information received will be utilized by the executive director in determining what action to take on the application for registration, pursuant to subsection (b) of this section

(b) The executive director shall determine, after review of any application for registration, if he will approve or deny an application for registration in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application for registration, the executive director will consider all relevant requirements of this subchapter and consider all information pertaining to those requirements received by the executive director regarding the application for registration. The written determination on any application for registration, including any authorization granted, shall be mailed by the Office of Chief Clerk to the applicant upon the decision of the executive director. At the same time the executive director's decision is mailed to the applicant, a copy or copies of this decision shall also be mailed by the Office of Chief Clerk to all persons who timely submitted written information on the application, as described in subsection (a) of this section. The written determination of the executive director shall include a response to all significant comments received.

(c) Motion for reconsideration. The applicant or any person submitting comments in accordance with subsection (a) of this section may file with the chief clerk a motion for reconsideration, under the procedures of §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application. Any person who was entitled to but not given proper notice of an application and subsequently did not submit comments within the 30 day comment period may file a motion for reconsideration.

§321.38. Proper CAFO Operation and Maintenance.

The facilities covered under this subchapter are required to document all Best Management Practices (BMPS) used to comply with all applicable waste and wastewater discharge and air emission limitations in this subchapter. Such documentation shall be included in the Pollution Prevention Plan (PPP) outlined in this subchapter and shall be made available to the executive director upon request. Where applicable, equivalent and applicable measures contained in a site specific animal waste management plan prepared by the Natural Resource Conservation Service (NRCS), may be substituted for the BMPs and PPP requirements in this subchapter. Where provisions in the NRCS plan are substituted for applicable BMPS or portions of the PPP, the PPP must refer to the appropriate section of the NRCS plan. If the PPP contains reference to the NRCS Plan, a copy of the NRCS plan must be kept on site.

§321.39. Pollution Prevention Plans.

(a) A pollution prevention plan shall be developed for each CAFO covered under this subchapter. Pollution prevention plans shall be prepared in accordance with good engineering practices and shall include measures necessary to limit the discharge of pollutants to waters 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, maintenance, and revision of the pollution prevention plan. The activities and responsibilities of the pollution prevention personnel shall address all aspects of the facility's pollution prevention plan.

(b) Where a NRCS plan has been prepared for the facility, the pollution prevention plan may refer to the NRCS plan when the NRCS plan documentation contains equivalent requirements for the facility. When the operator uses a NRCS plan as partial completion of the pollution plan, the NRCS plan must be kept on site. Design and construction criteria developed by the NRCS can be substituted for the documentation of design capacity and construction requirements (see subsection (f) of this section) of the pollution prevention plan provided the required inspection logs and water level logs in subsection (f)(3) and (11) of this section are kept with the NRCS Plan. Waste management plans developed by the NRCS can be substituted for the documentation of application rate calculations in subsection (f) (19) and (24) of this section. NRCS Waste Management Plans which have been prepared since January 1, 1989 are considered by the Natural Resources Conservation Service to contain adequate management practices. To insure the protection of water quality, the Natural Resources Conservation Service has determined that NRCS plans prepared prior to 1989 must be submitted for renewal with the Natural Resources Conservation Service or a waste management professional before

December 1995. NRCS has determined that all plans should be reviewed every five (5) years to insure proper management of wastes.

(c) 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 be retained on site. The plan shall be updated as appropriate.

(d) Upon completion of a plan review, the executive director may notify the operator 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.

(e) The operator shall amend the plan prior to any change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters in the state or if the pollution prevention plan proves to be ineffective in achieving the general objectives of controlling pollutants in discharges from concentrated animal feeding operations.

(f) The plan shall include, at a minimum, the following items:

(1) Each plan shall provide a description of potential pollutant sources. Potential pollutant sources include any activity or material that may reasonably be expected to add pollutants to waters in the state from the facility. An evaluation of potential pollutant sources shall identify the

types of pollutant sources, provide a description of the pollutant sources, and indicate all measures that will be used to prevent contamination from the pollutant sources. The type of pollutant sources found at any particular site varies depending upon a number of factors including site location, historical land use, proposed facility type, waste disposal practices, etc. The evaluation shall encompass all land that will be used as part of the CAFO as indicated in the site plan. Each potential pollutant source must be identified in the plan. A thorough site inspection of the facility is recommended to ensure that all sources have been identified. Potential pollutant sources found at CAFO facilities include, but are not limited to, the following: manure; sludge; wastewater; dust; silage stockpiles; fuel storage tanks; pesticide storage and applications; lubricants; disposal of any dead animals associated with production at the CAFO; land application of waste and wastewater; manure stockpiling; pond clean-out; vehicle traffic; and pen clean-out. Each plan shall include:

(A) A site plan/map, or topographic map indicating, an outline of the property that will be used in the waste generation and utilization activities of the concentrated animal feeding area; each existing structural control measure to reduce pollutants in wastewater and precipitation runoff; and surface water bodies.

