

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§321.31-321.37, 321.39-321.42, 321.46, and new §321.47, concerning technical requirements and administrative procedures relating to authorizations of concentrated animal feeding operations (CAFOs). The amendments and new section are adopted with changes to the proposed text as published in the January 8, 1999 issue of the *Texas Register* (24 TexReg 242).

The purpose for adopting the amendments to these rules is to provide for state assumption of National Pollutant Discharge Elimination System (NPDES) permitting of CAFO facilities. On September 14, 1998, the United States Environmental Protection Agency (EPA) authorized Texas to implement its Texas Pollutant Discharge Elimination System (TPDES) program. TPDES is the state program to carry out both the NPDES, a federal regulatory program to control discharges of pollutants to surface waters of the United States, and the corresponding state permitting program. As part of the TPDES program, Texas has assumed responsibility for authorization of CAFO facilities.

The current Subchapter B CAFO rules were adopted by the commission on August 19, 1998 and became effective on September 18, 1998. TNRCC's current authorizations by rule for CAFOs are state-only authorizations. The purpose of these rules is to implement NPDES assumption and to make the existing rules consistent with federal regulations. As amended, this subchapter will allow the TNRCC to administer a single permitting program for NPDES and state permits and provide CAFOs the opportunity to apply for just one permit to gain both state and federal coverage.

The commission has taken into consideration the following state and federal actions in proposing these amendments to Subchapter B: (1) EPA Region VI General Permit for CAFOs (March, 1993), which establishes the currently effective technical and procedural requirements for CAFOs to meet in order to maintain federal authorization to discharge under NPDES; (2) Proposed EPA Region VI NPDES General Permit for CAFOs (1998), which proposes requirements for permit coverage for CAFOs that discharge or have a potential to discharge process wastewater into waters of the United States; (3) §26.040 of the Texas Water Code, under which Subchapter B was originally adopted and which directed that the commission may by rule regulate and set requirements and conditions for discharges of waste whenever the commission determines that requiring individual permits is unnecessarily burdensome both to the waste discharger and to the commission; (4) HB 1542, 75th Texas Legislature (1997), which amended §26.040 of the Texas Water Code. This bill specifies that all current rules adopted by the TNRCC under §26.040 as it read prior to the effective date of the HB 1542 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; (5) Proposed EPA Region VI NPDES General Permit for CAFOs Located in Impaired Watersheds (1998), which proposes additional requirements for permit coverage for CAFOs and others that discharge or have a potential to discharge process wastewater into a watershed impaired by CAFO-related activities; (6) NPDES Memorandum of Agreement between the TNRCC and EPA Region VI (September 14, 1998), which establishes policies, responsibilities, and program commitments for assumption of the NPDES program by the TNRCC; (7) Federal NPDES Regulations contained in 40 Code of Federal Regulations (CFR) Parts 122, and 412; (8) EPA and United States Department of Agriculture (USDA) *Unified National Strategy for Animal Feeding Operations* (March 9, 1999) which

proposes goals and performance expectations for animal feeding operations; (9) Environmental Assessment and Finding of No Significant Impact on the Proposed Reissuance of EPA's NPDES General Permit for CAFOs (January 1999).

In its adoption of amendments to Subchapter B in 1998, the commission changed the existing technical and procedural requirements for some CAFOs. The CAFO permitting procedure as it operated prior to the adoption of the permit-by-rule system in 1995 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 that was necessary when all applications had to be for individual permits. Such criticism indicated that the long processing time 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 making 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 in 1995. By judgement rendered in *ACCORD Agriculture, Inc. v TNRCC* (Cause No. 96-00159), 353rd Judicial District of Travis County (*Accord*) in May 1998, Subchapter K was set aside due to procedural defects in its adoption. The district court's judgement setting aside Subchapter K was recently upheld by the 3rd Court of Appeals by a decision rendered on June 17, 1999. The 1998 amendments to Subchapter

B were 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 district 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 are 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, either chronic or catastrophic, greater than a 25-year, 24-hour event. The commission has elected to regulate CAFOs through the permit-by-rule under §26.040 of the Texas Water Code because generally, the permitted discharges from these facilities will be relatively small quantity discharges. This permit authorizes discharges that occur only occasionally and only in the event of a chronic or catastrophic rainfall event. Since discharges may occur only in the presence of large quantities of rainwater, the pollutant content of the discharged effluent will be small. As such, these discharges will be infrequent and small in total quantity compared to other types of industrial and municipal facilities that discharge continuously. Such action is consistent with the provisions and philosophy of the EPA Region VI General Permit for CAFOs. The 1998 amendments to Subchapter B provided a process of gaining authorization similar in nature and structure to that used by EPA Region VI. Amendments adopted today will complete the process of bringing the technical requirements of the state program up to those of the federal program, allowing the CAFOs in the state to achieve a single set of standards and provide the basis under which the state will efficiently administer assumed administration the TPDES CAFO program upon authorization of the program.

Before institution of permits by rule, in addition to obtaining an individual water quality permit, 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 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). These adopted amendments to Subchapter B not only are consistent with the provisions

of the EPA Region VI General water quality Permit for CAFOs, and they go even further by including additional requirements which address the commission's responsibilities for protection of both groundwater and air quality.

The permit by rule system initiated by the adoption of Subchapter K; the 1998 and these newly adopted amendments to Subchapter B provide a process under which CAFOs can gain coverage or authorization fully protective of both air and water quality through a single process. This combined process will conserve limited resources and manpower. The 1998 amendments to Subchapter B were 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 CAFOs. In addition to providing more consistency with the federal regulations, the 1998 amendments, and this amendment 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.

Subchapter B allows 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 best available control technology (BACT) for a facility applying for an individual permit, including the requirement to develop and operate under a pollution prevention plan (PPP), 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 regulations, 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 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. The 1998 and this amendment to Subchapter B 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, the 1998 and these amendments create 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 amended rules 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 adopted Subchapter K and then the 1998 amendments and these amendments to Subchapter B, in part, as a way to direct such resources to those cases where circumstances make an individual permit necessary for effective regulation.

In consultations with EPA on this draft permit-by-rule, EPA expressed concerns that the cumulative or individual permitted discharges from CAFOs might result in or contribute to excursions above state water quality standards. In its comments on the proposal, the U.S. Fish and Wildlife Service (USFWS) recommended that Subchapter B not authorize new CAFOs: (1) in Oldham, Potter, Hutchinson, Roberts, and Hemphill Counties that have the potential to discharge directly into the Canadian River; (2) where into waters in areas designated as critical habitat for the Concho Water Snake; or (3) where they may discharge into aquatic systems designated by USFWS as being of critical concern or high priority. Also, USFWS recommended that these rules establish additional requirements for CAFOs already operating in those watersheds in order to reduce the frequency and volume of permitted discharges.

EPA, USFWS, and TNRCC agree that it is the commission's responsibility to incorporate into its permits those conditions necessary to maintain state water quality standards where they are currently being met and to attain them where they are not. For those Texas waters that are currently maintaining their approved water quality standards, there is little, if any, verifiable evidence that CAFO management practices and discharges that have been permitted under existing EPA and Texas rules and permits have caused or contributed to impairment of aquatic life uses. The commission, EPA, USFWS, and the Texas Parks and Wildlife Department (TPWD) agree, however, that more information is needed in order to accurately assess whether changes are needed in permitting requirements for CAFOs. Therefore, the commission and EPA have agreed that a comprehensive study will be designed and executed under the joint planning and management of our agencies, with participation of USFWS, TPWD, and other state and federal agencies with appropriate expertise. The objective will be to define and then to answer relevant questions with regard to the effects of permitted CAFO discharges.

The study will be conducted in two phases and its goal will be to produce peer reviewed, verified, and reproducible results in three to five years. Phase I will consist of gathering, cataloging, and analyzing currently available data including, for example, records of rainfall events, reported CAFO discharges, and streamflow data. It will result in the selection of two or more distinct study areas in Texas for study and sampling in Phase II and in sampling in preparation for analysis in during Phase II. In Phase I, we will also analyze available short and long term modeling protocols for use in Phase II. If feasible and agreeable, some aspects of Phase II may be initiated during Phase I.

Phase I will be completed in 12-15 months, at which point EPA and TNRCC will publish in the *Texas Register* for public comment, a joint report consisting of the results of Phase I and the plan for Phase II. Depending on the results of Phase I, the second phase will consist of conducting modeling and instream sampling during discharge events and analysis of best management practices, structural requirements, and other means to affect the quantity, frequency, and content of CAFO discharges. The results will be used by TNRCC as a resource for the determination of what changes, if any, should be made in Subchapter B at its renewal.

At the conclusion of Phase I, EPA and TNRCC will consider whether any amendment to Subchapter B is necessary at that time. As set out in the Memorandum of Agreement governing administration of the TPDES program, TNRCC will propose to amend this CAFO permit by rule in response to a specific and well-grounded request by EPA to do so. Likewise, under TNRCC rules, the commission may also make an appropriate amendment in response to a petition from any governmental agency or member of the public to do so, or if the executive director determines that information not available at the time of issuance of this permit by rule justifies amendment of the permit terms.

Under its rules, the commission may make an appropriate amendment at any time in response to a petition to do so or if the executive director determines that information not available at the time of adoption of this permit by rule justifies amendment of the permit terms. All registrants for the permit by rule adopted today should remain aware of the commission's authority and duty to amend the terms of the permit any time it is necessary to do so in accordance with commission rules implementing state water quality standards, the state permitting program, or TPDES. Such amendments may result from

the total maximum daily loads (TMDL) process, the study described in this preamble, or any other appropriate cause. The commission points out, as well, that under §321.33(b), the executive director may at any time require a facility to apply for any individual permit, even if that facility holds a registration under the permit by rule. The adoption of a TMDL or an implementation plan for a TMDL is a factor that would be considered by the commission as grounds for making such a requirement. The commission also has the option of issuing statewide or area-specific general permits in response to TMDLs, and requiring registrants to transfer to those or to obtain a site-specific individual permit.

The commission notes two additional facts in response to EPA's and USFWS' concerns. First, the commission is currently conducting its TMDL analysis in the Upper North Bosque River segment in which CAFO operations have been identified as one factor in existing water quality impairment. That process is scheduled to be completed by the end of 1999, and implementation will begin at that point. The commission will be developing TMDLs in all impaired segments over the next several years in accordance with the schedule and plan approved by EPA. When the results of the TMDL process in the Bosque or any other impaired segment warrant amendment to the Subchapter B permit by rule or any other permit in the subject watershed, the commission will act under the authority of its rules to amend the permit if appropriate to do so at that time.

Second, the Texas Legislature has added §26.0286 to the Texas Water Code to require individual permits, rather than general permits or registrations under Subchapter B, to authorize new CAFOs to operate within certain distances of any body of surface water that is the sole source of drinking water for

a municipality. The commission's staff is currently drafting proposed rules to implement that amendment with regard to over 150 such surface water bodies.

EXPLANATION OF ADOPTED RULES

As amended, §321.31, Waste and Wastewater Discharge and Air Emission Limitations, deletes the term “disposed of” in order to clarify that disposal of CAFO waste or wastewater is not authorized by Subchapter B. Rather, the land application of manure and wastewater to cropland may be authorized at levels that do not exceed agronomic rates.

This amended section also clarifies that discharges authorized by subsection (b) are restricted to discharges from properly operated facilities that have valid permits or registrations.

The amended section also provides that facilities authorized under these rules must comply with 30 TAC §305.125 and all applicable permit conditions contained in TNRCC rules.

As amended, in §321.32, Definitions, the term “weaned swine weighing under 55 pounds” was added in the definitions for “animal unit” and “CAFO” to reflect that amended rules regulate weaned swine weighing under 55 pounds. The definition for “new concentrated animal feeding operation” was modified to clarify that a CAFO would be considered new if it was not in operation on August 19, 1998. The definition for “CAFO general permit” was modified to accomplish consistency between state and federal programs. The definition for agronomic rates was changed to provide that land application of animal waste or wastewater must enhance soil productivity.

As amended, §321.33, Applicability, provides that as part of NPDES assumption, TNRCC adopted the EPA's 1993 CAFO general permit, which remains in effect as TPDES authorization for those facilities with notice of intents filed with EPA and approved prior to March 10, 1998. That permit will cease to be effective when replaced by the TPDES permit by rule adopted today. Facilities that were operating under the expired EPA issued general permit must now obtain TPDES authorization from TNRCC. Within 60 days of the effective date of these amended rules, each such facility shall apply for authorization under this amended subchapter and shall continue to operate the facility under the terms of the expired authorization until final disposition of the application. Facilities already holding individual TPDES permits issued by TNRCC need no new or additional authorization.

Any facility that holds an authorization from the TNRCC and that is not required to obtain NPDES authorization shall continue to operate under the terms of its existing TNRCC authorization until expiration, amendment, or termination. All such TNRCC authorizations shall expire five years from the effective date of these amended rules, unless such authorization specifies an earlier expiration date.

Any facility that holds an authorization from the TNRCC and that is required, but does not hold, a current NPDES authorization, shall file an application under this subchapter within 60 days of the effective date of these rules. Failure to timely submit an application may result in enforcement proceedings.

By written request to the executive director, the owner or operator of any facility which is not required to obtain NPDES authorization may request a transfer of its authorization from an individual permit

granted by the commission to a registration. 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.

Any facility with an unexpired authorization under Chapter 321, Subchapter K and which is not required to obtain NPDES authorization, may request a transfer of its authorization to a registration under this subchapter if a written request is submitted on forms approved by the executive director and the facility operates in accordance with the provisions of this subchapter. Those holding unexpired authorizations under Subchapter K are not excluded from this transfer provision. Subchapter K was declared invalid, and six specific Subchapter K registrations were set aside by judgment of a State District Court in 1998 which was recently affirmed by the 3rd Court of Appeals. This proposal provides an optional vehicle for facilities with unexpired Subchapter K authorizations not specifically nullified by judicial order to transfer to Subchapter B.

An owner or operator holding a current authorization is required to obtain an amendment prior to making any substantial modification to the facility. Substantial modifications are those that result in an increase in the number of animals authorized to be confined, a change in the required buffer zone or required lagoon capacity, a change in boundaries of the site plan, or a violation of any management practice or physical or operational requirement of this subchapter.

As amended, §321.34, Procedures for Making Application for an Individual Permit, adds an amendment procedure for individual permits. In addition, only facilities which are not required to obtain NPDES authorization under federal law are eligible for automatic renewal of their permit.

In this section as amended, all applications for permit renewal must be administratively and technically complete and meet all applicable technical requirements of this subchapter.

In this section as amended, a facility which is not required under federal law to obtain NPDES authorization may apply for a state-only individual permit, for a term of five years, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event.

In this section as amended, notice, public comment, and hearing on applications shall be conducted in accordance with commission rules governing individual permits issued under Chapter 26 of the Texas Water Code.

As amended, §321.35, Procedures for Making Application for Registration, subsection (a)(1), was amended to clarify that the reference to the adoption of these amended rules is in 1999.

In this section as amended, a facility which is not required under federal law to obtain NPDES authorization may apply for a state-only registration, which authorizes the discharge or disposal of waste

or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event, or may transfer from an individual permit to such a registration in accordance with §321.33(l).

In this section as amended, all applications for permit renewal must be administratively and technically complete and meet all applicable technical requirements of this subchapter. In addition, this section, as amended, clarifies that all renewal applications, except renewal applications for facilities that do not require NPDES authorization and which meet the requirements of subsection (h)(1), will be processed according to §321.36 and §321.37.

In this section as amended, application procedures for registrations were changed to clarify the existing amendment process and to allow the executive director to determine which PPP components are necessary in an application. However, the entire PPP must be made available, with the application, for public inspection at the applicant's place of business and at a public place within the county.

In this section as amended, registrations issued under §321.37 or §321.47 of this subchapter shall expire five years after the effective date of these amendments (1999), and no new registrations shall be issued after that date. If the commission proposes to amend or readopt these rules prior to such expiration date, all registrations shall remain in effect until final commission action on the proposed amendment or readoption.

As amended, in §321.36, Notice of Application for Registration, within five working days of declaration of administrative and technical 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 subsection (c) of this section, and shall forward that statement to the applicant.

As amended, §321.37, Action on Applications for Registration, requires the executive director, after review of any application for registration, to approve or deny the application in whole or in part.

The section was amended to provide that the executive director may not approve an application for registration to a facility if prohibited under §26.0286 of the Texas Water Code relating to sole source surface water supplies.

As amended, §321.39, Pollution Prevention Plans, establishes requirements for land application of waste or wastewater. Some of the components that must be addressed in the PPP include: a site map showing the location of any land application areas; a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and all nutrient analysis data.

The PPP must include a list of any significant spills at the facility after September 18, 1998.

In the amended section, the proposed requirement for two feet of freeboard was replaced with the existing requirement of one foot of freeboard.

This amended section requires the PPP to describe measures that will be used to minimize entry of non-process wastewater into retention facilities. Such measures may include the construction of berms, embankments, or similar structures.

The section was amended to provide that when an annual soil sampling analysis for extractable phosphorus indicates a level greater than 200 parts per million (reported as P) in Zone 1 for a particular waste and/or wastewater land application field, the operator cannot apply wastewater to the affected application area unless the land application is implemented in accordance with a detailed nutrient utilization plan developed and certified by Natural Resource Conservation Service (NRCS), the Texas State Soil and Water Conservation Board, Texas Agricultural Extension Service, agronomist or soil scientist on full-time at an accredited university located in the State of Texas, or any professional agronomist or soil scientist certified by the American Society of Agronomy (ASA) and filed with the executive director. The executive director will issue technical guidance to assist in the development of complete and effective nutrient utilization plans.

