



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

September 18, 1997

The Honorable John L. Hutchison
Hansford County Attorney
P.O. Box 506
Spearman, Texas 79081

Letter Opinion No. 97-085

Re: Commissioners court's authority over
construction and operation of a concentrated
animal feeding operation (ID# 39442)

Dear Mr. Hutchison:

You ask about the authority of a commissioners court with respect to a concentrated animal feeding operation ("CAFO"). You explain that Texas Farm, Inc., has applied to the Texas Natural Resource Conservation Commission ("TNRCC") to operate a new swine feeding facility¹ in Hansford County. The facility will generate, collect, and treat animal waste and wastewater on the CAFO site. County residents, you state, are concerned the waste will pollute the underground water supply, and the odor from the swine and the waste will pollute the air.

Your first ask about all the powers a county commissioners court may have "in regard to the construction of a concentrated animal feeding operation and the regulation of the operations of a concentrated animal feeding operation." You additionally ask if "there are any other permits, in addition to the permit granted by the TNRCC, which Hansford County can require before the facility can be constructed." An exhaustive treatment of these questions is beyond the scope of an attorney general opinion. We limit our discussion to some of the relevant state law in this area, based on the concerns expressed. Furthermore, we express no opinion regarding the extent to which any of these provisions may be available to the county with respect to the proposed facility.

A county commissioners court has only the powers conferred by the Texas Constitution or statutes. Tex. Const. art. V, § 18; *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948). A commissioners court has no specific authority with respect to CAFO facilities. But a county does have general authority to deal with environmental pollution and sanitation problems that may be

¹The facility will hold a maximum of 23,222 swine. T.N.R.C.C., NOTICE OF APPLICATION FOR AUTHORIZATION TO OPERATE A CONCENTRATED ANIMAL FEEDING OPERATION IN ACCORDANCE WITH T.N.R.C.C. SUBCH. K RULES (Dec. 1996). See 30 T.A.C. § 321.182(A)(iii) (defining CAFO as any animal feeding operation designated by TNRCC executive director as significant contributor of pollution or any animal feeding operation which stables and confines for 45 days or more, in any 12-month period, more than 2,500 swine weighing over 55 pounds).

created by these facilities.² 36 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 32.1 (Texas Practice 1989). Specifically, the commissioners court may enforce the sanitation and health protection statutes as provided in chapters 121, 341, 361, and 364 of the Health and Safety Code, or the water quality laws as provided in chapter 26 of the Water Code. Similarly, the commissioners court may enforce air quality standards as provided in chapter 382 of the Health and Safety Code. A county appears to have very limited authority under these provisions, however, to regulate the actual construction and operation of a CAFO or similar facility.

We consider first the powers of the commissioners court under the sanitation and health protection provisions of the Health and Safety Code. A commissioners court may “enforce any law that is reasonably necessary to protect the public health,” Health & Safety Code § 122.003(a), and may appropriate and expend general county funds for the public health and sanitation in the county, *id.* § 122.001. The county may use chapter 341, which provides for general sanitation standards and health protection measures. *Id.* § 341.092(d). Section 341.011, for example, declares certain conditions or places to be a “public health nuisance,” including breeding places for flies in populous areas, and organic wastes stored or discharged in such a way as to be a potential instrument or medium in disease transmission to a person. Section 341.012 allows a local health authority to order abatement of public health nuisance, and the local prosecuting attorney to sue to abate such nuisance if necessary. Lastly, section 341.092(d) allows a county to institute proceedings to enjoin violations of chapter 341 generally, including section 341.013(c), which prohibits the storage or disposal of waste in a manner that may cause pollution or contamination of ground or surface water.³

The Solid Waste Disposal Act, Health and Safety Code chapter 361, allows a commissioners court by rule to require and issue licenses authorizing and governing operation of facilities that process, store, or dispose of solid waste,⁴ other than hazardous waste,⁵ outside the territorial or extraterritorial jurisdiction of a city. *Id.* § 361.154. This regulatory authority, however, is limited. It may not be available with respect to facilities regulated by the TNRCC under chapter 26 of the

²As you suggest, a county has very limited and specific zoning authority, and none that may be used to regulate construction or operation of the proposed facility. *See, e.g.,* Local Gov’t Code §§ 231.101 - .113 (county zoning around Lakes Tawakoni and Ray Roberts), 231.131 - .140 (county zoning around Lakes Alan Henry, Cooper, and Post); 231.171 - .183 (county zoning and regulations in El Paso Mission Trail Historical Area), 240.061 - .067 (regulation of slaughterers applicable to county containing 2 or more municipalities with population of 250,000 or more, or to county adjacent to such county), 243.001 - .011 (county and municipal regulation of sexually oriented business).

³The Texas Department of Health is a necessary and indispensable party in any suit brought by a county under this section. Health & Safety Code § 341.092(e).