(B) The plan shall identify the specific location of any recharge features identified on any tracts of land planned to be utilized under the provisions of this subchapter. In addition, the plan should also locate and describe the function of all measures installed to prevent impacts to identified recharge features.

(C) A list of any significant spills of these materials at the facility after the effective date of these rules, or for new facilities, since date of operation.

(D) All existing sampling data.

(2) The pollution prevention plan for each facility shall include a description of management controls appropriate for the facility, and the operator must implement such controls. The appropriateness and priorities of any controls shall reflect the identified sources of pollutants at the facility.

(3) The plan shall include the location and a description of structural controls. Structural controls shall be inspected, by those individuals identified in the PPP as responsible for development, implementation, maintenance and revision of the plan, at least four times per year for structural integrity and maintenance. The plan shall include dates for inspection of the retention facility, and a log of the findings of such inspections. The appropriateness of any controls shall reflect the identified sources of pollutants at the facility.

(4) The plan must include documentation of the assumptions and calculations used in determining the appropriate volume capacity of the retention facilities. In addition to the 25-year, 24-hour rainfall, the volume capacity of the retention facility shall be designed to meet the demands of a hydrologic needs analysis (water balance) which demonstrates the irrigation water requirements for the cropping system maintained on the wastewater application site(s). Precipitation inputs to the hydrologic

needs analysis (water balance) shall be the average monthly precipitation taken from an official source such as the "Climatic Atlas of Texas", LP-192, published by the Texas Department of Water Resources, dated December, 1983, or the most recent edition, or successor publication. The consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the hydrologic needs analysis (water balance). The following volumes shall be considered in determining the analysis:

(A) the runoff volume from all open lot surfaces;

(B) the runoff volume from all areas between open lot surfaces that is directed into the retention facilities;

(C) the rainfall multiplied by the area of the retention and waste basin;

(D) the volume of rainfall from any roofed area that is directed into the retention facilities;

(E) all waste and process generated wastewater produced during a twenty-one (21) day, or greater, period;

(F) the estimated storage volume for a minimum one (1) year of sludge accumulation;

(G) the storage volume required to contain all wastewater and runoff during periods of low crop demand;

(H) the evaporation volume from retention facility surfaces;

(I) the volume applied to crops in response to crop demand;

(J) the minimum treatment volume required for waste treatment, if treatment lagoon; and/or

(K) any additional storage volume required as a safety measure as determined by the system designer.

(5) The maximum required storage value calculated by the hydrologic analysis requirements shall not encroach on the storage volume required for the 25-year, 24-hour rainfall event. Wastewater application rates utilized in the hydrologic needs analysis (water balance) shall not induce runoff or create tailwater.

(6) In addition, the retention facility shall include a top freeboard of not less than two feet. Freeboard shall account for settlement and slope stability of the materials used at the time of design and construction.

(7) (Air quality only) A lagoon in a single lagoon system and a primary lagoon in a multi-stage lagoon system shall be designed to maintain the necessary treatment volume or surface area as calculated using the manure production data (mean plus one standard deviation) published by American Society of Agricultural Engineers (ASAE) standards D384.1, dated June, 1988, and applicable updates to comply with anaerobic lagoon design criteria as established by ASAE standards EP-403.2, dated December, 1992, and applicable updates, or other site-specific data documented in the PPP.

(8) Evaporation systems shall be designed to withstand a 10-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic), as determined by a hydrologic needs analysis (water balance), and sufficient freeboard (not less than one foot) shall be maintained to dispose of rainfall and rainfall runoff from the 25-year, 24-hour rainfall event without overflow. In the hydrologic needs analysis determination, any month in which a catastrophic event occurs the analysis shall replace such an event with not less than the long term average rainfall for that month.

(9) Site specific information should be used to determine retention capacity and land application rates. All site specific information used must be documented in the pollution prevention plan.