The section was amended to provide that land application under the terms of the Nutrient Utilization Plan may commence 30 days after the plan is filed with the executive director, unless prior to that time the executive director has returned the plan for failure to comply with all the requirements of this subsection. The nutrient utilization plan shall, at a minimum, evaluate and address the following factors to assure that the beneficial use of manure is conducted in a manner that prevents phosphorus impacts to water quality: (1) slope of application fields (as a percentage) and distance of the land application area from waters in the state; (2) average rainfall for the area for each month; (3) soil series, soil type, soil

family classification, and pH values of all soils in application fields; (4) chemical characteristics of the waste, including total nitrogen and phosphorus; (5) recommended rates, methods, and schedules of application of manure and wastewater for all fields; (6) crop types, maximum crop uptake rate, and expected yield for each crop; and (7) best management practices to be utilized to prevent phosphorus impacts to water quality, including any physical structures and vegetative filterstrips.

As amended, §321.40, Best Management Practices, provides that there shall be no water quality impairment to public and neighboring private drinking water wells or surface water or watercourses due to waste handling at the permitted facility. Vegetative buffer strips shall be maintained in accordance with NRCS guidelines, with a minimum buffer of no less than 100 feet of vegetation to be maintained between waste or wastewater application areas and surface water and watercourses.

Under the amended section, all herbicides and pesticides shall be stored, used, and disposed of in accordance with label instructions. There shall be no disposal of herbicides, pesticides, solvents or heavy metals, or of spills or residues from storage or application equipment or containers, into retention structures. Incidental amounts of such substances entering a retention structure as a result of stormwater transport of properly applied chemicals is not a violation.

As amended, §321.41, Other Requirements, includes grammatical changes which were made.

As amended, §321.42, Monitoring and Reporting Requirements, require that within 14 working days of a discharge from the retention facility the operator shall document the discharge to the PPP and submit that information to the appropriate regional office.

As amended, §321.46, Air Standard Permit Authorization for a CAFO General Permit, clarifies that 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.

As amended, this section replaces the term “date of adoption of these amended rules” with “August 19, 1998.”

As amended, §321.47, Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization, establishes procedures under which an existing facility may submit written notice that it will operate as required under this amended subchapter as an authorized TPDES facility.

As amended, this section replaces the term “45 days of the effective date of these amended (1999) rules” with the term “60 days of the effective date of these amended (1999) rules.”

As amended, subject to the provisions of §321.35(h) of this title (relating to Procedures for Making Application for Registration), a facility for which a complete and accurate written notice has been submitted in accordance with this section may operate as an authorized TPDES facility under this amended subchapter for the remainder of the unexpired term of their current authorization.

As amended, this section clarifies that initial TPDES authorization under this section does not require compliance with “air quality only” provisions of these rules that can be only accomplished by making structural changes to a structure that is currently in compliance with the design and engineering standards in the facilities latest permit.

REGULATORY IMPACT 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, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule amendment, which is intended to protect the environment and reduce risks to human health, will not have a material adverse affect on the economy or sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule amendment will not have a material adverse affect on the economy or a sector of the economy, productivity, and jobs because the rule changes will allow the TNRCC to fulfill the requirements of TPDES assumption, thereby eliminating the need to obtain separate federal and state authorization for operating a CAFO in Texas. The adopted rule amendment will not have a material adverse affect on the environment or the public health and safety of the state or a sector of the state because the rule changes will not make any of the technical requirements for operating a CAFO less stringent.

TAKINGS IMPACT ANALYSIS

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the Subchapter B rule amendments is to allow the TNRCC to fully implement the NPDES CAFO program in Texas by making the existing Subchapter B rules consistent with the EPA Region VI CAFO general permit requirements. The rule changes will also allow the TNRCC to fulfill the requirements of TPDES assumption and to administer one permitting program for both NPDES and state permits. This action will not burden private real property that is the subject of the regulation because the amended rules will enable the TNRCC to fully implement the NPDES program for CAFOs in Texas and thereby eliminate the need to obtain separate federal and state authorization for operating a CAFO.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

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 policies of the Coastal Management Program (CMP) contained in Chapter 501, Subchapter B of Title 31. These 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.

Consistency Determination: The commission has reviewed this rulemaking for consistency with the applicable CMP goals and policies pursuant to 31 TAC §505.22 and has found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the adopted rule include the protection, restoration, and

enhancement of the diversity, quality, quantity, functions, and values of CNRAs 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 adopted rule include the following:

1) discharges in the coastal zone shall comply with water-quality-based effluent limits; 2) discharges in the coastal zone 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 rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because these rules require that any new proposed CAFO located within one mile of a CNRA obtain an individual permit. This 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.

HEARING AND COMMENTERS

A public hearing was held on February 16, 1999. Oral testimony was received from four persons representing the following: ACCORD Agriculture, Inc.; Agri-Waste Technology, Inc.; Jackson Walker; and Consumers Union Southwest Regional Office.

The 30-day public comment period closed on February 16, 1999. Fourteen commenters submitted written comments. The Texas Pork Producers Association, ProAg, and the Texas Poultry Federation

either supported the rules as written or generally supported the rules with suggested changes. The law firm of Henry, Lowerre, Johnson, Hess and Frederick; Greenbelt Municipal and Industrial Water Authority; and National Wildlife Federation either opposed the rules as written or generally opposed the rules and recommended changes be made to the rules as proposed. Agri-Waste Technology, Inc.; Alan Plummer Associates, Inc.; Texas Cattle Feeders Association; Texas Board of Professional Engineers; The law firm of Jackson Walker; The law firm of Lemon, Shearer, Ehrlich, Phillips and Good; McCulley, Frick and Gilman, Inc.; and Consumers Union Southwest Regional Office (Consumers Union) did not generally support or oppose the rulemaking, but suggested changes to the rules as proposed. Written comments provided by Henry, Lowerre, Johnson, Hess and Frederick are listed in the analysis of testimony and comments under the name of ACCORD Agriculture, Inc.

ANALYSIS OF TESTIMONY

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

Consumers Union recommended that it should be state policy to set more stringent standards for facilities located in watersheds which contain multiple CAFOs. The state should look at the cumulative effects of new CAFOs in light of existing CAFOs. The commission should more stringently regulate watersheds that contain multiple CAFOs before water quality is negatively impacted, not after the environmental damage has already been done. ACCORD Agriculture, Inc. recommended that CAFOs which are located in clusters are more likely to have a negative impact on water quality than isolated CAFOs. The combined discharges can easily overburden receiving waters. CAFOs which are seeking to locate or expand in watersheds where clusters of other CAFOs are already located should be required to apply for an individual permit.

The commission recognizes the significance of the potential for cumulative effects of multiple CAFOs within a given watershed, and is exploring and addressing it as a part of the overall water quality program. The commission has expanded its watershed management program to address impacts of all sources of pollution within a watershed with the initiation of the evaluations of TMDL in a number of watersheds which have been demonstrated to have water quality impairments. The TMDL process provides an opportunity to evaluate all sources of contaminants that might contribute to the impairment and will lead to development of recommended actions that should be implemented to improve and protect water quality in that watershed. The commission considers the TMDL process to be a vital step needed to establish the technical foundation for development of specific regulatory and voluntary actions that need to be implemented to address individual and cumulative impacts of contaminants, and to improve and protect water quality. The commission will apply the recommendations developed in the TMDL by amendments to individual wastewater permits through the TPDES program or by adopting special watershed rules such as those found in 30 TAC Chapter 311. 30 TAC Chapter 311, Subchapter A deals with special water quality protection for the Lake Travis watershed and Subchapter C of this same chapter addresses water quality protection for the Clear Lake/Clear Creek watershed.

The commission has reviewed its data to determine whether there are watersheds with multiple facilities similar to the situation in the Bosque River and Lake Fork Creek watersheds and has not found any other areas of the state where multiple CAFOs have the potential to have a cumulative impact on water quality. The concern for potential water quality degradation due to cumulative

effects of multiple facilities within the Bosque River and Lake Fork Creek watersheds led to the designation of Dairy Outreach Program Areas (DOPAs). Dairy operations within the eight counties included in the DOPAs are required to meet more stringent requirements such as filing for a permit or registration for facilities with 300 animal units or more and a requirement that owners/operators obtain training and education credits for waste handling procedures every two years. In addition to being included in a DOPA, a portion of the Bosque River has been included on the list of impaired waters within the state and is the only listed watershed in which water quality degradation has been linked to CAFO operations.

With assistance from a number of local and state agencies, and a stakeholder group within the watershed, the commission is coordinating the development of a TMDL load evaluation to further identify cumulative water quality impacts from CAFOs as well as other sources of contaminants in the watershed. The commission will use the TMDL process to identify other actions that may be necessary to further improve and protect water quality. The commission will establish an implementation plan that may include revised effluent limits or design and operating parameters for individual wastewater permits or development of a watershed specific rule such as those found in 30 TAC Chapter 311 or development of a watershed specific general permit under §26.040, Texas Water Code as amended by HB 1283, 76th Legislature. These more specific rules, permits, or general permits will supersede more general authorizations such as these rules.

The commission has also initiated a study with cooperation from the TPWD, the Texas State Soil and Water Conservation Board, EPA, USFWS, and NRCS to evaluate potential impacts of

discharges from wastewater lagoons and retention ponds during runoff conditions that occur with chronic or catastrophic rainfall. This information will provide additional information on the potential for individual and multiple facilities to impact water quality.

ACCORD Agriculture, Inc., commented in subsection (a) that the commission cannot authorize continued discharges from CAFOs pursuant to its old rules because authorizations pursuant to those rules do not qualify as TPDES authorizations. Any discharge that does not have a TPDES authorization is illegal.

Pursuant to Chapter 1, Part III., Section C (b) of the Memorandum of Agreement between EPA and TNRCC concerning NPDES, any facility operating with a valid NPDES and state coverage may continue to operate under the conditions of their permit until expiration. These amended rules do not forgive any past violations by facilities that have been discharging without proper NPDES authorization if those facilities were required to obtain such authorization under federal law. The commission also points out that not all facilities that are required to have a state permit are also required to have NPDES authorization.

National Wildlife Federation and ACCORD Agriculture Inc. recommended that subsection (b) be amended to state that wastewater may be discharged only from authorized facilities that are properly designed, constructed, and operated. National Wildlife Federation also recommended that the second sentence in subsection (b) be revised to make clear that proper operation is also a condition of not being

subject to an effluent limitation. The language should be changed to make clear that proper operation is required in order for any discharge to be authorized.

The commission responds that the rules require that facilities must be properly designed and constructed in §321.39(b). However, the commission agrees that discharges authorized by subsection (b) should be restricted to discharges from properly operated facilities and, therefore, the first sentence in subsection (a) has been changed to: “...from a facility designed, constructed, and properly operated to contain....” The second sentence has also been changed to: “...discharges from detention structures constructed, operated and maintained to contain...and the retention structure has been properly operated and maintained.” In addition, the commission added the following sentence at the end of subsection (b): “Facilities authorized under this rule shall comply with §305.125 of this title (relating to Standard Permit Conditions) and all applicable permit conditions contained in TNRCC rules.” In addition, the rule has been modified to clarify that discharges under subsection (b) are only authorized from CAFOs authorized to operate under this subchapter.

Consumers Union recommended that subsection (b) be amended to correspond to the EPA Region VI proposed CAFO general permit, Part I.B., Permit Coverage and to read: “Wastewater may be discharged to waters in the state or of the United States only when rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed, maintained and operated to contain all process generated wastewaters resulting from the operation of the CAFO (including but not limited to contaminated runoff from corrals, stock piled manure or silage piles,

overflow from storage ponds, overflow from animal watering systems which are contaminated by manure, drainage of wastewater from land application areas, contaminated runoff from land application fields in which wastewater is applied at greater than the agronomic rate, runoff from fields on which manure has been applied by placement on or in the soil if such runoff results in a direct discharge of manure to waters of the US., and discharge of wastewater from retention structures to surface water via a hydrologic connection) plus the runoff (storm water) from a 25-year, 24-hour rainfall event from the location of the facility authorized under this subchapter.” ACCORD Agriculture, Inc., also recommended that rules be amended to read: “discharge limitations include, but are not limited to, the following discharge prohibitions: (1) Discharges of process wastewaters from control structures such as lagoons and animal confinement and maintenance areas to waters of the State or United States by means of a hydrologic connection is prohibited. (2) Contaminated run-off or drainage of land applied wastewater from land application areas is prohibited where it will result in a direct discharge of pollutants to waters of the State or the United States. (3) Contaminated run-off from fields on which manure has been land applied is prohibited where it will result in a direct discharge of pollutants to waters of the State or the United States. Manure will not be applied to land when the ground is frozen or saturated or during rainfall.”

The commission responds that under §321.31(a) the rule states that there shall be no discharge of disposal or waste or wastewater from animal feeding operations into or adjacent to waters in the state except in accordance with subsection (b). Under §321.32(36) “wastewater” includes process-generated wastewater. The main difference between the first sentence of subsection (b) and the suggested language from the EPA Region VI Proposed CAFO General Permit is the

reference to “waters of the United States” and the list of examples of process-generated wastewaters resulting from the operation of a CAFO. It is not necessary to add “waters of the United States” into the subsection (b) because “water in the state” includes “waters of the United States,” plus groundwater. It is also unnecessary to add the list of examples of discharges of process-generated wastewater resulting from CAFO operations because this subchapter clearly indicates that such activities are prohibited.

For example, under §321.39(f)(19)(A), the discharge or drainage of irrigated wastewater is prohibited when it will result in a discharge of pollutants into or adjacent to waters in the state. Under §321.39(f)(21), storage and land application of manure shall not cause discharges of pollutants to water in the state. Also, under §321.32(30), “process-generated wastewater” is any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which come 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. The examples of discharges in the suggested language clearly fall within the definition of “process-generated wastewater” which would be prohibited under §321.31 and, therefore, inclusion into the rule is unnecessary.

ACCORD Agriculture, Inc. and Consumers Union recommended that all references to "waters in the state" in the rules be amended to include waters of the United States since Texas now exercises NPDES authority.

The commission disagrees with this comment because the term “water in the state” includes all waters of the United States plus groundwater. Although TPDES is a federally authorized program it is implemented under Texas law, which determines what is covered by the program (see Texas Water Code, §26.121).

§321.32. Definitions.

Texas Cattle Feeders Association recommended that in the definition of “agronomic rate,” the word "productivity" be replaced with "quality."

The commission responds that “agronomic rate” as defined in §321.32(a) sets the limits for the land application of waste and wastewater. The standard is that land application must enhance the productivity of soil and crop production. While improved soil quality may produce the result of increased productivity, it is productivity that is the regulatory standard. Therefore, no change has been made to the rule.

National Wildlife Federation and Consumers Union recommended that the definition for agronomic rates be expanded, in order to be consistent with sewage sludge requirements, to include the following language: (1) minimize the amount of nutrient runoff to surface waters; and (2) which minimizes the nitrogen and phosphorus in the wastes and/or wastewater that passes below the root zone of the crop or vegetation grown on the land to the groundwater. National Wildlife Federation indicated that this would also make the definition more consistent with that found in the draft EPA Region VI CAFO General Permit.

The commission responds that the adopted definition for agronomic rate is not consistent with requirements for land application of sewage sludge related to nutrient runoff or minimization of nutrients that pass below the rootzone, but it is consistent with the definition in the draft EPA Region VI CAFO general permit. In addition, §321.39(f)(19)(A), 321.39(f)(19)(D), 321.39(f)(21), 321.39(f)(24)(G), and 321.40(9) prohibit the discharge of pollutants into water in the state resulting from the land application of waste and wastewater.

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

The commission responds that no changes are necessary because the rule is clear that the determination of whether a facility is an AFO is based on the total number of animals in confinement for the time specified, regardless of the term of confinement of any individual animal.

Consumers Union commented that the definition of animal feeding operation, the terms "beneficial use" and "disposal" are not completely interchangeable. Beneficial use should be defined to mean land application based on crop requirements that does not pose an environmental/water quality hazard.

The commission responds that land application of animal waste in accordance with these rules is beneficial use, not disposal. The term “beneficial use” means the land application of animal waste

or wastewater at agronomic rates. Manure applications at agronomic rates will supply nutrients and other elements necessary for increased productivity for agricultural products. The change from “disposal” to “beneficial use” was made to clarify that waste disposal is not authorized under these rules.

ACCORD Agriculture, Inc. recommended that the definition for AFO 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. ACCORD Agriculture, Inc. also commented that EPA has indicated that the provision regarding vegetative growth is intended to distinguish between feedlots and pastures. Because confined animals tend to cluster around feed areas and in the center of lots, there is often vegetation in portions of pens that are clearly parts of a CAFO. If there is not sufficient coverage in the actual pen areas to prevent significant runoff of manure, the facility should qualify as a CAFO.

The commission responds that the current definition of AFO is consistent with the federal definition found in 40 CFR §122.23. This federal definition is applicable to state NPDES programs; therefore, the commission has not changed this definition. The definition of AFO is comprehensive and provides the agency staff with the necessary elements to determine whether an individual facility is an AFO rather than an open-range type operation.

Texas Pork Producers Association offered support for the amendment to the definition of animal unit which added a multiplier for pigs weighing less than 55 pounds of 0.1.

The commission appreciates the comment of support for this rule.