⁴*See id.* § 361.003(34) (defining solid waste to include “garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities”).

⁵*See id.* § 361.003(12) (defining hazardous waste as solid waste identified or listed as such by administrator of United States Environmental Protection Agency under federal Solid Waste Disposal Act, as amended).

Water Code. *See id.* § 361.003(34) (excluding industrial discharges subject to regulation by permit under chapter 26 of Water Code from definition of solid waste). Moreover, the commissioners court may not exercise the licensing authority with respect to industrial solid waste disposed of on the site of the operation that is the source of the waste. *Id.* §§ 361.090, .152, .154. If the authority were exercisable, the county would have to adopt solid waste management rules consistent with those of and approved by the TNRCC. *Id.* § 361.154. The county then could amend or revoke a license granted for reasons of public health, air or water pollution, or violation of chapter 361 of the Health and Safety Code or other applicable law. *Id.* § 361.160. County actions would be subject to being superseded by a specific action or directive of the TNRCC. *Id.* §§ 361.151, .154.

If the Solid Waste Disposal Act were applicable, a county would have authority to enforce its provisions and rules adopted by the TNRCC with respect to solid waste management. *Id.* § 361.164. Specifically, the county would have authority to enter public or private property in its jurisdiction to inspect and investigate solid waste management conditions. *Id.* § 361.032(b). Additionally, the county could sue to enjoin violations or threatened violations of any provision of the act or any rule, permit, license, or other order of the TNRCC, the county, or another political subdivision exercising authority under this act, within the county's jurisdiction, have penalties assessed for violations, or both. *Id.* § 361.225.⁶

The County Solid Waste Control Act, chapter 364 of the Health and Safety Code, allows a commissioners court to regulate or prohibit waste disposal in the county if the disposal threatens public health, safety, and welfare. *Id.* §§ 364.011, .012. These provisions are subject, however, to the same limitations, including those related the definition of solid waste, described above with respect to the Solid Waste Disposal Act.

We consider next the county's authority to enforce water quality laws under chapter 26 of the Water Code. Section 26.121 generally prohibits discharge of waste⁷ into or adjacent to any water in the state⁸ except as authorized by a TNRCC rule, permit, or order. A county may inspect public water in the area and determine if persons discharging effluents have obtained and are complying with permits for the discharge, Water Code § 26.171, and may enter private property to inspect and investigate water quality conditions generally. *Id.* § 26.173. The commissioners court may also execute cooperative agreements with the TNRCC or other local governments to provide "water quality management, inspection, and enforcement functions . . ." *Id.* § 26.175. Finally, the county may sue to enjoin violations or threatened violations of section 26.121 or any TNRCC rule, permit,

⁶The TNRCC would be a necessary and indispensable party to any such action. *Id.* § 361.229.

⁷The term "waste" is defined as "sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste, as defined in this section. Water Code § 26.001(6).

⁸The terms "water" or "water in the state" includes groundwater. *Id.* § 26.001(5).

or order⁹ within the county's territorial jurisdiction, have penalties assessed for violations, or both. *Id.* § 26.124.¹⁰

Finally, we look at the county's authority, similar to its authority to enforce water quality laws under chapter 26 of the Water Code, to enforce air quality laws under the Texas Clean Air Act. The act prohibits emission of any air contaminant or any activity that causes or contributes to air pollution¹¹ except as authorized by a TNRCC rule or order. Health & Safety Code § 382.085(a). Furthermore, emission of any air contaminant or performance of any activity that violates the act or any TNRCC rule or order is prohibited. *Id.* § 382.085(b). The county may monitor the air quality and enter public or private property to determine compliance with the act. *Id.* § 382.111. The commissioners court may make recommendations to the TNRCC concerning any rule or order that affects the area within the county's jurisdiction, and the TNRCC is required to give maximum consideration to these recommendations. *Id.* § 382.112. A county may also execute cooperative agreements with the TNRCC or other local governmental entities "to provide for the performance of air quality management, inspection, and enforcement functions . . ." *Id.* § 382.115. Lastly, the county may bring suit¹² for injunctive relief, civil penalties, or both, against persons violating or threatening violation of the act or any TNRCC rule or order. *Id.* §§ 382.084, .114.¹³

We proceed to consider your second question regarding any permits that the commissioners court may require with respect to construction of the proposed facility. Generally, the TNRCC is

⁹Issuance of a TNRCC permit to discharge waste or air contaminants would not bar a nuisance action. *Manchester Terminal Corp. v. Texas TX TX Marine Transp., Inc.*, 781 S.W.2d 646, 651 (Tex. App.--Houston [1st Dist.] 1989, writ denied) (neither TNRCC permit authorizing emission of specified amount of pollutant into air nor underlying legislation gave company right to create nuisance; activity may be judicially declared nuisance); *Atlas Chem. Indus., Inc. v. Anderson*, 514 S.W.2d 309, 318-19 (Tex. Civ. App.--Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975) (permit to discharge pollutants into stream will not defeat action for damages); Attorney General Opinion M-190 (1968) at 5 (provisions of Texas Clean Air Act and what is now Water Code ch. 26 do not affect authority of city or county to abate pollution as common-law public nuisance; only effect of permit from TNRCC would be to protect permittee from "statutory pollution").

