

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §321.34, Procedures for Making Application for an Individual Permit; §321.35, Procedures to Making Application for Registration; and new §321.48, Additional Requirements for Certain Concentrated Animal Feeding Operation. The primary purpose of the proposed amendments and new section is to implement House Bill (HB) 801, Section 3, relating to Public Participation in Certain Environmental Permitting Procedures of the Texas Natural Resource Conservation Commission, 76th Legislature, 1999.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

HB 801, Section 3 (the "Act") amended Texas Water Code (TWC), Chapter 26 by adding §26.0286, which requires the commission to process an application for authorization to construct or operate a concentrated animal feeding operation (CAFO) as an application for an individual permit, if the CAFO is located or proposed to be located in the watershed of a sole-source surface drinking water supply and it is located sufficiently close, as determined by commission rule, to a public water supply system intake in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply. Section 7(b) of the Act provides that the changes in law apply only to applications declared administratively complete on or after September 1, 1999 and that former law is continued in effect for those applications declared administratively complete before September 1, 1999. In July 1999, the commission proposed new §321.48 to implement this legislation (see 24 TexReg 5458). In response to comments received on that proposal and to allow further consideration of alternative approaches for implementation of this legislation, the

commission allowed proposed new §321.48 to be automatically withdrawn six months after the date of publication (see 25 TexReg 562).

As a general rule under TWC, Chapter 26, any CAFO that discharges wastewater into or adjacent to water in the state must obtain an individual permit from the TNRCC according to TWC, §26.121 unless the commission chooses to regulate the CAFO through rule under the repealed version of TWC, §26.040 or through a general permit under the existing version of TWC, §26.040. The commission has adopted rules in Chapter 321, Subchapter B, under TWC, §26.040 which allows some CAFOs to apply for a registration rather than an individual permit if they meet the conditions set out in the rules. In addition, under §321.33(b)(1), the executive director may require any CAFO to obtain an individual permit if the CAFO is located near surface or groundwater resources even if the CAFO would otherwise be eligible to obtain authorization through registration. The Act merely prohibits CAFOs located sufficiently close, as determined by commission rule, to a public water supply system intake in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply from obtaining authorization through registration, and instead requires them to obtain an individual permit as is generally required of all CAFOs under TWC, §26.121.

This rulemaking now proposes new amendments to Chapter 321 to implement HB 801, Section 3.

SECTION BY SECTION DISCUSSION

Section 321.34(a) is proposed to be amended to substitute the phrase “concentrated animal feeding operation (CAFO)” for “CAFO” and to correct the cross-reference to “§321.35(c)(1)-(13)” by changing it to “§321.35(c).” This change accounts for the proposed change in the number of paragraphs under §321.35(c), discussed later in this preamble, by simply referring to §321.35(c), rather than §321.35(c)(1)-(14). Other minor editorial changes are proposed under §321.34(b)(2), (c), (d), and (h). These changes are the deletion of extraneous “(relating to...)” phrases and the correction of “Executive Director” to “executive director.”

Section 321.35(a) is proposed to be amended to substitute the phrase “concentrated animal feeding operation (CAFO)” for “CAFO.” Section 321.35(c) is proposed to be amended to add the following sentence, relating to applicability of the proposed new §321.35(c)(8), the requirements of which are discussed later in this preamble: “The requirements under paragraph (8) of this subsection apply only to registration applications declared administratively complete on or after the effective date of paragraph (8) of this subsection.” While the Act provides that its provisions apply to applications declared administratively complete on or after September 1, 1999, the commission proposes that this rule apply prospectively, rather than retroactively, in order to ensure the orderly implementation of the rule and increase certainty for persons involved in the registration and permitting processes. The executive director is reviewing CAFO registration applications declared administratively complete on or after September 1, 1999 but prior to the effective date of these rules on a case-by-case basis to determine if the location of the CAFO is sufficiently close to the intake of a sole-source surface drinking water supply so that the contaminants discharged from the CAFO could potentially affect the drinking water

supply. Based upon this review, the executive director will determine whether an individual permit is required by the Act.

Section 321.35(c) is proposed to be amended under paragraph (7) to divide the requirements for this application requirement into subparagraphs (A) and (B) to improve the readability of this paragraph.

The parenthetical term “(USGS)” is also proposed to be added after the phrase “United States Geological Survey.”