(10) The plan shall include a description of the design standards for the retention facility embankments. The following minimum design standards are required for construction and/or modification of a retention facility:

(A) Soils used in the embankment shall be free of foreign material such as trash, brush, and fallen trees;

(B) The embankment shall be constructed in lifts or layers no more than six inches thick and compacted at optimum moisture content;

(C) Embankment construction must be accompanied by compaction testing and certified to be in accordance with NRCS, Corps of Engineers, Bureau of Reclamation or ASCE design standards. Compaction tests must be certified by a licensed professional engineer; and

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

(11) The plan must include a schedule for liquid waste removal. A date log indicating weekly inspection of wastewater level in the retention facility, including specific measurement of wastewater level will be kept with the plan. Retention facilities shall be equipped with either irrigation or evaporation or liquid removal systems capable of dewatering the retention facilities. Operators using pits, ponds, tanks or lagoons for storage and treatment of storm water, manure and process generated wastewater, including flush water waste handling systems, shall maintain in their wastewater retention facility sufficient available capacity to contain rainfall and rainfall runoff from a 25-year, 24-hour rainfall event. The operator shall restore such capacity to store all runoff from a 25-year, 24-hour rainfall event after any rainfall event or accumulation of wastes or process generated wastewater which

reduces such capacity , weather permitting. Equipment capable of dewatering the wastewater retention structures of waste and/or wastewater shall be available whenever needed to restore the capacity required to accommodate the rainfall and runoff resulting from the 25-year, 24-hour rainfall event.

(12) A permanent marker (measuring device) shall be maintained in the wastewater retention facilities to show the following: the volume required for a 25-year, 24-hour rainfall event; and the predetermined minimum treatment volume within any treatment pond. The marker shall be visible from the top of the levee. At no time shall a treatment lagoon at a CAFO that is operated under an air quality authorization be dewatered to a level below the predetermined treatment volume, except for cleanout periods or periods where the net effect of evaporation and rainfall would require the addition of fresh water to maintain the treatment volume without pumping fresh groundwater from an aquifer.

(13) (Air quality only) The primary lagoon in a multi-stage lagoon system shall be designed and operated so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. Where practical, any contaminated runoff should be routed around the primary lagoon into the secondary lagoon.

(14) A rain gauge shall be kept on site and properly maintained. A log of all measurable rainfall events shall be kept with the pollution prevention plan.

(15) Concentrated animal feeding operations constructing a new or modifying an existing wastewater retention facility shall insure that all construction and design is in accordance with good engineering practices. Where site specific variations are warranted, the operator must document these variations and their appropriateness to the plan. Existing facilities which have been properly maintained and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site specific Natural Resources Conservation Service 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, wastes generated, etc.) All retention structure design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The operator must use those standards that are current at the time of construction.

(16) The operator shall include in the plan, site specific documentation that no significant hydrologic connection exists between the contained wastewater and waters in the state. Where the operator cannot document that no significant hydrologic connection exists, the ponds, lagoons and basins of the retention facilities must have a liner which will prevent the potential contamination of surface waters and groundwaters.

(A) The operator can document lack of hydrologic connection by either: documenting that there will be no significant leakage from the retention structure; or documenting that any leakage from the retention structure would not migrate to waters in the state. This documentation shall be certified by a NRCS engineer, licensed professional engineer or qualified groundwater scientist

and must include information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.

(B) For documentation of no significant leakage, in-situ materials must, at a minimum, meet the minimum criteria for hydraulic conductivity and thickness described below. Documentation that leakage will not migrate to waters in the state must include maps showing groundwater flow paths, or that the leakage enters a confined environment. A written determination by a NRCS engineer, or a licensed professional engineer that a liner is not needed to prevent a significant hydrologic connection between the contained wastewater and waters in the state will be considered documentation that no significant hydrologic connection exists.

(17) Site-specific conditions shall be considered in the design and construction of liners. NRCS liner requirements or liners constructed and maintained in accordance with NRCS design specifications in Appendix 10d of the Agricultural Waste Management Handbook (or its current equivalent) shall be considered to prevent hydrologic connections which could result in the contamination of waters in the state. Liners for retention structures shall be constructed in accordance with good engineering practices. Where no site specific assessment has been done by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist the liner shall be constructed to have hydraulic conductivities no greater than 1×10^{-7} cm/sec, with a thickness of 1.5 feet or greater or its equivalency in other materials.