¹⁰TNRCC is a necessary and indispensable party to any suit instituted by a county under this section. Water Code § 26.124(a).

¹¹The term "air pollution" means the presence of contaminants in such concentration and duration as to: (A) be injurious to or adversely affect human health or welfare, animal life, vegetation, or property; or, (B) interfere with normal use or enjoyment of animal life, vegetation, or property. Health & Safety Code § 382.003(3). The phrase "air contaminant" includes odor, produced by processes other than natural. *Id.* § 382.003(2). Odor produced by "natural processes" means that which occurs in nature and is affected or controlled by human mechanics only to the extent normal and usual for the particular area. *F/R Cattle Co., Inc. v. State*, 866 S.W.2d 200, 203 (Tex. 1993). Location is a factor to be considered in deciding if the pollutant is produced by "natural processes," and is a factual determination. *Id.* at 204-05.

¹²*See supra* note 9.

¹³TNRCC is a necessary and indispensable party. Health & Safety Code § 382.114(d).

the state agency with authority to issue permits for the construction or operation of facilities that may discharge waste or emit air contaminants. *See State v. Associated Metals & Minerals Corp.*, 635 S.W.2d 407, 409-10 (Tex. 1982) (discussing provisions with respect to TNRCC in Clean Air Act and concluding TNRCC has exclusive original jurisdiction to issue permits). Unless provisions of the Solid Waste Disposal Act¹⁴ apply, the county would appear to have a limited role in this process.

The TNRCC is expressly authorized to issue permits and amendments to permits for discharge of waste into or adjacent to water in the state. Water Code § 26.027(a). No person may construct a treatment facility, including any facility to treat, neutralize, or stabilize waste, until the TNRCC has issued a permit authorizing or approved the discharge. *Id.* §§ 26.001(15), .027(c). The TNRCC is also expressly authorized to issue a permit for a facility that may emit air contaminants or operate a “federal source.”¹⁵ Health & Safety Code § 382.051. A person must obtain the permit before constructing the facility. *Id.* § 382.0518.

Pursuant to its authority to regulate facilities that may discharge waste or emit air contaminants, the TNRCC has promulgated rules with respect to CAFOs that address both water and air quality issues. *See T.N.R.C.C.*, 20 Tex. Reg. 4719 (1995) (codified at 30 T.A.C. subch. K). CAFO facilities, as defined in the TNRCC rules, required to submit an application, may not start operation without receiving authorization or permit under the rules.¹⁶ 30 T.A.C. § 321.183(h). A county may oppose the issuance of the permit¹⁷ on the basis that the permitted activity may result in detrimental impact on the groundwater underlying the CAFO. *Id.* § 321.187. Any such administrative contest must be pursued within the time period and the format prescribed by the rules. *Id.*

¹⁴*See supra* discussion at 2.

¹⁵*See* Health & Safety Code § 382.003(7) (defining “federal source” as facilities subject to permitting requirements of federal Clean Air Act Amendments of 1990, Pub. L. No. 101-549).

¹⁶In addition to the TNRCC permit, a CAFO facility may be required to obtain coverage under a general, federal permit. *See* EPA GUIDE MANUAL ON NPDES REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (Dec. 1995) at 8, 10. To obtain this coverage, a CAFO operator must file a standardized notice of intent, prepare and implement a pollution prevention plan, properly operate and maintain the facilities, and lastly, “make proper notifications” if discharges do occur. *Id.* at 11, 14, 17, 30. This permit does not release the permittee from any responsibility it may have under other federal or state laws or regulations. *Id.* at 29.

¹⁷The applicant is required to publish notice of the application in a newspaper of general circulation within the county and area where the proposed facility is to be located. 30 T.A.C. § 321.186(b). Additionally, the TNRCC’s executive director must mail the notice of application (which includes instructions on the manner and time frame for submitting comments) to the county judge and health authorities in that county or in which the waste is to be disposed of, among others. *Id.* § 321.186(d)(1), (2)(C).

S U M M A R Y

A commissioners court has no specific authority with respect to a concentrated animal feeding operation ("CAFO"). A county does have authority to enforce environmental pollution laws in general under the provisions of the Health and Safety Code and the Water Code. A county has very limited authority to regulate the actual construction and operation of a CAFO or similar facility, however, under those provisions. Generally, the Texas Natural Resource and Conservation Commission is the state agency with authority to issue permits for construction and operation of a CAFO facility. A county's role is generally limited to opposing issuance of such permit.

Yours very truly,



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