Section 321.35(c) is also proposed to be amended to add new paragraph (8), which would require all applications for registration, including amendments and renewals, to submit one original, with the remainder in copies, of a USGS 7-1/2 minute quadrangle topographic map or an equivalent high quality copy showing: (1) the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots and control facilities; (2) the location of all private water wells (abandoned or in use), public wells, springs, or ponds within one mile of the outer boundary of the retention facility and downstream of the CAFO, and all other watercourses and lakes located downstream and within three miles of the outer boundary of the CAFO; (3) the location of the protection zone, as defined in §321.48 of this title (relating to Additional Requirements for Certain Concentrated Animal Feeding Operations), for each watercourse or lake located downstream and within three miles of the outer boundary of the CAFO, if any such watercourse or lake is a “sole-source surface drinking water supply” as defined in TWC, §26.0286(a); and (4) delineation of the locations of all pens, lots, ponds, and any other types of control

or retention facilities that are located within the protection zone of a “sole-source surface drinking water supply” as defined in TWC, §26.0286(a).

The requirements under §321.35(c)(8) are proposed to clarify registration application requirements and to ensure that a CAFO registration application will include the information necessary to determine whether the CAFO is or will be located within the protection zone of a sole-source surface drinking water supply, thereby necessitating processing as an individual permit application. These proposed rules require the applicant to delineate the protection zone associated with a sole-source surface drinking water supply. The number and identity of surface water bodies that qualify as sole-source surface drinking water supplies changes with some frequency. For example, a community that relies exclusively on surface water could add a secondary groundwater supply. If this community had the only sole-source supply intake in the surface water body, and that water body qualified as a sole-source surface drinking water supply only because of this community, then the water body would no longer qualify as a sole-source. On the other hand, a lake which does not initially qualify as a sole-source surface drinking water supply could have an intake added by a community relying exclusively on surface water. In this way, a water body may become a sole-source surface drinking water supply. In order to assist the regulated community in making determinations concerning protection zones of watercourses and lakes which are sole-source surface drinking water supplies, the executive director maintains a list of sole-source public water system intakes, which facilitates the identification of the watercourses and lakes qualifying as sole-source surface drinking water supplies. This list is available on the agency’s web site at www.tnrcc.state.tx.us.

In order to account for the addition of new proposed §321.35(c)(8), existing paragraphs (8)-(13) are proposed to be renumbered (9)-(14). Proposed paragraph (11) contains the clarification of “NRCS” by changing it to “Natural Resource Conservation Service (NRCS),” and substituting “NRCS” for “Natural Resource Conservation Service” under subparagraph (E).

Proposed new §321.48, implements the requirements of new TWC, §26.0286, relating to Procedures Applicable to Permits for Certain Concentrated Animal Feeding Operations, as added by HB 801, Section 3.

Proposed new §321.48(a) provides that this section applies to any application for registration to construct or operate a CAFO that is declared administratively complete on or after the effective date of these rules. While the Act provides that its statutory provisions apply to applications declared administratively complete on or after September 1, 1999, the commission proposes that this rule apply prospectively, rather than retroactively, in order to ensure the orderly implementation of the rule and increase certainty for persons involved in the registration and permitting processes.

Proposed new §321.48(b) provides that if, as of the date of declaration of administrative completeness, any part of any pen, lot, pond, or any other type of control or retention facility is located within the protection zone of a “sole-source surface drinking water supply,” as defined in TWC, §26.0286(a), the application must be processed as an application for an individual permit. Thus, the determination of whether or not a CAFO is in the protection zone is based upon the facts established at the time of declaration of administrative completeness. If a later date were used, an application for a facility

within a protection zone might be processed as a registration only to be subject to re-processing as an individual permit based upon changed circumstances occurring at a later date. Establishing a fixed time for such determinations increases certainty in the process. With regard to the areas of the permitted or registered site within the protection zone that trigger the requirement for an individual permit (i.e., any part of any pen, lot, pond, or any other type of control or retention facility), these are the areas with the greatest concentration of animal waste within the site, and therefore releases of waste from these areas have the potential to adversely impact a sole-source surface drinking water supply.