Jackson Walker and Agri-Waste Technology, Inc. recommend in the definition of animal unit that “swine weighing 55 pounds or less” should be modified to include only “weaned swine weighing 55 pounds or less” and offered support for the amendments to paragraph (9)(A)(iii) and (9)(B)(iii) which added swine weighing 55 pounds or less. In addition, Jackson Walker and Agri-Waste Technology, Inc. recommend in paragraph (9)(A)(iii) and (9)(B)(iii) that “swine weighing 55 pounds or less” should be modified to include only “weaned swine weighing 55 pounds or less.”

The commission agrees with this suggested language. The commission will include the term “weaned” to swine weighing less than 55 pounds because unweaned swine are housed with their mothers (sows) and, therefore, their wastes are accounted for and managed with the sows’ waste. However, waste from weaned swine weighing less than 55 pounds were not accounted for under these rules prior to this amendment.

Consumers Union recommended in the definition for best management practices (BMPs) that while "land application" is one method of disposing of animal wastes, it is not a substitute for "waste disposal." The definition of BMPs should be left intact or changed to read: “...spillage or leaks, sludge, waste disposal including land application or drainage from raw material storage.” Consumers Union further recommended that the commission reconsider substitution of the term "land application" for waste disposal throughout these rules.

The commission responds that land application of animal waste in accordance with this rule is not disposal of waste. In these rules the term “beneficial use” means the land application of animal waste or wastewater at agronomic rates. As defined in §321.32(1), land application at agronomic rates will enhance soil productivity and will not pose a water quality hazard. The change from “disposal” to “beneficial use” was made to clarify that waste disposal is not authorized under these rules. Therefore, the commission has not modified the rule as suggested by the comment.

Consumers Union commented that large poultry operations pose many of the same waste management issues as other animal operations; however, the current rule states only that poultry operations may be regulated as CAFOs but gives no clear guidelines under which a particular operation will indeed be regulated as such. Alan Plummer and Associates, on behalf of the City of Longview, also requested that application of litter from broiler houses be regulated under this rule and stated that a recent study confirmed that runoff impacted by litter is reaching area waterways.

The commission responds that under §321.32(9)(C), it may determine that a poultry facility that applies litter to land such that the litter is transported to waters in the state is a CAFO. The facility would then be required to obtain an authorization or individual permit which might include additional requirements for land application of litter. While the study in the Cypress Basin indicated higher levels of some nutrients in some instances, the data was inconclusive as to identify specific sources of the elevated nutrients. The agency will continue to evaluate individual facilities that are suspected of causing problems and has the authority under §321.33(b) to designate these facilities as a CAFOs and require them to obtain individual permits.

Alan Plummer and Associates also expressed concern that the disposal of poultry carcasses is not addressed in these rules.

The commission is already addressing this issue in a different rule. On May 21, 1999, the commission published a proposed rule (24 TexReg 3829-3840), 30 TAC Chapter 335, Subchapter A, §335.25, which defines approved disposal methods for poultry carcasses as authorized by statute. These proposed rules can be found at *www.tnrcc.state.tx.us*, Rule Log Number 97157-335-WS. They are scheduled for consideration for final adoption by the commission on August 11, 1999.

ACCORD Agriculture, Inc. and Consumers Union recommended in §321.32(9)(A)(x) that swine less than 55 pounds be added to the list of animals which, in combination, count toward qualification as a CAFO. National Wildlife Federation recommended that §321.32(9)(A)(x) and (9)(B)(x) be amended to refer to swine generally, without being limited to swine over 55 pounds.

The commission agrees with the comment, however, the proposed change would constitute a substantive change beyond the original scope of the proposed rule. Therefore, the commission will consider making this proposed change during a future rulemaking affecting this rule.

ACCORD Agriculture, Inc. recommended that the definition of CAFO should be further amended to include procedures and criteria for designating AFOs which are significant contributors of pollution as

CAFOs. There needs to be a mechanism for adversely affected persons to initiate the process of having such a determination made.

Sufficient authority exists under §321.33(b) for the TNRCC to determine that a feeding operation should be designated a CAFO. There are no restrictions for anyone, affected or not, to provide the commission with information that would provide grounds to initiate an investigation or to support such a determination. TNRCC Regional Offices are also available to respond to individual concerns or complaints relating to CAFOs. The commission welcomes and encourages all citizen input and inquiries through any of the formal and informal procedures that are available. Formal procedures include public meetings and public hearings. Informal procedures include contacts with staff at regional offices or the TNRCC central office by letters, telephone calls, and electronic mail.

National Wildlife Federation commented the proposed change to paragraph (9)(C) is not consistent with EPA's definition of CAFOs as it relates to poultry operations and as explained in the *Draft Unified National Strategy for Animal Feeding Operations* (USDA and EPA, September 11, 1998). The proposed definition of CAFO as it relates to poultry operations is much narrower than the definition set out by EPA because the proposed definition does not acknowledge that exposure of waste to rainfall constitutes a liquid manure system. The proposed definition seems to indicate that stockpiling outdoors will trigger regulation only if the stockpile is located near a watercourse. National Wildlife Federation recommended that the commission must revise its definition to be as broad as the federal definition or it will leave point source discharges of pollutants unregulated in a manner inconsistent with its

responsibilities pursuant to permitting under the federal Clean Water Act. Because large poultry operations, whether they use a wet or dry process, present a significant pollution risk, the commission should include them in the permitting process.

The definition for CAFO in the adopted rule is consistent with the definition in the Region VI CAFO general permit. Although the *Unified National Strategy for Animal Feeding Operations* states that the storage of poultry waste in areas exposed to rainfall may be considered a crude liquid manure handling system, the commission responds that if manure storage is handled in accordance with the provisions of this rule (§321.39(f)(21)), storage of manure will not cause a discharge of pollutants to waters in the state. Inappropriate handling of litter such as exposure to rainfall such that it would constitute a liquid manure system would be sufficient reason for the executive director to use his discretionary authority to designate this facility as a CAFO.

Texas Poultry Federation recommended that the term “freeboard” should be defined.

The commission responds that the term “freeboard” need not be defined because it is a commonly used engineering term that is well-understood by the profession.

Greenbelt Municipal and Industrial Water Authority noted that the rule does not address “water quality buffer zones” as they had previously requested. In comments submitted to the previous proposed rule, Greenbelt requested that a subsection be added to require a new or expanding CAFOs located within the drainage area of a public water supply should not be allowed within ten miles of the conservation pool

level. If this change is not made, then additional technical requirements should be made applicable to facilities that locate in these buffer zones.

The commission responds that HB 801 76th Legislative Session (1999), adding §26.0286 of the Texas Water Code, requires CAFOs that are sufficiently close to an intake of a public water supply system in a sole-source surface drinking water supply to obtain an individual permit rather than registration for authorization to operate. The commission will implement HB 801 in a future rulemaking by adopting rules amending Subchapter B to require those facilities covered by §26.0286 of the Water Code to obtain an individual permit. In addition, the commission has modified §321.37(b) to provide that the executive director may not approve an application for registration in conflict with §26.0286.

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 perform actions that constitute the practice engineering. They do authorize non-engineering activities to be performed by a qualified groundwater scientist, such as documentation of the lack of hydrologic connections or documentation that any leakage from retention structures will not migrate to water in the state.

§321.33. Applicability.

Texas Pork Producers Association commented that subsection (a)(1), (2), and (3) provide the procedures and opportunity for all CAFO operations in the state to become covered by this revised rule.

This subsection also provides the opportunity to have coverage under the TCAA within the same authorization. The design, construction, and management of a CAFO under these rules incorporates all of the necessary features that will provide sufficient protection of air related issues. Texas Cattle Feeders Association recommended that in subsection (a)(1) the statement "within sixty days of expiration of the existing NPDES authorization" should be modified to read "Within sixty days of the effective date of these amended (1999) rules, the facility owner/operator shall apply...."

The commission agrees with this comment because the proposed language more clearly sets out the commission's intent that a facility must apply for TPDES authorization within 60 days after the facility is no longer covered under the EPA Region VI CAFO General Permit. Therefore, the rule has been modified to read: "Within 60 days of the effective date of these amended (1999) rules, the facility shall apply...."

Jackson Walker and the Texas Poultry Federation recommended adding the following language to the first sentence in subsection (a) "or submit to the Executive Director written notice as required in §321.47 of this title."

The commission agrees with the comment and has modified the final rules to reflect the change to clarify the commission’s intent that an existing facility may submit notice under §321.47 in order to obtain initial TPDES authorization.

ACCORD Agriculture, Inc. commented in subsection (a)(1) and (3) that these rules authorize facilities to operate without any kind of authorization for 60 days after their authorizations expire. These facilities will be operating illegally for those 60 days and will be subject to enforcement actions. They conclude that the commission should not adopt rules which will lead facilities to think they are operating legally when they are not. Consumers Union recommended that CAFOs should be required to renew their authorizations before the existing authorizations expire. No CAFO should be granted specific permission to operate without a permit.

The commission disagrees with the comment because the 60-day timeline is consistent with EPA’s deadline for having a facility reapply for authorization under a renewed CAFO general permit. Facilities should be allowed the same opportunity under the amended subchapter because most facilities with federal authorization are authorized by EPA’s Region VI CAFO general permit and will continue to be so authorized until EPA reissues the general permit. The commission also disagrees with the comment suggesting that the rule must address the situation where the state authorization expires prior to the federal authorization, because in that case, the NPDES authorization is also a TPDES authorization affording both federal and state authorization for the facility.

National Wildlife Federation commented that the structure of subsection (a) does not appear to make sense. The introductory phrase limits the subsection's application only to facilities that have either an existing authorization from the commission or an existing NPDES authorization from EPA. However, paragraph (1) refers to facilities possessing both. In addition, subsection (a) purports to allow facilities with expired permits to apply, after the date of expiration, for additional authorization and to continue operation. That result is inconsistent with applicable statutes, the Texas Surface Water Quality Standards, and the commission's assumption of permitting authority under the federal Clean Water Act. The paragraph also appears to assume that NPDES authorization always will expire before the commission authorization. If that assumption is not always true, the paragraph does not address how the situation will be addressed. The last sentence also does not make clear that if a federal permit is continued in effect, the facility must continue to be operated in accordance with both the federal permit and the existing state authorization. The paragraph also should make clear that, in the case of inconsistency between the commission and federal authorization, the more stringent provision will control.

The commission agrees with some parts of this comment and disagrees with others. In order to make clear that subsection (a) also applies to CAFOs operating under both a currently effective state authorization granted by TNRCC and a currently effective federal authorization granted by EPA, subsection (a) is modified to read: “...under state law only by the TNRCC or federal law by EPA....” In addition, a facility must be operated in accordance with both the federal permit and existing state authorization, and that in case of conflict the more stringent provision will control; the last sentence of paragraph (1) has been modified to read: “...the applicant shall

continue to operate the facility under the terms of the expired federal authorization and any existing state authorization until final disposition of the application in accordance with this subchapter.” Finally, the commission has deleted the first sentence of §321.33(a)(1) because the sentence is redundant and is cover by the last sentence of subsection (a)(1).

The commission disagrees with the commenter’s suggestion that allowing a facility to apply for authorization under this amended subchapter within 60 days after expiration of their NPDES authorization is inconsistent with applicable statutes, the Texas Surface Water Quality Standards, and TNRCC’s assumption of the TPDES program. The provision has been changed to require all facilities currently registered for the expired EPA General Permit, which expired last year, to apply for a TPDES permit or registration under these rules within 60 days. The expired EPA General Permit was adopted by TNRCC on the date the TPDES program went into effect. Consistent with NPDES regulations, the old EPA-issued permit will cease to be effective for its registrants 60 days after its replacement is issued, unless before than they have applied for authorization under the new permit. In this instance, the replacement is not a new federal general permit, but the Subchapter B permit-by-rule adopted today. Therefore, all holders of registrations under the expired federal permit will be given 60 days to apply for a new permit or registration under these rules. In response to other comments, the requirement that the application be filed within days after expiration of their NPDES authorization has been changed to within 60 days of the effective date of these amended rules.

Consumers Union commented that subsection (a)(3) appears to allow existing facilities that have been operating without a required federal permit to come into compliance by filing under these rules, and this "initial" permit may never expire. Operations that have operated legally under federal permits will see their "initial" TPDES permit expire at the time their current authorization is due to expire, facilities that were not operating under an existing federal permit have no permit expiration date. Consumers Union recommended that any facility now operating illegally be required to file for an original permit under §321.34.

The commission disagrees with this comment. Under §321.33, a facility is required to apply for authorization under the amended rules within 60 days of the effective date of the amended rules or within five years of the effective date of the amended rules, depending on the nature of their current authorization. Also, under §321.47, as modified, a facility which seeks initial TPDES authorization under that section must file for a renewal under the amended rules upon expiration of the facility's state authorization if it expires before the registration itself under §321.35(h).

ACCORD Agriculture, Inc. recommended in subsection (b)(2) that this 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 this comment. This change was made previously during the adoption of Subchapter B, effective on September 18, 1998, and published on September 11, 1998 in the

***Texas Register (23 Tex Reg 9364).* The term “fresh water” was replaced with the term “water in the state” to cover both “fresh water” and “salt water” resources in the state.**

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 disagrees, because this provision implements §201.026 of the Texas Agriculture Code and §26.1311 of the Texas Water Code. In addition, this provision implements 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.

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 because §321.33(g) requires any AFO with more than 300 animal units in a DOPA to submit an application for registration under these rules. These

rules requires all AFOs 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 requirements for waste discharge and air emissions under §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emissions Limitations) and operational requirements for pollution prevention under §§321.38 - 321.40. The requirement that they comply with these provisions is as protective as requiring them to prepare a PPP, and exceeds requirements of federal law, under which such facilities are generally not regulated at all.

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. The creation of air quality standard permits is authorized by §382.051(b)(3) of the Texas Health and Safety Code. The commission agrees that prior authorization is needed; however, no change to the rule is needed now because subsection (i) was changed in the previously adopted version of the rules 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 subsection (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 is included in §101.4 of the commission’s 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).

National Wildlife Federation commented that subsection (j) seems to grant a standard air permit to facilities even if they do not comply with all of the requirements of the subchapter. The existing standard air permit already was problematic because the requirements of the subchapter did not guarantee the use of best available control technology (BACT) or consistency with the intent of the Texas Clean Air Act. Those deficiencies are only heightened by the proposed changes.

The commission disagrees that the changes made to subsection (j) relax any of the requirements for obtaining an air quality standard permit under this subchapter. After the original proposal of this section, it was pointed out to the commission that the language in subsection (j) was not clear

regarding the procedures for requesting air quality authorization when no water quality application was pending. The intent of the changes made to subsection (j) was to ensure that operators desiring air quality authorization must submit a written request and receive authorization in writing from the commission in order to be covered by the air quality standard permit in this subchapter. This is consistent with current practice and with the intent of the original subsection (j) adopted in 1998. In addition, the changes to §321.46 clarify that the applicant must still demonstrate compliance with “...all the requirements in this subchapter.”

National Wildlife Federation commented that before issuing a standard air permit, the commission must ensure that BACT will be used and that nuisance conditions will be avoided.

The commission’s opinion is that the requirements in the rule substantially reflect the application of BACT and any that facilities constructed and operated in accordance with these rules will not adversely affect human health or welfare of off-site receptors. The air quality requirements of this subchapter are similar to those that would be required in a traditional permit issued under 30 TAC Chapter 116, including the requirement to develop and operate under a PPP, 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. It should be

pointed out that because this is a permit by rule, a case-by-case determination of BACT for each facility seeking authorization under this rule will not be required. Based upon the commission's experience with CAFOs, the commission does not expect that facilities constructed and operated pursuant to the requirements of this subchapter will cause nuisance conditions to occur.

National Wildlife Federation commented that it is unclear what type of application is being referenced. Certainly an application for renewal which does not even involve public notice would not be sufficient to meet the requirements of §382.061 of the Texas Health and Safety Code requiring the availability of commission review for executive director actions. Section 321.37 provides only for the filing of a Motion for Reconsideration by the applicant or a person filing comments in response to public notice.

The commission disagrees that the language in subsection (j) is insufficient to meet the requirements of §382.061 of the Texas Health and Safety Code. The issuance of air quality standard permits is specifically excepted from Subchapter C of 30 TAC Chapter 50 by 30 TAC §50.31(c)(1) (which excepts air quality standard permits under Chapter 116). Therefore, 30 TAC §50.39(a), authorizing motions for reconsideration of an executive director action on an application, does not apply to authorizations under Chapter 321 except where motions for reconsideration are specifically authorized by §321.37 9 (see also 30 TAC §50.31(d)), i.e., by an applicant or a person filing comments in response to a public notice.

Regarding the format of the application and the need for public notice requirements, the commission's opinion is that it is not necessary to create a specific form in the rules or to require

separate public notice for air quality standard permit requests. In most cases, it is expected that facilities seeking both air and water authorization will submit a combined application and will provide public notice under §321.36 if seeking registration or under Chapter 39 if seeking an individual permit. In a case where an applicant is requesting only air authorization, they must have previously obtained water quality authorization under this subchapter and provided the applicable public notice at that time; therefore, additional public notice would not be deemed necessary for subsequent air quality authorization.

National Wildlife Federation commented that a transfer pursuant to §321.33(l) cannot qualify for a standard air permit because such a facility is not even required to meet the substantive standards of Subchapter B.

The commission disagrees with the comment. Facilities that have successfully undergone a case-by-case review under Chapter 116 and received an individual air quality permit should be able to transfer into this subchapter and operate under an air quality standard permit without making structural design changes and still accomplish the desired effect of those buffer distances and design criteria required by this subchapter. Facilities transferring under this subsection must still comply with the special conditions and provisions from the existing individual permit, as well as the appropriate provisions of §§321.38-321.42 of this subchapter (including proper CAFO operation and maintenance, PPPs, BMPs, and monitoring and reporting requirements). For facilities previously authorized under Chapter 116, the necessity of conducting a regulatory review

has already been accomplished; therefore, it is not necessary to repeat that review as described in this subchapter.