(18) Where a liner is installed to prevent hydrologic connection the operator must maintain the liner to inhibit infiltration of wastewaters. Liners shall be protected from animals by fences or other protective devices. No trees shall be allowed to grow within the potential distance of the root zone. Any mechanical or structural damage to the liner shall be evaluated by a NRCS engineer or a licensed professional engineer within 30 days of the damage. Documentation of liner maintenance shall be kept with the pollution prevention plan. The operator shall have a NRCS engineer, licensed professional engineer, or qualified groundwater scientist review the documentation and do a site evaluation every five years. If notified by the executive director that significant potential exists for the contamination of waters in the state or drinking water, the operator shall install a leak detection system or monitoring well(s) in accordance with that notice. Documentation of compliance with the notification must be kept with the pollution prevention plan, as well as all sampling data. In the event monitoring well(s) are required, the operator must sample each monitor well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the PPP, and compare the analytical results to the baseline data. If a ten percent 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. Data from any monitoring wells must be kept on site for three years with the pollution prevention plan. 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.

(19) Retention facilities shall be equipped with either irrigation or evaporation systems capable of dewatering the retention facilities, or a regular schedule of wastewater removal by contract hauler. The pollution prevention plan must include all calculations, as well as, all factors used in

determining land application rates, acreage, and crops. Land application rates must take into account the nutrient contribution of any land applied manures. If land application is utilized for disposal of wastewater, the following requirements shall apply:

(A) The discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge of pollutants into or adjacent to waters in the state.

(B) When irrigation disposal of wastewater is used, application rates shall not exceed the nutrient uptake of the crop coverage or planned crop planting with any land application of wastewater and/or manure. Land application rates of wastewaters should be based on the available nitrogen content, however, where local water quality is threatened by phosphorus, the operator shall limit the application rate to the recommended rates of available phosphorus for crop uptake, based upon crop and realistic yield goals, and provide controls for runoff and erosion as appropriate for site conditions.

(C) Wastewater shall not be irrigated when the ground is frozen or saturated or during rainfall events (unless in accordance with subparagraph (E) of this paragraph.

(D) Irrigation practices shall be managed so as to reduce or minimize ponding or puddling of wastewater on the site, pollution of waters in the state, and prevents the occurrence of nuisance conditions.

(E) It shall be considered proper operation and maintenance for a facility which has been properly operated in accordance with this subchapter, and that is in danger of imminent overflow due to chronic or catastrophic rainfall, to discharge wastewaters to land application sites for filtering prior to discharging to waters in the state. Only that portion of the total retention facility wastewater volume necessary to prevent overflow due to chronic or catastrophic rainfall shall be land applied for filtering prior to discharging to waters in the state. Monitoring and reporting requirements for such discharges shall be consistent with §321.42 of this title (relating to Monitoring and Reporting Requirements).

(F) Facilities including ponds, pipes, ditches, pumps, diversion and irrigation equipment shall be maintained to insure ability to fully comply with the terms of this subchapter and the pollution prevention plan.

(G) Adequate equipment or land application area shall be available for removal of such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.

(H) Where land application sites are isolated from surface waters and groundwaters and no potential exists for runoff to reach any waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval of the executive director. No land application under this subsection shall cause or contribute to a violation of water quality standards or create a nuisance.

(20) Solids shall be removed in accordance with a pre-determined schedule for cleanout of all treatment lagoons to prevent the accumulation of solids from exceeding 50 percent of the original treatment volume. Removal of solids shall be conducted during favorable wind conditions that carry odors away from nearby receptors and the operator shall notify the regional office of the commission as soon as the lagoon cleaning is scheduled, but not less than 10 days prior to cleaning, and verification shall be reported to the same regional office within five days after the cleaning has been completed. At no time shall emissions from any activity create a nuisance. 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.

(21) Manure and Pond Solids Handling and Land Application. Storage and land application of manure shall not cause a discharge of pollutants to waters in the state, cause a water quality violation in waters in the state or cause a nuisance condition. At all times, sufficient volume shall be maintained within the control facility to accommodate manure, other solids, wastewaters and contaminated storm water (rainwater runoff) from the concentrated animal feeding areas.

(22) Where the operator decides to land apply manures and pond solids the plan shall include: a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and all nutrient analysis data. Land application rates of wastes should be based on the available nitrogen content of the solid waste. However, where local water quality is threatened by phosphorus, the application rate shall be limited to

the recommended rates of available phosphorus for crop uptake, based upon crop and realistic yield goals, and provide controls for runoff and erosion as appropriate for site conditions.

(23) If the waste (manure) is sold or given to other persons for disposal, the operator must maintain a log of: date of removal from the CAFO; name of hauler; and amount, in wet tons, dry tons or cubic yards, of waste removed from the CAFO. (Incidental amounts, given away by the pick-up truck 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 from that year.