Proposed new §321.48(c) defines “protection zone” as that area within the watershed of a sole-source surface drinking water supply, as defined in TWC, §26.0286(a), that is within two miles of the normal pool elevation, as indicated on the USGS map, of a sole-source surface drinking water supply; or within two miles of that part of a perennial stream that is tributary to the sole-source surface drinking water supply and within three linear miles upstream of the normal pool elevation, as indicated on the USGS map, of a sole-source surface drinking water supply; or within two miles of that part of a stream that is a sole-source surface drinking water supply, extending three linear miles upstream from the water supply intake. The protection zone is intended to provide for greater scrutiny and opportunities for public participation of those CAFO applications within the protection zone. The primary pollutants of concern within protection zones include the nutrients phosphorus and nitrogen, which CAFOs have the potential to release. The protection zone of a sole-source water supply is proposed to extend three miles upstream from any perennial stream as defined by a USGS topographic map primarily because perennial streams are the primary contributors to reservoirs. Therefore, potential pollutants associated with land-use activities along or near the banks of perennial streams take a more direct route to the

reservoir than activities further inland or those along an intermittent stream. For intakes on streams, the protection zone is the area within two miles of the three-mile stream reach upstream from the intake. This approach of extending the area of influence further upstream of perennial streams is consistent with the Texas Source Water Assessment and Protection Program Strategy approved by the United States Environmental Protection Agency.

The two-mile distance around the reservoir is proposed based on the increased potential for CAFOs within that area to have adverse impacts on a sole-source surface drinking water supply. It is more likely that, outside the protection zone as defined in this rule, released contaminants will be absorbed or otherwise attenuated prior to entering the aquatic environment. In other words, compared to any released nutrients from CAFOs within a protection zone, any released nutrients from CAFOs located outside a protection zone are more likely to be attenuated (e.g., assimilated by terrestrial or aquatic plants or microorganisms) before entering the sole-source surface drinking water supply. The protection zone, as defined in proposed new §321.48(c), surrounds the entire sole-source surface drinking water supply. A protection zone based only on the intake point would not take the entire water supply into consideration and, therefore, would contain gaps that could leave portions of the water supply unprotected. For example, if the protection zone was proposed to be based on the intake point, a CAFO, or many CAFOs, for that matter, could be located in close proximity to a reservoir which is a sole-source surface drinking water supply, and be further than two miles from the intake point, and not be subject to individual permits, but still pose deleterious threats to the quality of the drinking water supply. In addition, by applying the protection zone around the entire water body, the protection zone will remain constant, even though new water supply intakes may be added. For example, if the

protection zone were based on the intake point, and new sole-source intakes were added each year for several years, then the protection zone would necessarily have to be redefined each time an intake was added, for several years in a row. In such a case, there would be much less certainty over whether a registration or an individual permit would be required in the context of this proposed rule. Thus, defining the protection zone in the manner proposed in this rule, based on the entire surface water body, facilitates the efficient administration of the Act.

In addition, under existing §321.33(n), any new CAFO located within one mile of Coastal Natural Resource Areas as defined by the Natural Resources Code, §33.203(1) must apply for and obtain an individual permit in accordance with §321.34. That rule is designed to provide a closer review of applications and allow for a contested case hearing prior to a CAFO locating within one mile of ecologically sensitive estuaries. Unlike §321.33, which is intended to protect ecologically sensitive estuary systems and other coastal waters, the proposed rules are related to drinking water supplies. Therefore, a protection zone of greater than one mile is warranted due to the human health concerns related to drinking water.

The commission intends to revisit the definition of the protection zone once a vulnerability assessment has been completed for all public water systems. These assessments, which are required by the 1996 amendments to the Safe Drinking Water Act (SDWA), are scheduled to be completed by May 2003 and will take into consideration soils, climate, slope, land use, and other factors which will be used to determine the vulnerability of a water supply to a list of contaminants. The SDWA amendments strengthened protections for all members of the public, while allowing the agency to focus on the

highest risks to human health and to develop responsible solutions. The criteria for determining relative susceptibility to different sources of contamination incorporates sound scientific principles which will yield similar results under similar circumstances when applied in different parts of the state. The results of this study will allow the commission to, in the future, promulgate rules that are more specifically tailored to the individual characteristics and vulnerability of each sole source surface drinking water supply. In the absence of this scientific data and because the Act applies to applications currently being processed, the commission believes that the conservative approach reflected in these rules is both appropriate and reasonable.

FISCAL NOTE

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rules are in effect, there will be no significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed amendments. The proposed rules would implement certain provisions of HB 801, relating to Public Participation in Certain Environmental Permitting Procedures of the Texas Natural Resource Conservation Commission, 76th Legislature, 1999, which amends TWC, Chapter 26.

HB 801 requires the agency to process an application for authorization to construct or operate a CAFO as a application for an individual permit, if the CAFO is located or proposed to be located in the watershed of a sole-source surface drinking water supply and it is located sufficiently close to a public water supply system intake in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply.