National Wildlife Federation commented that the “air quality only” requirements in §321.46, if applicable to such a facility, do not address many aspects of CAFO operations that result in air emissions. For example, those requirements do not address emissions from the actual confinement areas, manure storage activities, or land application activities. As a result, a standard air permit cannot be granted.

The commission disagrees that the requirements in these rules are insufficient to constitute a standard air permit. These rules contain many design and operational requirements that affect both air and water quality protection, and not all of these requirements are identified as “air quality only.” As such, these items are required regardless of whether an applicant is seeking air quality authorization when operating under this subchapter. The commenter is correct that air emissions can be generated from sources such as the confinement areas and manure handling activities; however, the commission does not believe it is reasonable to dictate one set of mandatory control measures for all facilities in this permit by rule. When applicable, the odor control plan required for certain facilities will address site-specific measures for controlling emissions in the PPP. For other facilities that do not require an odor control plan, a larger buffer zone will be established.

Consumers Union commented that subsection (l) assures operators with existing individual permits--no matter how old--that no new requirements will be imposed upon them. This means that existing CAFOs may obtain new authorization without upgrading any facilities to meet current BMPs. This undermines enforcement of these rules. Some CAFOs authorized under these rules will, in practice, be held to lower standards than others authorized under the same rules. Consumers Union recommended that the rules specify a time period during which CAFOs with existing permits must upgrade their facilities to meet all the requirements of the rules. ACCORD Agriculture, Inc. commented that subsection (l) offers no justification for waiving the requirements of these rules for facilities that transferred registrations 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 responds that existing facilities with current water or air quality authorizations are required to meet the requirements for water and air quality protection as provided by agency rules. Subsection (l) allows facilities that are not required under federal law to obtain NPDES authorization and that are covered by individual state permits to transfer to Subchapter B for state-only authorization by registration without imposing any additional conditions or other requirements for the unexpired term of the existing permit. However, upon renewal of the registration, the facility will be required to meet all applicable technical requirements of the amended subchapter under §321.35(h).

Texas Cattle Feeders Association offered support for subsections (l) and (o) for the process where an existing CAFO authorized by an individual permit or valid Subchapter K authorization can submit a

written request to the executive director to request a transfer of their authorization to a registration under the amended Subchapter B rules (1999).

The commission appreciates the support for these subsections, and notes that these provisions will assist the commission to provide uninterrupted regulation of all existing CAFO facilities that are currently under the commission's regulatory umbrella.

ACCORD Agriculture, Inc. recommended in subsection (o) that the Subchapter K rules were declared invalid by the Travis County District Court. Because those rules were never valid, none of the authorizations issued pursuant to those rules were valid. TNRCC cannot "transfer" those invalid authorizations.

The commission disagrees with this comment because the District Court's order invalidating Subchapter K addressed only the actual permits-by-rule at issue in the case and the effect of the order, if any, on other permits-by-rule issued prior to the District Court's order was not before the court. In addition, the recent Court of Appeals decision upholding the District Court's decision invalidating the Subchapter K rules did not address the effect of the decision on other permit-by-rules.

Consumers Union commented that subsection (o) in combination with §321.47 appears to allow any CAFO holding a Subchapter K permit to transfer to authorization merely by mailing in a notice that they will operate the facility in accordance with these provisions. The content of the notice is yet to be

determined. This appears to assure that CAFOs approved without appropriate public participation will enjoy continued authorization even if the Subchapter K process is overturned by a court. Companies holding Subchapter K permits that have actually been invalidated may also file notice of intent to comply and continue to operate as if they have held a valid permit all along. Facilities with invalid permits should be required to file for their permits again, with full public notice, comment, and participation.

The commission disagrees both parts of this statement. Facilities with Subchapter K authorization specifically invalidated by the Court are not eligible for transfer under this section. The court in *ACCORD v. TNRCC* specifically declined to set aside the other Subchapter K authorizations granted prior to the judgment in that case. Contrary to the commenter's statement, those Subchapter K applications were subject to the public comment process, and aggrieved persons had the opportunity to challenge them in court under §5.351 of the Water Code, consequently they received the full public scrutiny opportunity for comment and judicial challenge that is required by law and that Subchapter B registrations receive.

ACCORD Agriculture, Inc. and National Wildlife Federation commented that subsection (p) should clarify what changes qualify as "amendments" and what changes qualify as "nonsubstantial modifications." Substantial change needs to be defined. ACCORD Agriculture, Inc. questioned if an increase in the number of animals confined, a change in the required buffer zone or lagoon capacity, a change in boundaries of the site plan, or a violation of any management practice or physical or operational requirement were the only "amendments" changes. National Wildlife Federation

commented that it is inappropriate to limit amendments only to changes in the authorized number of animals, the site plan, or buffer distance determination. Any significant change in a PPP should require an amendment. The listed examples of changes that would not qualify as nonsubstantive modifications is not helpful. Texas Cattle Feeders Association recommended that the phrase "...or a violation of any management practice or physical or operational requirement of this subchapter" should be removed from the last sentence in subsection (p). It seems excessive and rules out most, if not all, changes or modifications at the site.

The commission agrees that the rule should be explicit. The subsection has been changed to list those changes that are classed as substantial.

Jackson Walker and Texas Poultry Federation recommended modifying the last sentence in subsection (p) by adding the words "in the outer" in between "change" and "boundaries." Texas Cattle Feeders Association recommended adding the word "in" between "change" and "boundaries."

The commission responds that the term "boundary" means the outer perimeter or border of a site plan. The commission agrees with the comment that the word "in" should be inserted in the third sentence and the section has been modified to reflect this change.

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 the requested changes are not necessary because §321.39(a) requires that CAFO facilities must be constructed with good engineering practices. Licensed professional engineers consider issues such as risk, embankment materials, and the flood plain characteristics in designing facilities for CAFOs. Any structures located in the floodplain must be certified by a licensed professional engineer as being designed specifically to protect the facility from damage and failure.

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

Texas Cattle Feeders Association recommended that in subsection (a) that the sentence beginning "An annual Clean Rivers Program fees is also required...." The word "fees" should be changed to "fee."

The commission agrees with this comment and has made the recommended change to the final rule.

ACCORD Agriculture, Inc. recommended that TPDES permits, including any permits-by-rule or general permits, must expire after five years. The commission cannot authorize facilities to seek renewals under these rules outside that five-year window. The five-year limitation ensures the public's ability to comment on and participate in the formulation of the permits that will be used to authorize CAFOs at least once every five years. The commission cannot take away this participation right by

purporting to allow renewal of its permits-by-rule that will allow those permits-by-rule, or general permits, to remain effective for more than five years.

The commission responds that under subsection (a), individual permits granted under Subchapter B shall be effective for a term not to exceed five years. Under §321.35(f), the permit-by-rule under Subchapter B shall be effective for a term of five years; individual registrations expire with the permit. Language has been added to §321.35(h) to make this clear.

ACCORD Agriculture, Inc. stated that subsection (b)(2) should 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.

Although emissions from CAFOs have historically been 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 1998 amendments to these rules incorporated changes to reference nuisance and “any violation of a state property line standard or federal ambient air quality standard.”

ACCORD Agriculture, Inc. recommended that some form of public participation process is needed for renewals of permits. Greenbelt Municipal and Industrial Water Authority also commented that the

public should have the opportunity to comment on the renewal of a permit if there has been a change in ownership since the last renewal.

On the issue of public participation, the commission disagrees with the commenter's statement that there will be no public participation process for renewal of permits. The renewal of individual permits without any public notice under subsection (b)(2) applies only to a limited set of facilities that meet a very demanding standard: they are not those making a substantial change to their operation, are not required to obtain NPDES authorization, and within the last 36 months they have not had a reasonably foreseeable and controllable unauthorized discharge or other violation that contributed to surface or ground water pollution or an air nuisance violation or violation of any applicable federal or state air quality control requirement. All other permit renewal applications will be subject to the public notice requirements applicable to the renewal of water quality permits in Chapter 39 of this title (relating to Public Notice) along with an opportunity for the public to comment on the application.

National Wildlife Federation recommend in subsection (b)(1) and (2) that the granting of a renewal of an individual permit without public notice is inconsistent with TNRCC's responsibilities under the Clean Water Act and 40 CFR Part 124 Subpart A. The rules must be revised to provide a notice process consistent with those requirements. The public needs to be made aware when facility authorizations are being considered for renewal to provide a mechanism for TNRCC to learn of problems that may have developed in the local area during the previous permit term.

The commission responds that renewal of individual permits under subsection (b)(2) applies only to facilities that are not required to obtain NPDES authorization; therefore, such renewal does not conflict with requirements of the federal Clean Water Act and 40 CFR Part 124, Subpart A.

Likewise, with respect to subsection (b)(1), the commission responds that this provision does not conflict with the requirements of the federal Clean Water Act and 40 CFR Part 124, Subpart A because it applies to facilities that do not discharge into or adjacent to water in the state and therefore also are not required to obtain NPDES authorization.

National Wildlife Federation recommended in subsection (b)(2) that the reference to “Section 305.63(3)” be corrected to read “Section 305.63(a)(3).”

The commission agrees with this comment and has made the recommended change to the final rule.

ACCORD Agriculture, Inc. commented that subsection (h) is unintelligible. First, §321.33(p) does not define "amendment." Second, the requirement that an application "be filed and processed as set out in this section" is unclear. Applications for amendment will be processed as set out in which subsection of this section? The phrase "accordance with subsection (a) of" should not be deleted.

The commission agrees that the proposed language is unclear and has changed the subsection to read: “If an application requests an amendment under §321.33(p) of this title (relating to

Applicability) of an existing individual permit, the application shall be filed and processed under this section.”

§321.35. Procedures For Making Application For Registration.

Greenbelt Municipal and Industrial Water Authority commented that the rule did not address “water quality buffer zones” as they had requested in comments on the previous amendments to the rule.

Consumers Union recommended that the commission reconsider the importance of additional water quality standards for CAFOs located near and particularly down gradient of local drinking source waters.

The commission responds that HB 801 76th Legislative Session (1999), adding §26.0286 of the Texas Water Code, requires CAFOs that are sufficiently close to an intake of a public water supply system in a sole-source surface drinking water supply to obtain an individual permit rather than registration for authorization to operate. The commission will implement HB 801 in a future rulemaking by adopting rules amending Subchapter B to require those facilities covered by §26.0286 of the Water Code to obtain an individual permit. In addition, the commission has modified §321.37(b) to provide that the executive director may not approve an application for registration to a facility covered by §26.0286.

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.” The rules should state explicitly that

storage areas for all wastes must be included in the site plan. Information on owners of all land located within the appropriate buffer zone should be included in order to assess buffer zone compliance.

The commission disagrees that the subsection is unclear, and notes that “land operated or controlled by the applicant” clearly includes all 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 submission of an area land use map identifying residences, AFOs, businesses, or occupied structures within a mile of the permanent odor sources. The buffer zone requirement in §321.46 was modified in the previously adopted amendments to apply to air authorizations only.

ACCORD Agriculture, Inc. recommended that additional language be added to subsection (c)(7) to require that additional information 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 there are no reliable data to support any particular cutoff for facilities of any particular size, and disagrees that size is necessarily the appropriate indicator. In the absence of data, the commission considers one mile to be appropriate because it is consistent with the commission’s requirement for comparable no-discharge municipal and industrial wastewater facilities.

ACCORD Agriculture, Inc. and National Wildlife Federation recommended in subsection (c)(8) that the application should contain the complete PPP. Unless the complete PPP is included in the application, the public, including nearby landowners, will have no way to review what measures are being proposed. Without all of that information, the executive director will not have the information to undertake a complete review of the application. National Wildlife Federation also suggested at minimum, that if the complete PPP is not required for submission, then certain key elements of the PPP must be included.

The commission responds that key elements of the PPP that are necessary for evaluating the application will be required to be submitted. However, the commission is also committed to the reduction of paper required in the application process and, therefore, certain parts of the PPP which are unnecessary in evaluating the proposed application will not be required to be submitted to the executive director. Examples include data submitted by the applicant showing actual rainfall amounts (§321.39(f)(14)), weekly water level measurements (§321.39(f)(11)), and quarterly structural control inspections (§321.39(f)(3)). This data becomes voluminous over a five-year period and it becomes a substantial burden on the agency to provide sufficient space to store these records. To address the commenter's concern about the availability of a copy of the complete PPP for review during the public comment period, paragraph (13) has been changed to require that the copies of the application made available at the applicant's place of business and in the county where the facility is located include a copy of the full PPP.

ACCORD Agriculture, Inc. recommended that language in both subsection (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.

The commission disagrees that in all cases, monitoring is necessary to protect recharge features. However, monitoring of groundwater is appropriate as required under §26.048 of the Texas Water Code. A licensed professional engineer will determine the elements of each plan on a case-by-case basis necessary, in best professional judgment, to protect both surface and ground water.

Jackson Walker and Texas Poultry Federation recommended in the second sentence of subsection (c)(13) that the word “either” should be deleted.

The commission agrees with this comment and has made the change to the final rule in order to correct a grammatical error and to clarify the commission’s intent that the applicant make available a copy of the application both at its place of business and at a public place for review by any interested persons.

Greenbelt Municipal and Industrial Water Authority suggested in subsection (g) that, 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 “public” rights. The commission believes that under some circumstances, with input from those potentially affected, the adjacent land owners, buffer requirements can appropriately be optional.

National Wildlife Federation recommended in subsection (h)(1) that the reference to “Section 305.63(3)” be corrected to read “Section 305.63(a)(3).”

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

ACCORD Agriculture, Inc. recommended that 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.

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 previously adopted version of the rule was 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.

ACCORD Agriculture, Inc. and National Wildlife Federation recommended that a public participation process is needed for renewals of registrations. ACCORD Agriculture, Inc. also commented that in subsection (h)(3) renewals should never be automatic.

On the issue of public participation, the commission disagrees with the comment's statement that there will be no public participation process for renewal of registrations. The renewal of registrations without any public notice under subsection (h)(1) applies only to a limited set of facilities that meet a very demanding standard: they are not those making a substantial change to their operation, are not required to obtain NPDES authorization, and they have not had a reasonably foreseeable and controllable unauthorized discharge or other violation that contributed to surface or ground water pollution or an air nuisance violation or violation of any applicable federal or state air quality control requirement. All other registration renewal applications will be subject to the public notice requirements in §321.36 (relating to Notice of Application for Registration) along with an opportunity for the public to comment on the application.

ACCORD Agriculture, Inc. commented that the executive director should have the discretion to require an individual permit, if determined to be appropriate.

The commission responds that the executive director has the authority, under §321.33(b) (Relating to Applicability), to require a facility to submit an application for an individual permit.

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 one month before the expiration date. Texas Cattle Feeders Association recommended that in subsection (h)(5) the notice of expiration should be sent by certified mail, return receipt requested.

The commission agrees that registrants are responsible for timely submission of an application for renewal. The commission agrees that the notice of expiration should be sent by certified mail, return receipt requested, and made the change in the previous amendments to Subchapter B in 1998.

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

The commission disagrees for several reasons. First, under the federal regulations, the minimum number of animal units to bring a facility into the definition of CAFO, and therefore, into the NPDES system, is 1,000. The commission has generally followed that guideline with some exceptions appropriate under the circumstances in particular watersheds. The commission requires AFOs between 300 and 1,000 animal units to obtain authority under Subchapter B within DOPA areas because the watershed in these areas include multiple facilities and there is reliable evidence of related water quality problems. The commission has examined its database to find

other watersheds with multiple facilities similar to the situation in the DOPA area and has not found that other areas of the state have experienced cumulative impacts on water quality.

Greenbelt Municipal and Industrial Water Authority suggested that the commission 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 because there is no evidence that it is necessary to restrict the number of CAFOs in a given area provided that the CAFOs are being operated in a manner consistent with Subchapter B. 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.

§321.36. Notice of Application For Registration.

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 commission responds that 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 all owners

or operators of public drinking water facilities located within five miles of the proposed facility are likely to be affected. However, the rule provides that notice may be sent to persons who may in the judgement of the executive director be affected. 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 used. The commission does not believe it is also necessary to notify the county judge and health officials of any counties downstream, as the rules are designed to preclude their being affected by a compliant, authorized facility.

§321.37. Actions on Applications For Registration.

National Wildlife Federation recommended in subsection (b) that the proposed change to allow conditional approval is inconsistent with the right of affected persons to comment on applications. If an application does not meet requirements, the application must be amended or denied. The amendment of the application must result in revised public notice so that the public can comment on the application actually being considered. The proposed change would deprive the public of this right.

The commission agrees, and therefore has deleted that language from the final rule. In addition, the commission has deleted the references to denial with prejudice and suspending the authority to conduct an activity for a specified period of time in order to clarify the executive director's only options are to approve or deny an application for registration in whole or in part.

§321.38. Proper CAFO Operation and Maintenance.

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.

The commission responds that this section 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. This rule also provides 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. Under §321.39(b), NRCS plans are considered equivalent to similar provisions in Subchapter B. NRCS is the agency within the USDA with the responsibility and expertise for developing agricultural plans to protect natural resources and employs specialists with appropriate training and experience to develop these plans in accordance with generally accepted scientific principles.

§321.39. Pollution Prevention Plans.