(24) The procedures documented in the pollution prevention plan must ensure that the handling and disposal of wastes as defined in §321.32 of this title (relating to Definitions) comply with the following requirements:

(A) Manure storage capacity based upon manure and waste production and land availability shall be provided. Storage and/or surface disposal of manure in the 100-year flood plain, near water courses or recharge feature is prohibited unless protected by adequate berms or other structures. The land application of wastes at agronomic rates shall not be considered surface disposal in this case and is not prohibited.

(B) 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.

(C) Waste shall not be applied to land when the ground is frozen or saturated or during rainfall events.

(D) Waste manure shall be applied to suitable land at appropriate times and at agronomic rates. Discharge (run-off) of waste from the application site is prohibited. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation and soil conditions.

(E) All necessary practices to minimize waste manure transport to waters in the state shall be utilized and documented to the plan.

(F) Edge-of-field, grassed strips shall be used to separate water courses from runoff carrying eroded soil and manure particles. Land subject to excessive erosion shall be avoided.

(G) Where land application sites are isolated from surface waters and no potential exists for runoff to reach waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval by the executive director. No land application under this subchapter shall cause or contribute to a violation of surface water quality standards, contaminate groundwater or create an nuisance condition.

(H) Nighttime application of liquid and/or solid waste shall only be allowed in areas with no occupied residence(s) within 0.25 mile from the outer boundary of the actual area

receiving waste application. In areas with an occupied residence within 0.25 mile from the outer boundary of the actual area receiving waste application, 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.

(I) Accumulations of solids on concrete cow lanes at dairies and concrete swine pens, without slotted floors, shall be scraped or flushed at least once per week or in accordance with proper design and maintenance of the facility. Farrowing pens at swine facilities which are not scraped or flushed once per week shall be scraped/flushed after each group of sows have been removed from the facility.

(J) Buildings designed with mechanical flush/scrape systems shall be flushed/scraped at least once per week or as often as necessary to maintain the design efficiency. This provision would include, but would not be limited to swine and caged poultry operations.

(K) Earthen pens shall be designed and maintained to ensure good drainage and to prevent ponding.

(L) Facilities that utilize a solid settling basin(s) shall remove solids from the basin as often as necessary to maintain the design efficiency.

(25) The plan shall include an appropriate schedule for preventative maintenance. Operators will provide routine maintenance to their control facilities in accordance with a schedule and plan of operation to ensure compliance with this subchapter. The operator shall keep a maintenance log documenting that preventative maintenance was done. A preventive maintenance program shall involve inspection and maintenance of all runoff management devices (mechanical separators, catch basins) as well as inspecting and testing facility equipment and containment structures to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.

(26) The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion. Where these areas have the potential to contribute pollutants to waters in the state the pollution prevention plan shall identify measures used to limit erosion and pollutant runoff.

(27) The operator shall document to the pollution prevention plan as soon as possible, any planned physical alterations or additions to the permitted facility. The operator must insure that any change or facility expansion will not result in a discharge in violation of the provisions of this subchapter or will require an amendment to an existing authorization in force at the time of modification.

(28) Prior to commencing wastewater irrigation and/or waste application on land owned or operated by the operator, and annually thereafter, the operator shall collect and analyze

representative soil samples of the wastewater and waste application sites according to the following procedures:

(A) Sampling procedures shall employ accepted techniques of soil science for obtaining representative and analytical results.

(B) Samples should be taken within the same 45 day time-frame each year.

(C) Obtain one composite sample for each soil depth zone per land management unit and per uniform (soils with the same characteristics and texture) soil type within the land management unit. For the purposes of this subchapter, a land management unit shall be considered to be an area associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used.

(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores obtained from each of the following soil depth zones:

(i) Zone 1: 0-6 inches for land application areas where the waste is incorporated directly into the soil or 0-2 inches for land application areas where the waste is not incorporated into the soil; if a 0-2 inch sample is required under this subsection, then an additional sample from the 2-6 inch soil depth zone shall be obtained in accordance with the provisions of this section, and

(ii) Zone 2: 6 - 24 inches.

(E) 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 reports should include nutrient recommendations for the crop yield goal.