Currently, under §321.33(b)(1), the executive director may require CAFOs located close to surface water resources to obtain an individual permit. To implement HB 801, the proposed rules would require an individual permit for CAFOs located within the defined protection zone. There are currently 591 permitted or registered CAFOs, of which an estimated 70 or 12%, would fall in a defined protection zone and upon amendment or renewal would be required to apply for an individual permit rather than a registration. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, the proposed rules are not anticipated to have significant costs for those applicants deemed to be within a protection zone and required to obtain an individual permit unless the commission grants a request for a contested case hearing by an affected person. Costs for those seeking permit applications would still include consultant and/or engineering fees for permit application preparation, permit fees, and costs associated with facility design and construction to meet agency and statutory requirements. However, if the commission grants a request for a contested case hearing, estimated costs to the applicant, could range anywhere from \$5,000-\$100,000 for attorney fees. The amount of attorney fees would vary, depending on the complexity of the issues involved, and the length of the hearing. The number of individual permit applications subject to contested case hearings cannot be determined. In general additional costs to document existing data in the forms required for an individual permit will vary depending on the detail and data entry required to document compliance with permit requirements and are not anticipated to be significant.

PUBLIC BENEFIT

Mr. Horvath has determined that for each of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement and compliance with these proposed rules will be

increased protection of the public drinking water supply and the possibility of increased opportunity for public participation in the CAFO permitting process conducted by the commission. The proposed rules would require the agency to process an application for authorization to construct or operate a CAFO as a application for an individual permit, if the CAFO is located or proposed to be located in the watershed of a sole-source surface drinking water supply and it is located sufficiently close to a public water supply system intake in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply.

Currently, under §321.33(b)(1), the executive director may require CAFOs located close to surface water resources to obtain an individual permit. The proposed rules would require an individual permit for CAFOs located within the defined protection zone. There are currently 591 permitted or registered CAFOs, of which an estimated 70 or 12%, would fall in a defined protection zone. Upon amendment or renewal, CAFOs located within the protection zone would be required to apply for an individual permit rather than a registration. This will allow for increased protection of the public drinking water supply by allowing for the possible inclusion of site-specific requirements into an individual permit. This will also allow for an increased opportunity for public participation by providing an opportunity for affected persons to request a contested case hearing on the application. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, the proposed rules are not anticipated to have significant costs for those applicants deemed to be within a protection zone and required to obtain an individual permit unless the commission grants a request for a contested case hearing by an affected person. Costs for those seeking permit applications would still include consultant and/or engineering fees for permit application preparation, permit fees, and costs

associated with facility design and construction to meet agency and statutory requirements. However, if the commission grants a request for a contested case hearing, estimated costs to the applicant could range anywhere from \$5,000-\$100,000 for attorney fees. The amount of attorney fees would vary, depending on the issues involved, and the length of the hearing. The number of individual permit applications subject to contested case hearings cannot be determined. In general additional costs to document existing data in the forms required for an individual permit will vary depending on the detail and data entry required to document compliance with permit requirements and are not anticipated to be significant.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In general, no significant economic effects are anticipated to small and micro-businesses as a result of implementing the proposed rules. However, adverse economic effects could be anticipated to small and micro-businesses if there is a contested case hearing. Small or micro-businesses affected by the proposed rules could include feedlots, dairies, poultry operations, hog farms, or other livestock operations that meet the definition of a CAFO, including confinement of greater than or equal to 1,000 animal units.

Currently under §321.33(b)(1), the executive director may require CAFOs located close to surface water resources to obtain an individual permit. The proposed rules would require an individual permit for CAFOs located within the defined protection zone. There are currently 591 permitted or registered CAFOs, of which an estimated 70 or 12%, would fall in a defined protection zone and upon amendment or renewal would be required to apply for an individual permit rather than a registration. It is not

known how many of these facilities are small or micro-businesses. Even though site-specific requirements in an individual permit could result in additional costs to the facility owner or operator, the proposed rules are not anticipated to have significant costs for those applicants deemed to be within a protection zone and required to obtain an individual permit unless the commission grants a request for a contested case hearing by an affected person. Costs for those seeking permit applications would still include consultant and/or engineering fees for permit application preparation, permit fees, and costs associated with facility design and construction to meet agency and statutory requirements. However, if the commission grants a request for a contested case hearing, estimated costs to the applicant could range anywhere from \$5,000-\$100,000 for attorney fees. The amount of attorney fees would vary, depending on the complexity of the issues involved, and the length of the hearing. The number of individual permit applications subject to contested case hearings cannot be determined. In general additional costs to document existing data in the forms required for an individual permit will vary depending on the detail and data entry required to document compliance with permit requirements and are not anticipated to be significant.