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 responds that certain components of the plan which directly involve engineering are required to be prepared and sealed by an licensed professional engineer, but the plan includes many components which are not practice of engineering. For example, the determination of a

lack of significant hydrologic connection between wastewater and waters in the state and documentation that any leakage from retention structures will not migrate to waters in the state may be accomplished by a groundwater specialist. Nutrient management plans can be developed by soil scientists, soil chemist, or environmental scientists under §321.39(f)(28)(G).

Accord Agriculture, Inc. requested that subsection (b) include a specific process for determining adequacy of NRCS plans with explicit, enforceable requirements.

The commission considers the current rule regarding adequacy of NRCS plans to be sufficient because the NRCS is the agency within the USDA with the responsibility and expertise for developing agricultural plans to protect natural resources. It employs specialists with appropriate training and experience to develop these plans in accordance with generally accepted scientific principles. Such plans reflect current research in agricultural practices and provide protection of natural resources. PPP is an enforceable part of these rules; therefore, when the NRCS plan is included in the PPP, it must followed by the permittee.

ACCORD Agriculture, Inc. suggested in subsection (d) that it is not clear how PPP reviews relate to actions on registration applications. Registration applications without adequate PPPs should 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 §321.39(a) requires that a PPP be developed for each CAFO covered by this subchapter. The review process for plans submitted with registrations is the same as for other CAFOs. A PPP that is adequate at the time of application may become inadequate at a later date, for a number of reasons such as substantial changes to the facility. Such a change requires a formal amendment. This provision allows the executive director at any time, such as during an inspection, to notify the permittee of deficiencies in the plan. The provision does not prohibit the executive director from requiring that changes to the PPP be made during a time period of less than 90 days.

ACCORD Agriculture, Inc. recommended in subsection (e) that PPPs must be amended when a change affects the potential for odor generation from the facility.

The commission responds that odor control measures are addressed in §321.46 by an odor control plan. The commission disagrees that an odor control plan must be amended for any change that potentially affects air emissions. An operator required to develop an odor control plan must operate in compliance with that plan at all times and the plan should be updated as needed when changes occur. When measures in the current odor control plan are changed, an updated odor control plan shall be forwarded to the executive director to update existing files.

Consumers Union recommended that in subsection (f)(1) the term "land application" be replaced with the term "waste disposal" which was deleted from the original rule.

The commission responds that land application in accordance with this rule will enhance the productivity of soil and therefore is beneficial use, not disposal of wastes. These changes were made to clarify that waste disposal is not authorized by this rule.

ACCORD Agriculture, Inc. recommended that in subsection (f)(1)(A) the site plan or map should show the drainage pattern of the CAFO area and include arrows indicating the direction of surface water flow.

The commission responds that the drainage pattern and the direction of surface water flow on a site is a key consideration in the development of a PPP developed in accordance with other provisions of this section. Nevertheless, the requested change is not necessary because the inclusion of this information on the site map is considered to be consistent with standard engineering practices and most applications include a topographic map which typically shows slope and flow characteristics.

National Wildlife Federation Recommended in subsection (f)(1)(C) that the list of significant spills must include at least those occurring since the requirement was first put into the rules. ACCORD Agriculture, Inc. further recommended that a facility should be required to maintain a list of all spills occurring since the facility was subject to regulation.

The commission agrees that the effective date of the 1998 amendments is more appropriate and has revised subsection (f)(1)(C) to read “after September 18, 1998.” The commission considers it

appropriate that all significant spills should be recorded and this requirement will be applied to all spills that occurred since requirement was first added to the rule.

ACCORD Agriculture, Inc. recommended in subsection (f)(3) that the PPP should include the location and a description of all existing structural and nonstructural controls.

The commission did not make this change because this subsection requires that the PPP include the location and description of structural controls and subsection (f)(2) requires the applicant to include management controls that will be implemented. Therefore, these subsections adequately address the need for a description of structural and nonstructural controls.

ACCORD Agriculture, Inc. recommended that subsection (f)(4)(B) be changed to require that runoff from areas between open lots be included in the volumes for determining the retention facility capacity.

The commission responds that this subsection states that all runoff from areas between open lots that is directed into the retention basins should be included in the calculation of lagoon size. Therefore, the current language adequately addresses this issue.

ACCORD Agriculture, Inc. recommended that in subsection (f)(4)(E) the following phrase should be added after the word “period”: “including (1) volume of wet manure that will enter pond; (2) volume of water used for manure waste removal; (3) volume of cleanup/wastewater; and (4) other water such as drinking water that enters facilities.”

The commission responds that these items are included in the term “all waste and process generated wastewater,” and, therefore, the issue is adequately addressed in the proposed version and no change is needed. In addition, animal drinking water is considered process-generated wastewater which is also included in that term.

Greenbelt Municipal and Industrial Water Authority requested that subsection (f)(6) be revised to require that minimum freeboard requirements also account for settling and that the initial freeboard should exceed two feet. They also requested an additional requirement for a ten-foot top width and a slope no flatter than a horizontal to vertical ratio of 3:1.

The commission responded to this comment in the 1998 proposal by changing §321.39(f)(6) to require that the design for freeboard take into consideration settling and slope stability. The commission notes that the levee width and slope should be determined on a site-specific basis. This change and other provisions requiring good engineering practices in the design of these facilities adequately addresses this issue.

ProAg, Lemon, Shearer, Ehrlich, Phillips & Good; Texas Poultry Federation; Texas Pork Producers Association; Texas Cattle Feeders Association and Jackson Walker commented that the change in freeboard requirements to two feet rather than the current requirement of one foot in subsection (f)(8) is a structural change which is not justified in the rules, and is an unnecessary and burdensome requirement given the design requirement for sizing of evaporation systems which mandates that such systems be designed with a water balance based upon withstanding a ten-year (consecutive) period of

maximum recorded monthly rainfall (other than catastrophic), without overflow. Agri-Waste Technology recommended that the language associated with freeboard requirements be changed to be consistent with the language in the proposed statewide and impaired watersheds EPA Region VI NPDES General Permits for CAFOs. Texas Cattle Feeders Association recommended that no changes be required in the structural requirements for existing facilities.

The commission agrees that it is unnecessary to increase the freeboard requirement to two feet for evaporation systems because the design requirement for sizing of evaporation systems provides sufficient protection to prevent overflows because evaporation systems must be designed to withstand a ten-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic) without overflow. Therefore, subsection (f)(8) has been revised to read “not less than one foot.”

Greenbelt Municipal and Industrial Water Authority requested that subsection (f)(10) be revised to require that retention facility embankments be designed in accordance with the standards of the NRCS, United States Army Corps of Engineers, United States Bureau of Reclamation, and the American Society of Civil Engineers (ASCE). They also requested that subsection (f)(10)(C) be clarified to ensure that required certification include specific elements.

The commission responds that embankment design and construction should be in accordance with appropriate engineering standards as specified in the rules. The commission added language in the previous amendment of Subchapter B in response to this same comment to include engineer

certification of embankment design in accordance with NRCS, Corps of Engineers, Bureau of Reclamation, or ASCE requirements and post-construction certification of compaction testing with accompanying test results and documentation. The language was added to subsection (f)(10)(C) and this provision continues to adequately address this concern.

Consumers Union recommended in subsection (f)(18) that lagoons should be inspected before and after construction by an independent engineer. A final inspection by an individual who was not involved in the construction of the facility itself will ensure the integrity of the inspection process.

The commission responds that requiring this in all instances would be an unnecessary expense to the agency since the rules require that the facilities be designed and constructed in accordance with standard engineering practices and the facilities are subject to the inspection of the executive director at any time. The owner or operator is subject to enforcement, penalties, and order requiring appropriate repairs to the facility to achieve compliance.

Consumers Union recommended that subsection (f)(18) require the use of low-cost leak detection systems for all lagoons sited near drinking water sources to insure that leaks are detected quickly before groundwater is contaminated. The rule requires groundwater monitoring once contamination has been identified, but the baseline for measuring the degree of contamination will be the first year's data from monitoring wells. This baseline will not reflect a "clean" water standard because presumably the wells are in place because the damage has been done. Consumers Union further recommended the use of monitoring wells at all lagoon sites, with a baseline established when the wells are first installed.

The commission responds that leak detection systems are not appropriate for all retention structures because the lagoons are required to be designed in accordance with standard engineering practices and a recharge feature evaluation that has been prepared by a qualified groundwater scientist and certified by a licensed professional engineer in accordance with §321.39(f)(16)(A). If a lack of hydrologic connection cannot be documented by the owner, either a leak detection system, other monitoring system, or increased liner thickness will be required, so as to address the potential contamination of groundwater.

Consumers Union offered support for the proposed amendment to subsection (f)(19)(B). Although rates are still based on nitrogen content and uptake by plants (as opposed to environmental risk), the proposed amendment does restrict land application until the facility conforms to "a detailed nutrient utilization plan" if annual soil sampling indicates phosphorus levels higher than 200ppm.

The commission appreciates the support for this provision, noting that it is intended to encourage the responsible use off animal waste for beneficial purposes, thereby discouraging stockpiling other less environmentally appropriate practices.

Consumers Union and National Wildlife Federation recommended in subsection (f)(19)(B) that TNRCC adhere to the proposed EPA Region VI general permit requirement that facilities conduct more frequent soil analyses to determine whether nutrient levels are too high.

The commission responds that under subsection (f)(28)(F), soil is analyzed on an annual basis regardless of any known water quality problems. Soil characteristics do not vary significantly over short periods of time, and samples collected on a quarterly basis will not provide a more definitive characterization of nutrient levels in the soil. Annual sampling is satisfactory to determine any changes in soil characteristics and more frequent sampling is an unnecessary and burdensome expense.

ACCORD Agriculture, Inc. recommended in subsection (f)(19) that the following language be added:

"Disposal of wastewaters shall not contribute to the taking or harming of any endangered or threatened species of plant, fish, or wildlife; nor shall such disposal interfere with or cause harm to migratory birds. The operator shall notify the TNRCC and TPWD in the event of any significant fish, wildlife, or migratory bird/endangered species kill or die-off on or near retention ponds or in fields where waste has been applied, and which could reasonably have resulted from waste management at the facility."

The commission shares the concern for the protection of endangered species and migratory birds. However, the commission's authority to issue these rules is under Chapter 26 of the Texas Water Code, which protects water quality and maintains Texas water quality standards, including aquatic life uses. The executive director's staff currently coordinates with the TPWD and the USFWS on permit applications, when appropriate, by requesting that applicants consult with these agencies and actively work to address issues such as this.

ACCORD Agriculture, Inc. recommended that subsection (f)(19)(B) land application rates of wastewaters always be based on both the available nitrogen and phosphorous content. Application rates should not exceed the agronomic rate for either nitrogen or phosphorous. The current permit allows phosphorous concentrations in the soil to increase to unacceptable levels before the addition of phosphorous is curtailed. It is poor management to allow the concentration to reach a critical level before it is curtailed. Greenbelt Municipal and Industrial Water authority also commented that the proposed changes in subsection (f)(19)(B) delete provisions that allow limitations on wastewater land applications when local water quality is threatened by phosphorus. They suggested that TNRCC include language to address local situations which might dictate lower phosphorus levels (less than 200 ppm) to better reflect local conditions.

The commission responds that soil scientists across the country continue to conduct research on the levels of phosphorus that can be placed on various types of soils before phosphorus thresholds are exceeded. The commission will continue to monitor research in this area and to determine, based on stream monitoring or other reliable data that become available, if changes are needed in land application procedures.

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 of the United States.

The commission responds that the language in §321.39(f)(19)(D) does not authorize wastewater from irrigation practices to be discharged to waters in the state. The prohibition on discharges of wastewater from land application areas is contained under §321.39(f)(19)(A), and therefore no change is necessary.

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(I), the PPP require the inclusion of the methods and procedures for analyzing nutrients in the land application area soils, manure, and wastewater. National Wildlife Federation commented in subsection (f)(19)(I) and (J) that the record-keeping provisions would be strengthened by including a requirement that the actual nutrient budget calculations be included. This would provide inspectors with a method for determining whether the nutrient budget calculation procedures in the PPP were properly being implemented.

The commission responds that the modifications to §321.39(f)(19)(B) and §321.39(f)(28)(F) regarding methods and procedures for chemical analysis, other calculation procedures address this concern. PPPs should include these issues to be considered technically complete.

Consumers Union and National Wildlife Federation offered support for changes to subsection (f)(19)(I) and (J) that requires additional elements for the PPP and recordkeeping.

The commission appreciates the support for these changes.

Greenbelt Municipal and Industrial Water Authority requested that the term “significant pollutants” be defined.

In response to this comment on the 1998 proposed amendments, the commission removed the word “significant” to make the subsection consistent with §321.31.

ACCORD Agriculture, Inc. recommended in subsections (f)(21) and (f)(22) that land application rates should not exceed the agronomic rate for either nitrogen or phosphorous.

The commission responds that the rules require that waste be applied at the nitrogen uptake rate unless the soil phosphorus level of 200 ppm is exceeded. The nitrogen uptake rate is necessary to achieve optimal crop production, but the commission recognizes that this approach causes phosphorus to rapidly increase in the soil. When this happens, the operator must either obtain professional assistance to develop a comprehensive nutrient management plan or seek other land for application of wastes. In either case, land application will be at the agronomic rate for manure, but not always tied to the uptake rate a particular nutrient.

ACCORD Agriculture, Inc. recommended in subsection (f)(22) that the following language be added:

“The disposal of manure shall not cause or contribute to the taking or harming of any endangered or threatened species of plant, fish, or wildlife; nor shall such disposal interfere with or cause harm to migratory birds. The operator should be required to notify the commission and TPWD in the event of a

fish, wildlife, or migratory bird/endangered species kill or die-off on or near retention ponds or in fields where waste has been applied.”

The commission shares the concern for the protection of endangered species and migratory birds. However, the commission’s authority to issue these rules is under Chapter 26 of the Texas Water Code, which protects water quality and maintains Texas water quality standards, standards including aquatic life uses. The executive director’s staff currently coordinates with TPWD and USFWS on permit applications, when appropriate, by requesting that applicants consult with these agencies and actively work to address issues such as this. In addition, in order to clarify that this subsection applies to land application of manure or pond solids, the commission has modified the second sentence of the subsection as follows: “... the operator may apply manure or pond solids to the affected application are only in accordance with”

Consumers Union recommended in subsection (f)(23) that a sustainable AFO should not produce more animal waste than the operation itself can utilize and that more stringent guidelines be set for off-site land application.

The commission responds that issue of whether an AFO should be sustainable operations is a policy issue beyond the scope of this rulemaking and is not germane to this rulemaking.

ACCORD Agriculture, Inc. recommended that subsection (f)(24)(A) should specify what qualifies as "adequate berms or other structures." Land application should never be allowed in the 100-year floodplain because of the risk of pollution during flooding events.

The commission agrees that the word “adequate” is unclear in the context of the referenced subsection and it has been removed. In addition, the term “berms or other structures” refers to protection from the 25-year, 24-hour rainfall event. There may be cases, where land application of manure is beneficial within the 100-year floodplain, provided that the safeguards of the subsection are complied with.

USFWS recommended in the second sentence of subsection (f)(24)(A) that the term “surface application” be replaced with the term “surface disposal.”

The commission agrees with this comment and has made the change as suggested. This change will make it clear that improper application of manure in the floodplain is disposal and therefore prohibited.

Greenbelt Municipal and Industrial Water Authority commented that §321.39(f)(24)(A) should be clarified to delineate what is “adequate” berms and what “other structures” might be identified to prevent pollution from manure storage areas. The commenter also requested that application or storage of manure be precluded within 500 feet of a drinking water source or recharge feature.

The commission agrees that the word “adequate” is unclear in the context of the referenced subsection and it has been removed. Further definition of “other structures” is not necessary because §321.39(f)(24)(B) adequately addresses the issue of areas where manure can be stored and applied.

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 this rule requires stockpiled manure be stored in a well-drained area with no ponding of water, with the top and sides of the stockpiles adequately sloped to ensure proper drainage area. Therefore, if manure stockpiling is managed according to these rule requirements, downward migration of contaminants will be minimized because the lack of ponding will prevent downward migration of pollutants and runoff will be channeled and collected in a storage lagoon.

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 agrees that the rule should require filter strips when necessary and set out parameters for determining appropriate width. Therefore, the commission has added language to §321.40(7) that requires compliance with NRCS technical guidelines and specifically refers to the

minimum of a 100-foot grass buffer between the waste application areas and any surface waters/watercourse. Under the rule, registrants are required to maintain a 150-foot buffer between waste application areas and private water wells, and a 500-foot buffer between waste application areas and public water wells.

ACCORD Agriculture, Inc. recommended in subsection (f)(24)(G) that land application rates should not be allowed to exceed nutrient crop uptake rates and that this provision should be deleted.

The commission does not agree. This provision applies only in cases where application sites are so isolated that there is no potential to reach water in the state. Such land application may not cause or contribute to violation of the surface water quality standards, contaminate groundwater, or create a nuisance condition. Finally, once the concentration of phosphorus reaches the 200 ppm, further application can only occur under a nutrient utilization plan pursuant to §321.39(f)(28)(G).

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 commission “Guidelines for Operation and Maintenance of Dams in Texas.”

The commission disagrees, because retention structures are not dams or levees subject to the dam safety and maintenance requirements under §12.052 of the Texas Water Code. In addition, the commission believes it is better policy to limit maintenance requirements only to those included in “Guidelines for Operation and Maintenance of Dams in Texas.” The consulting engineer may

add specific maintenance requirements based on the engineer’s design criteria. The commission publishes the guidance and other similar documents to provide the owner and consulting engineer with recommendations on ways in which required maintenance schedules and programs should be implemented.