(F) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from wastewater and waste application sites shall include the following:

(i) Nitrate reported as nitrogen in parts per million (ppm)

(ii) Phosphorus (extractable, ppm) - Texas Agricultural Extension Service Soil Testing Laboratory - TAMU extractant or Mehlich III,

(iii) Potassium (extractable, ppm),

(iv) Sodium (extractable, ppm),

(v) Magnesium (extractable, ppm),

(vi) Calcium (extractable, ppm),

(vii) Soluble salts/electrical conductivity (dS/m) - determined from extract of 2:1 (v/v) water/soil mixture,

(viii) Soil water pH,

(G) When results of the annual soil analysis for extractable phosphorus in subparagraph (F) of this paragraph indicates a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular waste and/or wastewater disposal field or if ordered by the commission to do so in order to protect the quality of waters in the state, then the operator shall limit waste and/or wastewater application on that site to the recommended P rates based on crop uptake. Waste and/or wastewater application shall remain limited to recommended P rates until soil analysis indicates extractable phosphorus levels have been reduced below 200 ppm P, or to a lower level as ordered by the commission.

(29) The operator shall annually analyze at least one (1) representative sample of irrigation wastewater and one (1) representative sample of solid waste for total nitrogen, total phosphorus and total potassium.

(30) Results of initial and annual soils, wastewater and solid waste analyses shall be maintained on-site as part of the pollution prevention plan.

(31) Operators submitting applications for renewal or expansion of existing facilities authorized under this subchapter to utilize a playa lake as a wastewater retention structure shall within ninety (90) days of the effective date of the renewal, submit a groundwater monitoring plan to the Agriculture Section, Water Quality Division of the Texas Natural Resource Conservation Commission. At a minimum, the ground water monitoring plan shall specify procedures to annually collect a ground water sample from each well providing water for the facility, have each sample analyzed for chlorides and nitrates and compare those values to background values for each well.

§321.40. Best Management Practices.

The following Best Management Practices (BMPs) shall be utilized by concentrated animal feeding operations owners/ operators, as appropriate, based upon existing physical and economic conditions, opportunities and constraints. Where the provisions in a NRCS plan are equivalent or more protective the operator may refer to the NRCS plan as documentation of compliance with the BMPs required by this subchapter.

(1) Control facilities must be designed, constructed, and operated to contain all process generated wastewaters and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the point source. Calculations may also include allowances for surface retention, infiltration, and other site specific factors. Waste control facilities must be constructed, maintained and

managed so as to retain all contaminated rainfall runoff from open lots and associated areas, process generated wastewater, and all other wastes which will enter or be stored in the retention structure.

(2) Facilities shall not expand operations, either in size or numbers of animals, prior to amending or enlarging the waste handling procedures and structures to accommodate any additional wastes that will be generated by the expanded operations.

(3) Open lots and associated wastes shall be isolated from outside surface drainage by ditches, dikes, berms, terraces or other such structures designed to carry peak flows expected at times when the 25-year, 24-hr. rainfall event occurs.

(4) New or expanding facilities shall not be built in any stream, river, lake, wetland, or playa lake (except as defined by and in accordance with the Texas Water Code §26.048).

(5) No waters in the state shall come into direct contact with the animals confined on the concentrated animal feeding operation. Fences and other methods may be used to restrict such access.

(6) Wastewater retention facilities or holding pens may not be located in the 100-year flood plain, as defined in Chapter 301 of this title, unless the facility is protected from inundation and damage that may occur during that flood event.

(7) There shall be no water quality impairment to public and neighboring private drinking water wells due to waste handling at the permitted facility. Facility wastewater retention facilities, holding pens or waste/wastewater disposal sites shall not be located closer than 500 feet of a public water supply well or 150 of a private water wells, except in accordance with Chapter 238 of this title (relating to Water Well Drillers).

(8) Waste handling, treatment, and management shall not create a nuisance condition or an environmental or a public health hazard; shall not result in the contamination of drinking water; shall conform with State regulations for the protection of surface and ground water quality.

(9) Solids, sludges, manure, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent pollutants from being discharged into waters in the state or creation of a nuisance condition.

(10) The operator shall prevent the discharge of pesticide contaminated waters into waters in the state. All wastes from dipping vats, pest and parasite control units, and other facilities utilized for the application of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent any significant pollutants from entering the waters in the state or create a nuisance condition.

(11) Dead animals shall be properly disposed of within three days as required by statute or by rules of the commission unless otherwise provided for by the executive director. Animals

shall be disposed of in a manner to prevent contamination of waters in the state or creation of a nuisance or public health hazard.

(12) Collection, storage, and disposal of liquid and solid waste should be managed in accordance with recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land disposal site shall be secondary to the proper disposal of waste and wastewater.

(13) Appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant shall be taken. Where potential spills can occur materials, handling procedures and storage shall be specified. Procedures for cleaning up spills shall be identified and the necessary equipment to implement a clean up shall be available to personnel.