DRAFT REGULATORY IMPACT ASSESSMENT

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of the 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 statute. The proposal does not meet the definition of “major environmental rule” for several reasons. First, these proposed rules are procedural in nature, dealing primarily with application requirements that are needed to enable the executive director to determine whether a particular CAFO is located in

the watershed of a sole-source surface drinking water supply and sufficiently close to an intake of a public water supply system in such a surface drinking water supply that contaminants discharged from the CAFO could potentially affect the public drinking water supply. If so located or proposed to be so located, the commission, by statute, must process an application for authorization to construct or operate such a CAFO as an individual permit application. Furthermore, the commission's rules currently allow the executive director to require a CAFO to apply for an individual permit if the operation is located near surface water resources. Therefore, the requirement to apply for an individual permit is not a new requirement, and thus the rule does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state. Finally, because the rules deal primarily with application requirements, they are procedural in nature and would not adversely affect the environment, or the public health and safety of the state or a sector of the state.

In addition, these proposed rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not exceed a standard set by federal law because there are no such corresponding federal standards. This proposal does not exceed an express requirement of state law because it is specifically required by TWC, §26.0286, which requires the commission to use certain procedures for processing applications for certain CAFOs. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the September 14, 1998 Memorandum of Understanding between the United States Environmental

Protection Agency and the TNRCC, authorizing the commission to implement the National Pollution Discharge Elimination System permitting program in Texas, requires CAFOs, as defined in the federal Clean Water Act, to obtain Texas Pollution Discharge Elimination System authorization but does not specify whether the authorization must be through an individual permit, registration under a permit-by-rule, or through a general permit. This proposal does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., TWC, §26.0286, which requires the commission to use certain procedures for processing applications for certain CAFOs).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of the proposed rules is to implement the requirements of HB 801 regarding CAFOs. The specific primary purpose of the proposed rules is to establish by rule the parameters of how to determine, in accordance with HB 801, whether a particular CAFO is located in the watershed of a sole-source surface drinking water supply and is located sufficiently close to an intake of a public water supply system in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply; thereby requiring the commission to process an application for authorization to construct or operate such a CAFO as an individual permit application. The proposed rules will substantially advance this stated purpose by establishing the protection zone, which is the primary parameter of how to determine whether a particular CAFO is located in the watershed of a sole-source surface drinking water supply and is located sufficiently close to an intake of a public water supply system in the sole-source surface drinking water supply so that contaminants discharged from the

CAFO could potentially affect the public drinking water supply, thereby triggering permit requirements.

Promulgation and enforcement of these proposed rules will not affect private real property which is the subject of the rules primarily because these proposed rules are procedural in nature. A CAFO facility located within the protection zone would still be able to operate, but only after obtaining an individual permit rather than another form of authorization such as a registration. These proposed rules are not anticipated to affect private real property because they do not prohibit or restrict a CAFO from operating within a protection zone. They simply require the facility to follow different procedures for obtaining authorization to construct or operate. Furthermore, CAFOs located near surface water resources are already required to prevent the likelihood of inadvertent discharges and to ensure that permitted discharges do not degrade water quality. These proposed rules establish by rule the parameters of how to determine, in accordance with HB 801, whether a particular CAFO is located in the watershed of a sole-source surface drinking water supply and is located sufficiently close to an intake of a public water supply system in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply; thereby requiring the commission to process an application for authorization to construct or operate such a CAFO as an individual permit application. Therefore, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. This action concerns only the procedural rules of the commission and general agency operations. Therefore, the proposed rules are not subject to the CMP.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on June 15, 2000 at 10:00 a.m. in Building F, Room 3202A at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-030-321-AD. Comments must be received by 5:00 p.m., June 19, 2000. For further information, please contact Ray Austin, Policy and Regulations Division, (512) 239-6814.