ACCORD Agriculture, Inc. recommended in subsection (f)(28) that permittees should be required to conduct analytical tests to determine the nutrient contents of the manure and wastewater generated by the facility, and soils within the land areas prior to the first land application event at new CAFOs and the first seasonal land application event at existing facilities, then once per quarter thereafter. The commission should be able to increase sampling frequencies if there are identified or suspected water quality standard violations. The permittee should be required to compare the nutrient contents of the manure and wastewater with residual nutrient contents of the land application soils to determine the needed fertility and application rates for pasture production or production of other targeted crop yields.

The commission responds that in order to develop a nutrient management plan required by this subsection, the recommended analytical test will be necessary. In addition, under subsection (f)(28)(F), soil is analyzed on an annual basis regardless of any known water quality problems. Soil characteristics do not vary significantly over short periods of time and samples collected on a quarterly basis will more a definitive characterization of nutrient levels in the soil. Annual sampling is more appropriate to determine any changes in soil characteristics and more frequent sampling is unnecessary and burdensome expense. The commission will continue to monitor

research in this area to determine, based on stream monitoring, if changes are needed in land application procedures.

USFWS recommended in subsection (f)(28)(F) that the width of filter strips require a 50 meter wide buffer strip.

The commission agrees that the rule should require filter strips when necessary and set out parameters for determining appropriate width. Therefore, the commission has added language to §321.40(7) that requires compliance with NRCS technical guidelines and specifically requires a minimum of a 100-foot grass buffer between the waste application areas and any surface waters/watercourse. Under the rule, registrants are required to maintain a 150-foot buffer between waste application areas and private water wells, and a 500-foot buffer between waste application areas and public water wells. Permittees are also required to maintain a 150-foot buffer between waste application areas and private water wells, and a 500-foot buffer between waste application areas and public water wells.

ACCORD Agriculture, Inc. recommended in subsection (f)(28)(G) that land application rates should not exceed the agronomic rate for nitrogen or phosphorous.

The commission responds that the rules require that waste be applied at the nitrogen uptake rate unless the soil phosphorus level of 200 ppm is exceeded. The nitrogen uptake rate is necessary to achieve optimal crop production, but the commission recognizes that this approach causes

phosphorus to rapidly increase in the soil. When this happens, the operator must either obtain professional assistance to develop a comprehensive nutrient management plan or seek other land for application of wastes. In either case, land application will be at the agronomic rate for manure, but not always tied to the uptake rate of a particular nutrient.

Texas Board of Professional Engineers, Jackson Walker, and McCulley, Frick, and Gilman, Inc. recommended that subsection (f)(28)(G) be clarified to allow nutrient utilization plans to be developed by Texas licensed professional engineers.

The commission agrees that licensed professional engineers should not be precluded from developing a nutrient utilization plan provided they receive certification by the ASA. The commission has also modified the rule to specify that the plan may also be developed by the TSSWCB, the Texas Agricultural Extension Service, or any professional agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas. The commission has also deleted the language regarding an active member of ASA holding a Masters or Doctorate degrees from an accredited United States institution. The commission will issue technical guidance to assist in the development of complete and effective nutrient utilization plans and the certified plans will be filed with executive director. In addition, the rule allows land application to commence 30 days after the plan is filed with the executive director unless prior to that time the executive director has returned the plan for failure to comply with the requirements of this subsection.

Texas Cattle Feeders Association recommended that subsection (f)(28)(G) be clarified to allow nutrient utilization plans to be developed by Certified Crop Advisors. The technical education and training level should not exceed the level of training required for the qualified groundwater scientist which recognizes a baccalaureate degree with appropriate experience.

The commission agrees that Certified Crop Advisors should be allowed to develop a nutrient utilization plan provided they receive certification by the ASA. The commission has also modified the rule to specify that the plan may also be developed by the TSSWCB, the Texas Agricultural Extension Service, or any professional agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas. The commission has also deleted the language regarding an active member of ASA holding a Masters or Doctorate degrees from an accredited United States institution. Under the rule, the executive director will issue technical guidance to assist in the development of complete and effective nutrient utilization plans and the certified plans will be filed with executive director. In addition, the rule allows land application to commence 30 days after the plan is filed with the executive director unless prior to that time the executive director has returned the plan for failure to comply with the requirements of this subsection.

National Wildlife Federation recommended in subsection (f)(28)(G) that the following language be added to the end of the last sentence, “and the nutrient utilization plan must be prepared with the specific goal of avoiding causing or contributing to such a violation or the creation of nuisance conditions.” The inclusion of such language would ensure that the specific goal of avoiding pollution

was a driving force in the development of the nutrient utilization plan rather than a secondary consideration.

The commission responds that changes throughout this rule have focused on the goal of protecting water resources. The requirement for the development of a nutrient management plan is designed to prohibit the disposal of waste and to promote the use of waste and wastewater and to improve soil productivity. The rule goes further than the commenter's suggestions; it prohibits application that will cause or contribute a violation of water quality standards.

ACCORD Agriculture, Inc. recommended that in subsection (f)(31), relating to playa lakes, 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 for monitoring wells in §26.048 of the Texas Water Code when a playa lake is used as a wastewater retention facility.

ACCORD Agriculture, Inc. recommended in subsection (f)(31) that playa lakes are waters of the United States. TNRCC must prohibit any discharge into those waters except in compliance with a TPDES permit.

Under state and federal regulation, playas may be waste treatment facilities. For those that EPA determines to be waters of the United States, rather than treatment facilities, the TPDES Memorandum of Agreement provides that EPA retains NPDES jurisdiction.

ACCORD Agriculture, Inc. recommended in subsection (f)(32) that the rules should reinstate the requirement that the PPP include a plan for odor abatement. The rule should include criteria against which to measure the adequacy of such a plan.

The commission responds that it is not necessary for odor control measures be added to the PPP requirements because the requirement to submit an odor control plan is included in §321.46.

§321.40. Best Management Practices.

Consumers Union recommended that wastewater retention facilities, holding pens, or land application sites should be no closer than 1,000 feet from a public water supply and 300 feet from a private well.

The commission responds that buffer zone restrictions in other provisions of this rule (500 feet from a public water supply well and 150 feet from a private well) are based on construction standards to protect the quality of water produced from the wells and have not been demonstrated to be inadequate for the protection of public water supplies and private wells. In addition, the buffer distances in these rules are consistent with such distances in rules codified in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers) and 30 TAC Chapter 290 (relating to Water Utilities).

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 responds that the listed practices are recognized as BMPs in documents developed by the NRCS and TSSWCB and they are recognized as appropriate control measures by the American Society for Agricultural Engineers (ASAE). Although all the practices listed are appropriate for CAFO operations, some flexibility within the regulatory parameters is necessary to accommodate the unique features of each facility. 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 recommended that subsection (1) be amended to read: “Control facilities and retention structures must be designed, constructed, maintained and operated....”

The commission responds that the recommended additions are not necessary to enhance the provision as it is proposed. Retention facilities are considered to be part of the control facilities and the proper operation of such facilities require that they will be maintained. Specific requirements related to maintenance and operation methods for these facilities are covered in detail in other provisions of this subchapter, such as §321.39 relating to PPPs.

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

The commission responds that the words “stream,” “river,” and “lake” are commonly understood terms for which no definition in this rule is necessary. In addition, “wetland” is defined in §307.3(49) of commission rules and “playa” is defined in §26.048 of the Texas Water Code.

ACCORD Agriculture, Inc. recommended that in paragraph (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 responds that the provisions in these rules related to the location of facilities in relation to a stream, river, lake, wetland, or playa lake provides for adequate protection of the water resources of the state. The rules provide a distinction between existing versus new construction in a manner such that §26.048 of the Water Code prohibits the use of playas as a retention basin for new facilities after 1993. Also, under §321.31(a), the rules prohibit discharge of waste into waters in the state except in the event of a chronic or catastrophic rainfall event in compliance with §321.31(b).

ACCORD Agriculture, Inc. recommended that in paragraph (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. Particular construction techniques are needed.

The commission responds that any structures located 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. Design standards described in §321.39(f)(10) are minimum design standards for construction of retention facilities. Standard engineering practices should allow adaptation of these design standards to accommodate situations that are unique to construction in a 100-year floodplain.

Greenbelt Municipal and Industrial Water Authority requested that in paragraph (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 any structures located 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 term “100-year floodplain” is a commonly used term which is defined in section §301.2 of this title.

ACCORD Agriculture, Inc. and Consumer Union recommended that in paragraph (7) the indicated proximity to water wells is inadequate to provide adequate protection and should be 1,000 feet from

public water supply wells and 300 feet from private water wells. ACCORD Agriculture, Inc. suggested that in paragraph (7) if a facility seeks to locate more closely, an individual review of the potential for pollution is needed.

The commission responds that buffer zone restrictions in other provisions of this rule (500 feet from a public water supply well and 150 feet from a private well) are based on construction standards to protect the quality of water produced from the wells and have not been demonstrated to be inadequate for the protection of public water supplies and private wells. In addition, the buffer distances in these rules are consistent with such distances in rules codified in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers) and 30 TAC Chapter 290 (relating to Water Utilities).

ACCORD Agriculture, Inc. suggested that paragraph (8) is so general as to be virtually meaningless and fails to provide useful guidance. In addition, ACCORD Agriculture, Inc. inquired about what state guidelines are being referred to in this subsection.

The commission responds that this subsection provides regulatory parameters for the development and utilization of management practices. Such practices may not create a nuisance or health hazard, result in contamination of drinking water, or be in noncompliance with agency regulations. In response to the previous submission of this comment, the commission removed the term “guideline” from this subsection, to evidence its regulatory nature.

USFWS commented that paragraph (10) is not consistent with the requirements of the EPA proposed general permit which, if adopted, will prohibits the discharge of hazardous chemicals including pesticides, herbicides, solvents, and toxic metals into retention structures, as well as waters of the state.

In addition, ACCORD Agriculture, Inc. recommended that paragraph (10) be amended to read:

“prevent the discharge of pesticide contaminated waters into retention structures ...such as to prevent pollutants from entering retention structures or from creating a nuisance condition. All wastes from dipping vats, pest and parasite control units, and other facilities utilized for the management of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent pollutants from entering the retention structures.” To be consistent with federal law, the rule should require that all discharges to containment structures be composed entirely of wastewaters from the proper operation and maintenance of a CAFO and the precipitation runoff from the CAFO areas. The disposal of any materials, other than discharges associated with proper operation and maintenance of the CAFO, into the containment structures should be prohibited. If the reference to "significant pollutants" is retained in the rule, the term needs to be defined. It is not clear if this is intended to be a category of pollutants or a quantitative limitation.

The commission’s opinion is that the prohibition of discharges of pesticide contaminated waters into water in the state is much broader and applies to the whole facility and all its components. Changes were incorporated into §321.40(12) to clarify that disposal of hazardous chemicals including pesticides, herbicides, solvents, and toxic metals into retention structures is prohibited.

ACCORD Agriculture, Inc. recommended that in paragraph (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 proper disposal of dead animals should 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 nuisance or detrimental impact to water quality. On May 21, 1999, the commission published a proposed rule (24 TexReg 3829-3840), 30 TAC Chapter 335, Subchapter A, §335.25, which provides approved disposal methods for poultry carcasses as authorized by statute. These proposed rules can be found at www.tnrcc.state.tx.us, Rule Log Number 97157-335-WS. They are scheduled for consideration for final adoption by the commission on August 11, 1999.

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

The commission responds that the wide scope of the provision demands a general reference to agricultural management practices. Section 321.39 addresses required management practices regarding the collection, storage, and land application of waste and wastewater. These require practices are consistent with ASAE standards developed by the NRCS.

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

The commission responds that BMPs will be considered in meeting the technical and administrative requirements in the approval process. Practices included in this subsection are to be implemented, if appropriate, based upon existing physical and economic conditions, opportunities, and constraints.

§321.41. Other Requirements.

ACCORD recommended in subsection (e) that the report documenting inspections should include a signed certification which states: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations." This certification is used for NPDES reporting requirements and assures that the owner or operator is aware of the significance of falsifying any entries.

The commission responds that under §321.42(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 these rules is subject to administrative penalties and may also be subject to civil and criminal penalties. The site inspection report under §321.41(e) is a document covered under §321.42(c). Therefore, the recommended change is not necessary.

§321.42. Monitoring And Reporting Requirements.

ACCORD Agriculture, Inc. recommend revising subsection (a) to include: “The executive director should be orally notified immediately, and at least within 24 hours of any discharge to waters in the State or of the United States. Further, the information contained in § 321.42(a)(1)-(7) should be submitted to the Commission in the written report filed within 14 days of the discharge to be consistent with federal NPDES requirements.”

The commission disagrees that immediate oral notification to the executive director rather than oral notification within 24 hours is necessary because 24-hour oral notification provides sufficient notice to the executive director to allow for any investigation or inspection if necessary and is consistent with unauthorized discharge notification requirements for other water quality programs where the noncompliance may endanger human health or safety, or the environment. In addition, the commission disagrees that adding “waters of the United States” to the rule is necessary because “water in the state” encompasses “waters of the United States” as well as groundwater. The commission agrees that the information contained in §321.42(a)(1)-(7) should be submitted to the commission in order to provide the agency appropriate data about CAFO discharges. Therefore, the commission has modified the second sentence in §321.42(a) to the following: “... shall document

the following information to the pollution prevention plan and submit that information to the appropriate regional office within 14 days....”

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. ACCORD Agriculture, Inc. also recommended that in subsection (a)(7) to ensure enforceability, the commission 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 responds that it is not feasible to require the facility to sample discharges from areas other than the retention facility because of the difficulty in obtaining a representative sample from those areas and the difficulty of identifying a representative sampling point. 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. This exception is necessary to account for dangerous conditions when sampling cannot take place.

Consumers Union offered support for requiring an operator to maintain records on-site for three years and making them available to the executive director upon request. Consumers Union also recommended that pollution prevention information and the results of any pollution monitoring should be filed with the commission and available for public inspection. This enables local residents to determine the effect a CAFO may have on local water and air quality.

The commission responds that the pollution monitoring information should be made available for inspection and has amended §321.42(a) to require that the information required under subsection (a)(1)-(7) be submitted to the appropriate regional office within 14 days. This information will be available for review by the public.

§321.46. Air Standard Permit Authorization.

ACCORD Agriculture, Inc. commented that the rules must comply with the Health and Safety Code prerequisites for issuance of a air quality standard air permit. The rules must ensure BACT and avoidance of conditions of air pollution.

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.

Jackson Walker and the Poultry Federation recommended that existing CAFOs be allowed to submit a request in writing with the commission to gain coverage under the Air Standard Permit Authorization, in the case where no water quality application is pending. The rules provide "if no water quality application is pending, a separate request may be submitted in writing which demonstrates compliance with all the requirements in this Subchapter." This proposed language appears overly broad, and while

presumably intended to require the filing of a simple document (such as a notice of intent), the provision could be construed to require filing a full blown application which demonstrates compliance with all the terms of the Subchapter B rules. Given that the provision involves a "standard permit," a person should be able to gain coverage under the standard permit merely by certifying compliance with those terms of the §321.46 which pertain to air quality issues, rather than filing a new permit application. The rule language should be clarified to this effect.

The commission agrees with the concept of a simple notice of intent (as opposed to a “full blown application”) when applying only for air quality standard permit, but believes it is appropriate for the applicant to somehow demonstrate compliance with all of the subchapter because authorization cannot be obtained for air quality without also obtaining water quality authorization under this subchapter. This demonstration of water quality compliance could be in the form of submitting a copy of the letter of authorization of the registration, individual permit, or CAFO general permit previously issued by the commission. No changes are being made to the adoption version in response to this comment.

Jackson Walker and the Texas Poultry Federation recommended that paragraphs (1) and (2) should be clarified as to the meaning of "amended rules" in the phrase "in operation on the date of adoption of these amended rules...." These phrases plainly refer to the amendments adopted in 1998 (rather than the current proposal which is being referred to throughout as the 1999 amendments), and a reference should be included to make this clear.

The commission agrees with this statement and has replaced the language “...the date of adoption of these amended rules...” with “...August 19, 1998...,” the date of adoption of the 1998 amendments.

Texas Cattle Feeders Association recommended in the fourth sentence that the word "all" should be deleted and the words "air quality only" should be inserted between the words "the" and "requirements."

The commission disagrees. As stated in the first sentence of §321.46, in order to qualify for air quality coverage under this subchapter, an applicant must first demonstrate compliance with all requirements of the subchapter. The air quality standard permit available in this subchapter was never intended to be a stand-alone authorization and must be accompanied with water quality authorization in the form of a registration, individual permit, or CAFO general permit. The change being adopted in these amended rules simply clarifies the opportunity to obtain air quality authorization after one has already received water quality authorization.

§321.47. Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization.

Texas Cattle Feeders Association offered support for the process where an existing CAFO can submit a written notice to the executive director for initial TPDES authorization that indicates they will operate the facility in accordance with the provisions of Subchapter B.

The commission acknowledges this statement of support.

ACCORD commented that this section appears to circumvent the procedures set out in the rest of the rule and should be eliminated.

The commission responds that this section does not circumvent the procedures set out in the rest of the rule because the initial TPDES authorization available under this section is available only to those CAFOs operating under a currently effective authorization granted under state law by the commission. As such, their current state authorization has been subject to public notice and comment and will be subject to all the technical provisions of the TPDES permit-by-rule contained in this subchapter. In addition, if the initial TPDES authorization expires before the permit-by-rule expires, the owner or operator must file for renewal under the full procedures of §321.34 or §321.35 (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration).