§321.41. Other Requirements.

(a) Education and Training.

(1) Any CAFO owner/operator with greater than 300 animal units and located within an area specified in the definition of Dairy Outreach Program Areas in §321.32 of this subchapter (relating to Definitions) shall obtain authorization under this subchapter and, within twelve months of receiving such authorization, the owner/operator or his designee with operational responsibilities shall complete an eight hour course or its equivalent on animal waste management. In addition, that

owner/operator shall also complete at least eight additional hours of continuing animal waste management education for each two year period after the first twelve months. The minimum criteria for the initial eight hours and the subsequent eight hours of continuing animal waste management education shall be developed by the executive director and the Texas Agricultural Extension Service. Verification of the date and time(s) of attendance and completion of required training shall be documented to the pollution prevention plan.

(2) Where the employees are responsible for work activities which relate to compliance with provisions of this subchapter, those employees must be regularly trained or informed of any information pertinent to the proper operation and maintenance of the facility and waste disposal. Employee training shall inform personnel at all levels of responsibility of the general components and goals of the pollution prevention plan. Training shall include topics as appropriate such as land application of wastes, proper operation and maintenance of the facility, good housekeeping and material management practices, necessary recordkeeping requirements, and spill response and clean up. The operator is responsible for determining the appropriate training frequency for different levels of personnel and the pollution prevention plan shall identify periodic dates for such training.

(b) Inspections and Recordkeeping. The operator or the person named in the pollution prevention plan as the individual responsible for drafting and implementing the plan shall be responsible for inspections and recordkeeping.

(c) Recordkeeping and Internal Reporting Procedures. Incidents such as spills, other discharges or nuisance conditions, along with other information describing the pollution potential and quality of the discharge shall be included in the records. Inspections and maintenance activities shall be documented and recorded. These records must be kept on site for a minimum of three years.

(d) Visual Inspections. The authorized person shall inspect designated equipment and facility areas. Material handling areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system or the creation of a nuisance. A follow-up procedure shall be used to ensure that appropriate action has been taken in response to the inspection.

(e) Site Inspection. A complete inspection of the facility shall be done and a report documenting the findings of the inspection made at least once/year. The inspection shall be conducted by the authorized person named in the pollution prevention plan, to verify that the description of potential pollutant sources is accurate; the site plan/map has been updated or otherwise modified to reflect current conditions; and the controls outlined in the pollution prevention plan 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 as part of the pollution prevention plan. Records of inspections shall be maintained for a period of three (3) years.

(f) Additional Requirements. No condition of this authorization shall release the operator from any responsibility or requirements under other statutes or regulations, Federal, State or Local.

§321.42. Monitoring and Reporting Requirements.

(a) If, for any reason, there is a discharge to waters in the state, the operator is required to notify the executive director orally within 24 hours and in writing within 14 working days of the discharge from the retention facility or any component of the waste handling or disposal system. In addition, the operator shall document the following information to the pollution prevention plan within 14 days of becoming aware of such discharge:

(1) A description and cause of the discharge, including a description of the flow path to the receiving water body. Also, an estimation of the flow and volume discharged.

(2) 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.

(3) If caused by a precipitation event(s), information from the on site rain gauge concerning the size of the precipitation event.

(4) Unless otherwise directed by the executive director, facilities authorized under this subchapter shall sample and analyze all discharges from retention facilities. Sample analysis shall be documented to the pollution prevention plan.

(5) Samples shall consist of grab samples taken from the over-flow or discharges from the retention structure. A minimum of one sample shall be taken from the initial discharge (within 30 minutes). The sample shall be taken and analyzed in accordance with EPA approved methods for water analysis listed in 40 CFR 136. Measurements taken for the purpose of monitoring shall be representative of the monitored discharge.

(6) Sample analysis of the discharge must, at a minimum, include the following: Fecal Coliform bacteria; 5-day Biochemical Oxygen Demand (BOD5); Total Suspended Solids (TSS); ammonia nitrogen; and any pesticide which the operator has reason to believe could be in the discharge.

(7) In lieu of discharge sampling data, the operator must document description of why discharge samples could not be collected when the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples including weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.). Once dangerous conditions have passed, the operator shall collect a sample from the retention structure pond or lagoon. The sample shall be analyzed in accordance with paragraph (6) of this subsection.

(b) All discharge information and data will be made available to the executive director upon request. Signed copies of monitoring reports shall be submitted to the executive director if requested at the address specified in the request.