STATUTORY AUTHORITY

The amended and new sections are proposed under TWC, §26.0286, which requires the commission to process an application for authorization to construct or operate a CAFO as an application for an individual permit if the CAFO is located or proposed to be located in the watershed of a sole-source surface drinking water supply and it is located sufficiently close to a public water supply system intake in the sole-source surface drinking water supply so that contaminants discharged from the CAFO could potentially affect the public drinking water supply. The rules are also proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.013, which establishes the commission's authority over various statutory programs; §26.011, which establishes the commission's authority over water quality in the state; and §26.028, which establishes the commission's authority to approve certain applications for wastewater discharge; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendments and new section implement TWC, §26.0286.

CHAPTER 321 - CONTROL OF CERTAIN ACTIVITIES BY RULE

SUBCHAPTER B : CONCENTRATED ANIMAL FEEDING OPERATIONS

§§321.34, 321.35, 321.48

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

(a) A concentrated animal feeding operation (CAFO) [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) [§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) (No change.)

(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) (No change.)

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

(d) A permittee submitting an application for renewal satisfying the criteria in subsection (b)(2) of this section will automatically be issued a notice of renewal for the existing permit by the executive director [Executive Director].

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

(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) (No change.)

§321.35. Procedures for Making Application for Registration.

(a) A concentrated animal feeding operation (CAFO) [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(1) 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 requirements under paragraph (8) of this subsection apply only to registration applications declared administratively complete on or after the effective date of paragraph (8) of this subsection. The completed application shall be submitted to the executive director signed and notarized and with the following information:

(1)-(6) (No change.)

(7) One original (remainder in copies) United States Geological Survey (USGS) 7-1/2 minute quadrangle topographic map or an equivalent high quality copy showing:

(A) the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots and control facilities; and [,]

(B) the location of all private water wells (abandoned or in use) and public wells and all springs, lakes, or ponds within one mile of the outer boundary of the retention facility and downstream of the facility.

(8) For all registration applications, including amendments and renewals, one original (remainder in copies) USGS 7-1/2 quadrangle topographic map or an equivalent high quality copy showing:

(A) the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots and control facilities;

(B) the location of all private water wells (abandoned or in use), public wells, springs, or ponds within one mile of the outer boundary of the retention facility and downstream of the CAFO, and all other watercourses and lakes located downstream and within three miles of the outer boundary of the CAFO;

(C) the location of the protection zone, as defined in §321.48 of this title (relating to Additional Requirements for Certain Concentrated Animal Feeding Operations), for each watercourse or lake located downstream and within three miles of the outer boundary of the CAFO, if any such watercourse or lake is a “sole-source surface drinking water supply” as defined in Texas Water Code (TWC), §26.0286(a); and

(D) delineation of the location of all pens, lots, ponds, and any other types of control or retention facilities that are located within the protection zone of a “sole-source surface drinking water supply” as defined in TWC, §26.0286(a).

(9) [(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).

(10) [(9)] A copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner/operator of any lands to be utilized under the proposed CAFO. This requirement does not apply to any lands not owned, operated, or controlled by the applicant for the purpose of off-site land application of manure wherein the manure is given or sold to others for beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure.

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

(A) Railroad Commission;

(B) Groundwater District, if applicable;

(C) Texas Water Development Board;

(D) TNRCC;

(E) NRCS [Natural Resource Conservation Service];

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

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

(12) [(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.

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

(14) [(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)-(f) (No change.)

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

(h) 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) (No change.)

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

(3) (No change.)

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

(5) (No change.)

§321.48. Additional Requirements for Certain Concentrated Animal Feeding Operations.

(a) This section applies to any application for registration to construct or operate a concentrated animal feeding operation (CAFO), including amendments and renewals, that is declared administratively complete on or after the effective date of this section.

(b) If, as of the date of declaration of administrative completeness, any part of any pen, lot, pond, or any other type of control or retention facility is located within the protection zone of a “sole-source surface drinking water supply,” as defined in Texas Water Code, §26.0286(a), the application for authorization to construct or operate a CAFO shall be processed as an application for an individual permit under §321.34 of this title (relating to Procedures for Making Application for an Individual Permit).

(c) In this subchapter, “protection zone” is defined as that area within the watershed of a sole-source surface drinking water supply that is:

(1) within two miles of the normal pool elevation of a body of surface water that is a sole-source surface drinking water supply; or

(2) within two miles of that part of a perennial stream that is:

(A) a tributary of a sole-source surface drinking water supply; and

(B) within three linear miles upstream of the normal pool elevation of a sole-source surface drinking water supply; or

(3) within two miles of that part of a stream that is a sole-source surface drinking water supply, extending three linear miles upstream from the water supply intake.