National Wildlife Federation commented that this section is unjustified and should be deleted. The term "existing facility" is not defined in the rules. It certainly is not defined, or even referred to, in §321.33(a). In effect, this section would appear to purport to allow a facility that has operated illegally (that is, without a required federal permit) to obtain authorization pursuant to federal law without undergoing any public notice or substantive review process. This provision is inconsistent with the basic approach the commission has taken elsewhere in these proposed rules and previously in regulating CAFOs. In particular, it would mean that PPPs are not reviewed by the commission. The commission has consistently taken the position that individualized review of applications for authorization are needed. This sudden departure from that position appears to be unjustified. This provision also could be

interpreted as allowing existing authorizations without expiration dates to continue in effect indefinitely. This provision, as well as some of the §321.33 provisions, would appear to authorize continued use of playa lakes as treatment facilities. Such authorization is inconsistent with the commission's responsibilities under federal law.

The commission responds that while the term “existing facility” is not defined in the rules, the meaning of the term “existing facility” as used in this section is described in §321.33(a)(3) as any facility holding an authorization from the commission under state law as of the effective date of these amended rules (1999) and which under federal law is required to, but does not, hold a current NPDES authorization. Some of the facilities that will be eligible for initial TPDES authorization under this provision are facilities that have not been able to obtain federal authorization because the EPA Region VI CAFO general permit expired in March 1998 and has yet to be renewed. In any event, the key point is that only those facilities that have gone through the state application and public participation process will be allowed to initiate their TPDES coverage by submitting a notice under §321.47. Those facilities will be required to meet all the technical requirements of these amended rules, including the requirement in §321.39 that the facility prepare a PPP. If their state authorization expires during the term of this permit-by-rule they must file for renewal under §321.34 or §321.35 (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). The renewal application will include the PPP for the facility. Nothing in this section forgives any past unpermitted operation.

The commission agrees that the section should be more explicit about expirations. Therefore, the commission has added two new sentences at the beginning of §321.35(h) which read as follows:

“Registrations issued under §321.37 or §321.47 of this subchapter shall expire five years after the effective date of these amendments (1999), and no new registrations shall be issued after that date. If the commission proposes to amend or readopt these rules prior to such expiration date, all registrations shall remain in effect until final commission action on the proposed amendment or readoption.”

Jackson Walker, Texas Poultry Federation, ProAg, and Lemon, Shearer, Ehrlich, Phillips & Good offered support and commented that this section provides a procedure for existing CAFOs to obtain their initial TPDES authorization by filing written notice with the executive director that they will operate in accordance with the provisions of Subchapter B. Given the delegation of the NPDES program to Texas by EPA last year, this provision is of great importance to owners and operators of CAFOs. This provision of the rule appropriately recognizes the need for a streamlined process to obtain initial TPDES authorization for existing CAFOs, following NPDES delegation and in light of the pending adoption by EPA Region VI of a new CAFO general permit. Absent such a streamlined process, the commission would be flooded with renewals of CAFO authorizations following EPA's adoption of its new CAFO general permit, and such a result would unduly burden the permit staff at the agency and also owners and operators of CAFOs in Texas. The proposal properly implements a process which will lead to a staggering of renewal applications.

The commission acknowledges this comment supporting the proposed procedure for existing CAFOs to obtain initial TPDES authorization.

Jackson Walker and the Poultry Federation recommend adding the following language “or within 45 days of the issuance of a new registration or permit for any facility for which a technically and administratively complete application was pending prior to the effective date of these amended (1999) rules.” to the end of the sentence “...and submitted within 45 days of the effective date of these amended (1999) rules.”

The commission disagrees with this suggested change because these facilities are not existing facilities as described by §321.33(a). Furthermore, the proposed change is unnecessary because pending permit applications under the existing Subchapter B rules are being processed as applications for TPDES permits under which the applicant will have both federal and state authorization, and applications for registration under the existing Subchapter B rules are being processed only for facilities that either already have federal authorization or are not required to have federal authorization.

Texas Cattle Feeders Association recommended changing "45 days" to "60 days" in the sentence “...and submitted within 45 days of the effective date of these amended (1999) rules.”

The commission agrees with this comment in order to be consistent with §321.33(a) and has made the change.

Texas Cattle Feeders Association recommended that the word "the" should be inserted between "of" and "unexpired" in the sentence "A facility for which a complete and accurate...."

The commission agrees with this statement and has made the recommended change in the final rule.

Texas Cattle Feeders Association recommended that the rules should clarify in all sections related to applicability and application that the air quality buffer requirement is not applicable to any CAFO currently holding a valid authorization from the commission that transfers into the amended rules (1999) or obtains initial TPDES authorization in accordance with §321.47. The rules should also specify that these CAFOs are not subject to the air quality buffer requirement or associated documentation when the CAFO is required to renew the permit.

The commission responds that CAFOs holding a current authorization from the commission must meet the appropriate air quality buffer requirements under §321.46 if they are obtaining an air quality standard permit in conjunction with a TPDES authorization under these rules. However, the air quality buffers are not required to be met at the time of initial TPDES coverage if the facilities have separate coverage for air quality under Chapter 116 of this title. Facilities that have undergone a traditional permit review under Chapter 116 are subjected to operational requirements that are at least as stringent as those required by this subchapter; therefore, the desired effect of the buffer zones required by this subchapter will still be accomplished.

Texas Cattle Feeders Association recommended that the rules should clarify in all sections related to applicability and application that the recharge feature certification requirement is not applicable to any CAFO currently holding a valid authorization from the commission that transfers into the amended rules (1999) or obtains initial TPDES authorization in accordance with §321.47. The rules should also specify that these CAFOs are not subject to the recharge feature certification requirement or associated documentation when the CAFO is required to renew the permit.

The commission responds that a recharge feature certification is a mechanism for ensuring the protection of groundwater resources; therefore, the commission does not agree that a CAFO holding a valid authorization should never be required to prepare a recharge feature certification. Accordingly, the rules require that a recharge feature certification be submitted as part of the application of a new facility, or an application for renewal of an authorization.

Texas Cattle Feeders Association recommended that this section clarify that an application for initial TPDES authorization does not require an application fee. The facilities holding perpetual permits will be subject to a renewal fee five years from the effective date of the amended rules (1999).

The commission responds that initial TPDES authorization is not an application and therefore no fee is required.

Consumers Union commented that in §321.33 and §321.47 taken together will allow all existing operations, whether or not they have appropriate permits today, to continue operating as they do now

indefinitely, without public review or significant improvements to bring them into compliance with current standards. Consumers Union recommended deleting §321.47.

The commission disagrees with this comment. Under §321.33, all existing facilities will be required to apply for authorization under the amended rules either within 60 days of the effective date of these amended rules or within five years of the effective date of the amended rules, depending on the type of their existing authorization.

On the second point, under §321.35(h) a registration issued under §321.47 expires, at the latest, five years after the effective date of these amendments at which time, the registrant will submit an application for renewal under the full procedures set out in §321.34 or §321.35. This is the same schedule of renewal and public notice that would have applied to these facilities without these amendments.

GENERAL COMMENTS

Jackson Walker and the Poultry Federation suggested that the rules should clarify that no structural changes are required by any change in a rule requirement or definition for permit applications which are pending at the agency and which have been deemed administratively and technically complete by the time the rules are adopted and effective.

The commission disagrees that no structural changes should ever be required of a facility which has an administratively and technically complete application under the previous rules. In order to obtain TPDES authorization under these amended rules, the facility will be required to comply with the technical requirements in these rules, even if doing so will require structural changes to the facility.

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

The commission responds that 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 based on the requirements of the rule, and subject to review by the commission through a motion for reconsideration.

Consumer Union opposed the application of a general permit-by-rule to AFOs, contending that the CAFO industry consists of several industries with different waste management practices. ACCORD Agriculture, Inc. commented that issuing a permit-by-rule that allows registration rather than individual permitting for all CAFOs, other than those in CNRAs, will not adequately address the water quality problems that CAFOs are known to cause. In addition to the variety of facilities that would be regulated by the proposed rules, site conditions such as soil topography, climate, and size can vary greatly from operation to operation. Such site-specific variations require individual treatment of each CAFO.

The commission responds that the nature of CAFOs is such that uniform standards of performance and management, as reflected 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. Waste management practices for different types of CAFOs are sufficiently similar to allow inclusion in a permit-by-rule. Under §321.33(b), the executive director may designate any AFO as a CAFO and require it obtain an individual permit in order to protect surface or ground water resources.

Consumers Union requested information on how the rules implement the Clean Water Act with respect to operations allowed to use playa lakes for wastewater retention under state law.

The TPDES program describes the scope of the jurisdiction over discharges from CAFO operations. The Memorandum of Agreement between the EPA and the TNRCC specifies that the EPA shall retain permitting and enforcement jurisdiction over CAFOs that are not subject to TNRCC jurisdiction. In this manner, any CAFO which TNRCC cannot permit due to state statutory restrictions will be permitted by the EPA.

ACCORD Agriculture, Inc. commented that permitted CAFOs are likely to discharge significantly more than once every 25 years. Large CAFOs have the potential to significantly degrade water quality in their receiving streams with discharges that are in compliance with the permit-by-rule. Any CAFO whose discharge, albeit from a properly designed facility, during a catastrophic rainfall, is likely to significantly impair water quality should not be eligible for authorization pursuant to a permit-by-rule. Facilities which contain more than 2,000 animal units are clearly above the threshold of facilities whose discharges

will significantly impair water quality. Facilities over this size should be required to obtain individual permits.

ACCORD Agriculture, Inc. recommended their opposition to any authorization by rule or general permit which applies to CAFOs located in impaired watersheds. These facilities need individualized review to ensure that they do not contribute to further degradation of their receiving waters and violations of water quality standards. CAFOs in impaired watersheds should be authorized only through individual permits which contain such individual control measures as are necessary to prevent further degradation of the watershed. A list of impaired watersheds should be developed using the 303(d) and 305(b) lists. The §314 list of trophic states for reservoirs also should be considered, with streams tributary to reservoirs demonstrating unacceptably high trophic levels also being singled out for special protection.

EPA, the Service, and TNRCC agree that it is the commission's responsibility to incorporate into its permits those conditions necessary to maintain state water quality standards where they are currently being met and to attain them where they are not. For those Texas waters that are currently maintaining their approved water quality standards, there is little, if any, verifiable evidence that CAFO management practices and discharges that have been permitted under existing EPA and Texas rules and permits have caused or contributed to impairment of aquatic life uses. The commission, EPA, the Service, and the TPWD agree, however, that more information is needed in order to accurately assess whether changes are needed in permitting requirements for CAFOs. Therefore, the commission and EPA have agreed that a comprehensive study will be designed and executed under the joint planning and management of our agencies, with

participation of USFWS, TPWD, and other state and federal agencies with appropriate expertise.

The objective will be to define and then to answer relevant questions with regard to the effects of permitted CAFO discharges.

The study will be conducted in two phases and its goal will be to produce peer reviewed, verified and reproducible results in three to five years. Phase I will consist of gathering, cataloging, and analyzing currently available data including, for example, records of rainfall events, reported CAFO discharges, and streamflow data. It will result in the selection of two or more distinct study areas in Texas for study and sampling in Phase II and in sampling in preparation for analysis in during Phase II. In Phase I, we will also analyze available short and long tem modeling protocols for use in Phase II. If feasible and agreeable, some aspects of Phase II may be initiated during Phase I.

Phase I will be completed in 12-15 months, at which point EPA and TNRCC will publish in the *Texas Register* for public comment, a joint report consisting of the results of Phase I and the plan for Phase II. Depending on the results of Phase I, the second phase will consist of conducting modeling and instream sampling during discharge events and analysis of BMPs, structural requirements, and other means to affect the quantity, frequency, and content of CAFO discharges. The results will be used by TNRCC as a resource for the determination of what changes, if any, should be made in Subchapter B at its renewal.

At the conclusion of Phase I, EPA and TNRCC will consider whether any amendment to Subchapter B is necessary at that time. As set out in the Memorandum of Agreement governing administration of the TPDES program, TNRCC will propose to amend this CAFO permit by rule in response to a specific and well-grounded request by EPA to do so. Likewise, under TNRCC rules, the commission may also make an appropriate amendment in response to a petition from any governmental agency or member of the public to do so, or if the executive director determines that information not available at the time of issuance of this permit by rule justifies amendment of the permit terms.

Under our rules, the commission may make an appropriate amendment at any time in response to a petition to do so or if the executive director determines that information not available at the time of adoption of this permit by rule justifies amendment of the permit terms. All registrants for the permit by rule adopted today should remain aware of the commission's authority and duty to amend the terms of the permit any time it is necessary to do so in accordance with commission rules implementing state water quality standards, the state permitting program, or TPDES. Such amendments may result from the TMDL process, the study described in this preamble, or any other appropriate cause. The commission points out, as well, that under §321.33(b), the executive director may at any time require a facility to apply for any individual permit, even if that facility holds a registration under the permit by rule. The adoption of a TMDL or an implementation plan for a TMDL is a factor that would be considered by the commission as grounds for making such a requirement. The commission also has the option of issuing statewide or area-specific general

permits in response to TMDLs, and requiring registrants to transfer to those or to obtain a site-specific individual permit.

ACCORD Agriculture, Inc. commented that they are involved in a lawsuit with TNRCC and are contesting the Subchapter K rules and the Subchapter B rules that were recently adopted. They also are contesting all 56 CAFO permits that were issued under Subchapter K and the 24 pending permits that would be considered by the TNRCC. TNRCC is not legally able to accept the EPA delegation and is strongly encouraged not take on this added task until our court case is settled.

EPA has determined that TNRCC meets all legal requirements for administering the NPDES program in Texas. The commission declines to refrain from exercising its responsibilities under the TPDES program and the Water Code due to pending unresolved litigation. The commission will, of course, make any change to its rules or program that may ultimately be required by court decision.

ACCORD Agriculture, Inc. and National Wildlife Federation 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 §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 §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. ACCORD Agriculture, Inc. suggested that the rules must ensure that each individual facility, as that term is defined in §382.003 of Health and Safety Act, making up an AFO will utilize BACT.

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 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 authorizes the commission to continue 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. The commenter has raised these issues in litigation and the commission will continue to respond as appropriate in that forum.

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 the 1998 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 1998 amendments to the rule altered 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, the 1998 amendment and this amendment to Subchapter B continued 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, recordkeeping, and reporting to the TNRCC.

The commission disagrees that case-by-case BACT determinations must be conducted in standard permits-by-rule. 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 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 adopted rule will be protective of human health and the environment, based upon the commission's experience with Texas CAFOs.

STATUTORY AUTHORITY

The amendments and new section 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 by HB 1542 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 Texas Water Code, §26.028(c), which provides that the commission may renew a permit for a CAFO which was issued between July 1, 1974 and December 31, 1977 without holding a public hearing, and §26.041 of the Texas Water Code under which the commission may use any means provided by Chapter 26 of the Texas Water Code to prevent a discharge of waste that is injurious to public health. These amendments are also adopted under Texas Health and Safety Code, §382.011, which provides the commission the authority to establish the level of quality to be maintained in the state's air; §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and §382.051, which provides the commission the authority to issue standard permits by rule.

SUBCHAPTER B : CONCENTRATED ANIMAL FEEDING OPERATIONS

§321.31-321.37, 321.39-321.42, 321.46, §321.47

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

(a) Pursuant to §305.1 of this title (relating to Scope and Applicability), it is the policy of the Texas Natural Resource Conservation Commission that there shall be no discharge or disposal of waste 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 by the commission prior to the effective date of these rules, or a CAFO general permit issued or adopted by the commission. Waste and wastewater generated by a CAFO under this subchapter shall be retained and utilized 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 from CAFOs authorized to operate under this subchapter whenever rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed, and properly operated to contain process generated wastewaters plus the runoff (storm water) from a 25-year, 24-hour rainfall event for the location of the facility authorized under this subchapter. There shall be no effluent limitations on discharges from retention structures constructed, operated, 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 operated and maintained. Retention structures shall be designed in accordance with §321.39 of this title (relating to Pollution Prevention Plans). Facilities authorized under this rule shall comply with §305.125 of this title (relating to Standard Permit Conditions) and all applicable permit conditions contained in TNRCC rules.

(c) (No change.)

§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 or wastewater at rates of application which will enhance soil productivity and provide the crop or forage growth with needed nutrients for optimum health and growth.

(2) (No change.)

(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 postharvest 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 beneficial use 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 weaned swine weighing 55 pounds or less multiplied by 0.1, plus the number of sheep multiplied by 0.1, plus the number of horses/mules multiplied by 2.0.

(5) (No change.)

(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. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, land application, or drainage from raw material storage.

(7) **CAFO general permit** - A general permit issued or adopted by the commission in accordance with Chapter 26 of the Texas Water Code for the express purpose to regulate discharges from CAFOs on a statewide or geographic basis.

(8) (No change.)

(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)-(ii) (No change.)

(iii) 2,500 swine weighing over 55 pounds or 10,000 weaned swine weighing 55 pounds or less;

(iv)-(x) (No change.)

(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)-(ii) (No change.)

(iii) 750 swine weighing over 55 pounds or 3,000 weaned swine weighing 55 pounds or less;

(iv)-(x) (No change.)

(C) Poultry facilities that have no discharge to waters in the state normally are not considered a CAFO. 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 will be transported into surface water or groundwater may be considered a CAFO.