(c) Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under the provisions of this subchapter, including reports of compliance or noncompliance shall be subject to administrative penalties not to exceed $10,000 per violation. Such person(s) may also be subject to civil and criminal penalties pursuant to the Texas Water Code, §26.122 and §26.213.

(d) The operator shall retain copies of all records required by this subchapter for a period of at least three years from the date reported. This period may be extended by request of the executive director at any time.

(e) The operator shall furnish to the executive director, within a reasonable time, any information which the executive director may request to determine compliance with the provisions of this subchapter. The operator shall also furnish to the executive director, upon request, copies of records required to be kept by the provisions of this subchapter.

(f) When the operator becomes aware that they failed to submit any relevant facts or submitted incorrect information in any report to the executive director, they shall promptly submit such facts or information.

(g) All reports or information submitted to the executive director shall be signed and certified in accordance with §305.44 of this title (relating to Signatories to Applications).

(h) The operator shall maintain ownership, operation or control over the retention facilities, disposal areas and control facilities identified in the final site plan submitted with the application under §321.34 or 321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). In the event owner loses ownership, operation or control of any of these areas, the operator shall notify the executive director prior to such loss of control and immediately request and file an application to amend the existing authorization, an application for a new authorization under this subchapter or present the executive director with a plan to cease all concentrated animal feeding operations at that site.

(i) Any operator required to obtain authorization under §321.33 of this title (relating to Applicability) shall locate and maintain all facilities in accordance with the final site plan submitted with the application as required under §321.34 or 321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). In the event the operator does not properly locate and maintain such facilities in accordance with the final site plan they shall be deemed in noncompliance with the provisions of this subchapter.

(j) Operator shall furnish to the executive director soil testing laboratory results of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of this subsection.

§321.43. Notification.

All new animal feeding operations which confine more than 300 animal units and/or any animal feeding operation which confines more than 300 head of a species or combination of species not specifically listed under the definition of CAFO as stated in §321.32 of this title (relating to Definitions) and have a potential to discharge into the waters in the state shall notify the executive director of their business name, physical location including a map or hand drawn sketch, mailing address and number of head in confinement. Such notification shall be in writing and signed by the owner/operator and shall be submitted not later than 180 days of the effective date of these rules or commencement of operation, whichever is later. Additionally, should an animal feeding operation covered by this section change ownership or substantially change the number of head in confinement, that operator shall submit an amended notification. No fees are associated with notification under this section.

§321.44. Dairy Outreach Program Areas.

For the purposes of this subchapter the Dairy Outreach Program Areas includes all of the following counties: Erath, Bosque, Comanche, Hamilton, Johnson, Hopkins, Wood and Rains. The commission shall review the areas designated under this section on at least a triennial basis to determine whether counties should be deleted or other areas should be added. At any time, areas under this section may be added or deleted by the commission in accordance with the rulemaking process.

§321.45. Effect of Conflict or Invalidity of Rule.

(a) If any provision of this subchapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the provisions contained in this subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

(b) To the extent of any irreconcilable conflict between provisions of this subchapter and other rules of the commission, the provisions of this subchapter shall supersede.

§321.46. Air Standard Permit Authorization .

Pursuant to Texas Clean Air Act Section 382.051, any CAFO which meets all of the requirements for registration or individual permit outlined in this subchapter or all the requirements for operating under a CAFO general permit and which satisfy this section is hereby entitled to an air quality standard permit authorization in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Facilities which meet all the "Air Quality Only" requirements in §321.39 of this title (relating to Pollution Prevention Plans) and obtain either a registration or individual permit or a CAFO general permit are eligible for an air quality standard permit. In addition to meeting the "Air Quality Only" requirements, the applicant must also demonstrate compliance with the following:

(1) Construction or expansion of a new animal feeding operation. Animal feeding operations not in operation on the date of the adoption of these amended rules, must document compliance with either paragraph (1)(A) or (1)(B) of this section at the time of application for amendment, transfer, registration or an individual permit under this subchapter or for a CAFO general permit.

(A) Operator shall not locate any permanent odor sources within 0.50 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or

(B) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection. Operator shall also develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum

address manure collection, manure and wastewater storage and treatment, land application, dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.

(2) Expansion of an existing animal feeding operation. Animal feeding operations in operation on the date of the adoption of these amended rules must document compliance with either paragraph (2)(A) or (2)(B) of this section at the time of application for transfer, amendment, registration or an individual permit under this subchapter or for a CAFO general permit.

(A) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or

(B) Operator shall develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum address manure collection, manure and wastewater storage and treatment, land application, dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.