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

(11)-(20) (No change.)

(21) **New CAFO** - A CAFO which was not authorized under a rule, order, or permit of the commission in effect on August 19, 1998.

(22)-(38) (No change.)

§321.33. Applicability.

(a) Any CAFO operating under currently effective authorization granted under state law only by the TNRCC or under federal law by EPA prior to the effective date of these amended rules (1999) shall submit to the executive director written notice as required in §321.47 of this title (relating to Initial TPDES Authorization) or do one of the following.

(1) Within 60 days of the effective date of these amended (1999 rules), the facility owner or operator shall apply for authorization under this amended subchapter (1999) in accordance with the provisions of either §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). If such application is filed within the 60-day period, and is administratively and technically complete, the applicant shall continue to operate the facility under the terms of the expired authorization until final disposition of the application in accordance with this subchapter.

(2) Any facility holding an authorization from the TNRCC and which is not required under federal law to obtain National Pollutant Discharge Elimination System (NPDES) authorization shall continue to operate under the terms of its existing TNRCC authorization until expiration, amendment, or termination. All such TNRCC authorizations shall expire five years from the effective date of the amendments (1999) to these rules, unless such authorization specifies an earlier expiration date.

(3) Any facility holding an authorization from the TNRCC under state law only and which under federal law is required to, but does not, hold a current NPDES authorization, shall file an application in accordance with provisions of this subchapter within 60 days of the effective date of these amended (1999) rules.

(b)-(e) (No change.)

(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 such 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 such 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(11) 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)-(i) (No change.)

(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 files an application, meets the requirements of §321.46 of this title (relating to Air Standard Permit Authorization), and obtains approval of such application in accordance with the provisions 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, and which do not 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) (No change.)

(l) By written request to the executive director, the owner or operator of any facility described in subsection (a)(2) of this section may request a transfer of its authorization from an individual permit granted by the commission to a 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 or provisions from the existing individual 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 both 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) (No change.)

(o) By written request to the executive director, the owner or operator of any facility described in §321.33(a)(2) of this title (relating to Applicability) and 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. Written request shall be on the same form as required under §321.47 of this title and continued authorization shall be in accordance with the terms of §321.47 of this title. A Subchapter K authorization that has been specifically set aside by court order shall not be eligible for transfer under this subsection.

(p) Any owner or operator holding a current authorization issued at any time under this subchapter shall obtain an amendment pursuant to §321.34 of this title (relating to Procedures for Making Application for an Individual Permit) or §321.35 of this title (relating to Procedures for Making Application for Registration) prior to any increase in the number of animals authorized for confinement or to making any modification to the facility which would cause a substantial change to the site plan or in the buffer distance determination as specified in §321.46 of this title (relating to Air Standard Permit Authorization). Nonsubstantial modifications may be made to the site plan or the pollution prevention plan submitted with the approved application without prior authorization from the commission. Substantial modifications are those that result in an increase in the number of animals authorized to be confined, a change in the required buffer zone or required lagoon capacity, a change in boundaries of the site plan, or a violation of any management practice or physical or operational requirement of this subchapter.

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

(a) A CAFO that was not authorized under a rule, order, or permit issued or adopted by the commission and in effect at the time of the adoption of these amended rules (1999) shall apply for an individual permit in accordance with the provisions of this section or shall apply 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. A facility which is not required under federal law to obtain National Pollutant Discharge Elimination System authorization may apply for a state-only individual permit, for a term of five years, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event. 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 Plans, 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, 305.46, and 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 fee 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 and 305.63-305.68 of this title (relating to Applicability, 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). Notice, public comment, and hearing on applications shall be conducted in accordance with commission rules governing individual permits issued under Chapter 26 of the Texas Water Code. 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) All applications for permit renewal must be administratively and technically complete, meet all applicable technical requirements of this subchapter, and be in accordance with one of the following.

(1) An application to renew an individual 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 land application.

(2) Except as provided by §305.63(a)(3) of this title (relating to Renewals), an application for a renewal of an individual permit for a facility as described in §321.33(a)(2) of this title (relating to Applicability) 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 (relating to Consolidated Permits) or a major source as defined under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Renewal under this paragraph 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)-(C) (No change.)

(3) If the application for renewal does not meet all of the criteria in this subsection, then an application for renewal shall be filed in accordance with subsection (a) of this section.

(c)-(d) (No change.)

(e) Any permittee with an issued and effective individual permit shall submit an application for renewal at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall provide the permittee notice of deadline for the application for renewal at least 240 days before the permit expiration date. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

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

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

(h) If an application requests an amendment as defined by §321.33(p) of this title (relating to Applicability) of an existing individual permit, the application shall be filed and processed under in this section.

(i) 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 is not authorized under a rule, order, or permit of the commission in effect at the time of the adoption of these amended rules (1999) 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 renewal of such registration granted under this subchapter, or an amendment as defined in §321.33(p) of this title (relating to Applicability), shall submit a complete and accurate application to the executive director, according to the provisions of this section.

(b) (No change.)

(c) Application for registration under this section shall be made on forms prescribed by the executive director. A facility which is not required under federal law to obtain National Pollutant Discharge Elimination System authorization may apply for a state-only registration, which authorizes the discharge or disposal of waste or wastewater into or adjacent to water in the state only in the event of a 25-year, 24-hour rainfall event, or may transfer from an individual permit to such a registration in accordance with §321.33(l) of this title. The applicant shall submit an original completed application with attachments and one copy of the 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)-(4) (No change.)

(5) A proposed 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, on-site and off-site land application 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 land application areas, including their name and address. As used in this subchapter, the term "land application 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 land application.

(6)-(7) (No change.)

(8) Sections of the pollution prevention plan to be designated by the executive director. Prior to utilization of wastewater retention facilities, documentation of liner certifications by a licensed professional engineer must be submitted (if applicable).

(9)-(10) (No change.)

(11) Where the applicant cannot document the absence of recharge features on the tracts for which an application is being filed, the proposed 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 land application areas; or

(B) submission of a detailed groundwater monitoring plan covering all affected facilities and land application 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) (No change.)

(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 make a copy of the application and the entire pollution prevention plan available for public inspection at the applicant's place of business during normal business hours, Monday through Friday, and at 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 offices; community recreation centers; or public schools.

(d)-(g) (No change.)

(h) Registrations issued under §321.37 or §321.47 of this title (relating to Action on Applications for Registration or Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization) shall expire five years after the effective date of these amendments (1999), and no new registrations shall be issued after that date. However, if the commission proposes to amend or readopt these rules prior to such expiration date, all registrations shall remain in effect until final commission action on the proposed amendment or readoption. An application for renewal of a registration under this section must be administratively and technically complete, meet all applicable technical requirements of this subchapter, and, except as otherwise provided in paragraphs (1) - (5) of this subsection, be processed according to §321.36 and §321.37 of this title (relating to Notice of Application for Registration and Action on Application for Registration). A registration for a facility described in §321.33(a)(2) of this title (relating to Applicability) may be renewed, according to the following procedures:

(1) Except as provided by §305.63(a)(3) of this title (relating to Renewals), an administratively and technically complete application 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)-(C) (No change.)

(2)-(5) (No change.)

§321.36. Notice of Application for Registration.

(a) Administrative and technical review.

(1) (No change.)

(2) Within five working days of declaration of administrative and technical 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 subsection (c) of this section, and shall forward that statement to the applicant.

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

(1)-(4) (No change.)

(5) a brief summary of the information included in the application for registration, including, but not limited to, the general location of facilities and land application 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)-(7) (No change.)

(c)-(d) (No change.)

(e) Notice by mail.

(1) (No change.)

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

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

(B)-(J) (No change.)

(3)-(4) (No change.)

§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 application for registration for which notice has been issued under this subchapter. The executive director shall review any written comments received within 30 days of

mailing the notice. Only written comments received within the 30-day period must 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, after review of any application for registration, approve or deny it in whole or in part. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for amendment of any existing registration. In considering an application for registration, the executive director will consider all relevant requirements of this subchapter and consider all information pertaining to those requirements timely received by the executive director regarding the application for registration. The executive director may not approve an application for registration by a facility that is required to obtain an individual permit under Texas Water Code, §26.0286. 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 during the 30-day comment period.

(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 who subsequently did not submit comments within the 30-day comment period may file a motion for reconsideration.

§321.39. Pollution Prevention Plans.

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

(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, but not limited to: site location, historical land use, proposed facility type, and land application practices. 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)-(B) (No change.)

(C) A list of any significant spills of these materials at the facility after September 18, 1998, or for new facilities, since date of operation.

(D) (No change.)

(2)-(7) (No change.)

(8) Evaporation systems shall be designed to withstand a ten-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, in 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)-(18) (No change.)

(19) The pollution prevention plan shall describe measures that will be used to minimize entry of non-process wastewater into retention facilities. Such measures may include the construction of berms, embankments, or similar structures. 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, the following requirements shall apply.

(A) (No change.)

(B) When wastewater is used to irrigate land application areas, 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. 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 shall be based on the available nitrogen content, however, where annual soil sampling analysis for extractable phosphorus as described in paragraph (28)(F) of this subsection indicates a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular waste or wastewater land application field, the operator may apply wastewater to the affected application area only in accordance with the conditions established in paragraph (28)(G) of this subsection.

(C)-(H) (No change.)

(I) The pollution prevention plan shall include the following information:

(i) a site map showing the location of any land application areas, either on-site or off-site which are owned, operated, or under the control of the facility owner or operator which will be utilized for land application of waste or wastewater;

(ii) the location and description of the major soil types within the identified land application areas;

(iii) crop types and rotations to be implemented on an annual basis;

(iv) predicted yield goals based on the major soil types within the identified land application areas;

(v) procedures for calculating nutrient budgets to be used to determine application rates;

(vi) a detailed description of the type of equipment and method of application to be used in applying the waste or wastewater;

(vii) projected rates and timing of application of the manure and wastewater as well as other sources of nutrients that will be applied to the land application areas.

(J) The owner or operator shall maintain on-site and update records of all waste and wastewater either utilized at the facility or removed from the facility.

(i) For facilities where waste or wastewater is applied on property owned, operated, or controlled by the owner or operator, such records shall include the following information: date of waste or wastewater application; location of the specific application site and the number of acres utilized during each application event; acreage of each individual crop on which waste or wastewater is applied; number of dry tons, percent nitrogen based on a dry basis, and the percent moisture content of the manure; and actual annual yield of each harvested crop.

(ii) Where waste or wastewater is removed from the facility, records must be maintained in accordance with paragraph (23) of this subsection.

(20)-(21) (No change.)

(22) Where the operator decides to land apply manures or 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 shall be based on the available nitrogen content of the solid waste, except however, where annual

soil sampling analysis for extractable phosphorus as described in paragraph (28)(F) of this subsection indicates a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular waste or wastewater land application field, the operator may apply manure or pond solids to the affected application area only in accordance with the conditions established in paragraph (28)(G) of this subsection.

(23) If manure is sold or given to other persons for off-site land application or 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 of the manure from that year.

(24) The procedures documented in the pollution prevention plan must ensure that the handling and land application 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 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)-(C) (No change.)

(D) Manure shall be uniformly 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)-(G) (No change.)

(H) Nighttime application of liquid or solid waste shall be allowed only 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)-(L) (No change.)

(25)-(27) (No change.)

(28) Prior to commencing wastewater irrigation 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)-(D) (No change.)

(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 test reports shall include nutrient recommendations for the crop yield goal.

(F) (No change.)

(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 or wastewater land application 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 not apply any waste or wastewater to the affected area unless the waste or wastewater application is implemented in accordance with a detailed nutrient utilization plan developed by NRCS, the Texas State Soil and Water Conservation Board, Texas Agricultural Extension Service, an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas, or any professional agronomist or soil scientist certified by the American Society of Agronomy (ASA) The executive director will issue technical guidance to assist in the development of complete and effective nutrient utilization plans. No

land application under an approved nutrient utilization plan shall cause or contribute to a violation of water quality standards or create a nuisance. Land application under the terms of the Nutrient Utilization Plan may commence 30 days after the plan is filed with the executive director, unless prior to that time the executive director has returned the plan for failure to comply with all the requirements of this subsection. The nutrient utilization plan shall, at a minimum, evaluate and address the following factors to assure that the beneficial use of manure is conducted in a manner that prevents phosphorus impacts to water quality:

- (i) slope of application fields (as a percentage) and distance of the land application area from waters in the state;
- (ii) average rainfall for the area for each month;
- (iii) soil series, soil type, soil family classification, and pH values of all soils in application fields;
- (iv) chemical characteristics of the waste, including total nitrogen and phosphorus;
- (v) recommended rates, methods, and schedules of application of manure and wastewater for all fields;

(vi) crop types, maximum crop uptake rate, and expected yield for each crop;

and

(vii) best management practices to be utilized to prevent phosphorus impacts to water quality, including any physical structures and vegetative filterstrips.

(29)-(31) (No change.)

§321.40. Best Management Practices.

The following Best Management Practices (BMPs) shall be utilized by CAFOs owners or 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)-(6) (No change.)

(7) There shall be no water quality impairment to public and neighboring private drinking water wells or surface water or watercourses due to waste handling at the permitted facility. Vegetative buffer strips shall be maintained in accordance with NRCS guidelines. The minimum buffer shall be no less than 100 feet of vegetation to be maintained between waste or wastewater application areas and surface water and watercourses. Wastewater retention facilities, holding pens, or waste/wastewater land

application sites shall not be located closer than 500 feet of a public water supply well or 150 feet of a private water well.

(8)-(11) (No change.)

(12) Collection, storage, and land application of liquid and solid waste shall be managed in accordance with recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land application site shall be secondary to the proper application of waste and wastewater. All herbicides and pesticides shall be stored, used, and disposed of in accordance with label instructions. There shall be no disposal of herbicides, pesticides, solvents or heavy metals, or of spills or residues from storage or application equipment or containers, into retention structures. Incidental amounts of such substances entering a retention structure as a result of stormwater transport of properly applied chemicals is not a violation of this rule.

(13) (No change.)

§321.41. Other Requirements.

(a) Education and training.

(1) Any CAFO owner or operator with greater than the number of animals specified in §321.32(9)(B) of this title (relating to Definitions) and located within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions) shall obtain authorization under this subchapter and, within 12 months of receiving such authorization, the owner or operator or his designee with operational responsibilities shall complete an eight-hour course or its equivalent on animal waste management. In addition, that owner or operator shall also complete at least eight additional hours of continuing animal waste management education for each two-year period after the first 12 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 land application of waste. 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)-(f) (No change.)

§321.42. Monitoring and Reporting Requirements.

(a) If, for any reason there is a discharge to waters in the state, the operator shall 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 land application system. In addition, the operator shall document the following information to the pollution prevention plan and submit that information to the appropriate regional office within 14 days of becoming aware of such discharge:

(1)-(7) (No change.)

(b)-(c) (No change.)

(d) The operator shall retain copies on-site of all records required by this subchapter for a period of at least three years from the date reported or received, and shall make them available to the executive director upon request. This period may be extended by request of the executive director at any time.

(e)-(g) (No change.)

(h) The operator shall maintain ownership, operation, or control over the retention facilities, land application areas, and control facilities identified in the 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 the 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 to reflect an alternate method for beneficially utilizing the waste or wastewater or to add new or additional land application areas to the authorization, an application for a new authorization under this subchapter or present the executive director with a plan to cease all CAFOs 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 site plan submitted with the application as required under §321.34 or 321.35 of this title. In the event the operator does not properly locate and maintain such facilities in accordance with the site plan and the provisions of §321.33(p) of this title, they shall be deemed in noncompliance with the provisions of this subchapter.

(j) The 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 subchapter.

§321.46. Air Standard Permit Authorization.

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. Pursuant to Texas Clean Air Act, §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. The air quality standard permit may be obtained in conjunction with a water quality application. If no water quality application is pending, a separate request may be submitted in writing which demonstrates compliance with all the requirements in this subchapter. 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 August 19, 1998, must document compliance with either subparagraph (A) or (B) of this paragraph at the time of application for amendment, transfer, registration, or an individual permit under this subchapter or for a CAFO general permit.

(A)-(B) (No change.)

(2) Expansion of an existing animal feeding operation. Animal feeding operations in operation on August 19, 1998 must document compliance with either subparagraph (A) or (B) of this paragraph at the time of application for transfer, amendment, registration, or an individual permit under this subchapter or for a CAFO general permit.

(A)-(B) (No change.)

§321.47. Initial Texas Pollutant Discharge Elimination System (TPDES) Authorization.

In lieu of the procedure specified in §321.33 of this title (relating to Applicability), the owner or operator of any existing facility as described in §321.33(a) of this title (relating to Applicability) may submit to the executive director written notice that they will operate the facility in accordance with the provisions of this subchapter. Such notice shall be on forms approved by the executive director and submitted within 60 days of the effective date of these amended (1999) rules. Subject to the provisions of §321.35(h) of this title (relating to Procedures for Making Application for Registration), a facility for which a complete and accurate written notice has been submitted in accordance with this section may operate as an authorized TPDES facility under this amended subchapter for the remainder of the unexpired term of their current authorization. Such initial TPDES authorization shall not require compliance with “air quality only” provisions of this title that can be accomplished only by making structural changes to a structure that is currently in compliance with the design and engineering standards in the facility’s latest permit. Upon expiration of the specified term of the facility’s current state-only

authorization, the owner or operator shall file for renewal in accordance with either §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). If the existing authorization contains any special conditions or provisions, the owner or operator shall operate such facility in accordance with the provisions of this subchapter and any additional special provisions or conditions specified in the authorization.