

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for a Petition for Rulemaking

AGENDA REQUESTED: April 6, 2016

DATE OF REQUEST: March 18, 2016

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Kris Hogan, (512) 239-6812

CAPTION: Docket No. 2016-0277-PET. Consideration of a petition for rulemaking under Section 20.15 of 30 Texas Administrative Code (TAC) Chapter 20, Rulemaking.

The petition was filed with the Texas Commission on Environmental Quality (commission) on February 24, 2016, by Jackson Walker LLP on behalf of the Texas Forestry Association. The petitioner requested that the commission amend 30 TAC Chapter 111, Subchapter B, to provide specific requirements for prescribed burning conducted by Certified and Insured Prescribed Burn Managers who are certified by the Prescribed Burning Board of the Texas Department of Agriculture. (Kati Wooten, Amy Prescott) (Project No. 2016-024-PET-NR).

Ramiro Garcia, Jr.

Deputy Director

Susan Jablonski

Division Director

Kristina M. Hogan

Agenda Coordinator

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners Date: March 18, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Ramiro Garcia, Jr., Deputy Director
Office of Compliance and Enforcement

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2016-0277-PET

Project No.: 2016-024-PET-NR

Who Submitted the Petition:

On February 24, 2016, the Texas Commission on Environmental Quality (commission or TCEQ) received a petition for rulemaking from Jackson Walker LLP on behalf of the Texas Forestry Association (petitioner).

What the Petitioner Requests:

The petitioner requests the commission amend 30 Texas Administrative Code (TAC) Chapter 111, Subchapter B, concerning Outdoor Burning, to provide specific requirements for prescribed burning conducted by Certified and Insured Prescribed Burn Managers (CPBMs), who are certified by the Prescribed Burning Board (PBB) of the Texas Department of Agriculture.

Recommended Action and Justification:

The Executive Director (ED) recommends a rulemaking proceeding be initiated. The rule language proposed by the petitioner shall be evaluated to ensure consistency with current Texas Health and Safety Code statutes, State Implementation Plan commitments, and similar PBB regulations, as well as to confirm overall adherence to general outdoor burn regulations currently in place for the purpose of protecting the environmental health and safety of the state.

Current TCEQ rules provide an exception from the general prohibition on outdoor burning to authorize prescribed burning activities under specific conditions. However, TCEQ rules do not differentiate between those who conduct prescribed burning activities. As such, TCEQ regulations governing prescribed burning are the same for prescribed burn activities conducted by CPBMs, as defined in 4 TAC §225.1, as they are for prescribed burning conducted by other parties.

The ED understands the petitioner's concern that the TCEQ's current rules do not recognize CPBMs, who have been certified by the PBB and, therefore, have demonstrated they have met specific training and minimum experience level requirements to plan and oversee responsible prescribed burns. Accordingly, the ED agrees an amendment stipulating requirements specific only to CPBMs would benefit the public and the

Re: Docket No. 2016-0277-PET

environment by promoting the ability of CPBMs to provide their services, thereby encouraging prescribed burns be conducted by trained and experienced managers.

However, while the ED agrees TCEQ's current rules should more closely align with PBB regulations, it is not clear how the petitioner's specific proposed rule changes would accomplish this goal. For example, the petitioner's proposed rule language slightly revises TCEQ notification requirements which are already substantively aligned with PBB rules at this time. As such, the ED does not agree the petitioner's proposed rule language revisions fulfill the intent of aligning TCEQ prescribed burning regulations with PBB regulations.

Lastly, per PBB rules found in 4 TAC §225.3, the "TCEQ regulates outdoor burning in Texas"; and the "prescribed burning standards established by the [PBB] represent the minimum requirements for conducting prescribed burning in the state of Texas [...] The standards do not, and are not intended to, preempt or supersede requirements established by state, federal, or private natural resource management organizations, but rather, are intended to serve as a baseline for effectively planning and conducting prescribed burns as a certified and insured prescribed burn manager." For this reason, TCEQ outdoor burn regulations shall not be revised in such a manner which would inhibit compliance determinations to be made by TCEQ.

Applicable Law:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule
- 30 TAC §20.15, which provides such procedures specific to the commission
- 30 TAC §111.203, which provides definitions related to outdoor burning
- 30 TAC §111.211, which allows for the exception for prescribed burning
- 30 TAC §111.219, which provides general requirements for allowable outdoor burning
- 4 TAC §225.1, which defines CPBM
- 4 TAC §225.3, which provides minimum standards for prescribed burning
- 4 TAC §227.4, which details maintenance requirements of prescribed burn notification records
- 4 TAC §228.2, which details notification requirements prior to prescribed burns

Agency Contacts:

Kati Wooten, Rule Project Manager, Program Support Division, (512) 239-0837
Amy Prescott, Staff Attorney, (512) 239-3668
Kris Hogan, Texas Register Coordinator, (512) 239-6812

Attachment
Petition

Commissioners

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March 18, 2016

Re: Docket No. 2016-0277-PET

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel
Kati Wooten
Kris Hogan

Edward C. Small
(512) 236-2370 (Direct Dial)
(512) 391-2145 (Direct Fax)
esmall@jw.com

February 23, 2016

Via Certified Mail, Return Receipt Requested

Richard A. Hyde, P.E. (MC-109)
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Certified Article Number

9414 7266 9904 2028 2485 99

SENDERS RECORD

RE: Original Petition for Rulemaking by Texas Forestry Association to amend Chapter 211, Subchapter B of Title 30, Texas Administrative Code

Dear Mr. Hyde,

Please find enclosed an Original Petition for Rulemaking (the "Petition") filed on behalf of the Texas Forestry Association seeking to amend 30 Tex. Admin. Code Chapter 111, Subchapter B, to provide specific rules for prescribed burning conducted by Certified and Insured Prescribed Burn Managers who are certified by the Prescribed Burning Board of the Texas Department of Agriculture. Also enclosed is a copy to be file-stamped and returned to our office in the enclosed self-addressed postage paid envelope.

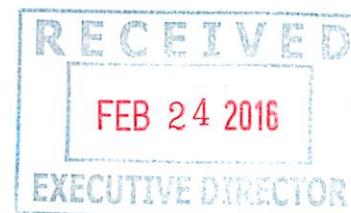
We respectfully request that this Petition be set for consideration and Commission action. We look forward to working with all concerned on this matter.

If you have any questions, please do not hesitate to contact me at (512) 236-2370.

Sincerely,



Edward C. Small



Enclosures

cc: Ron Hufford, Executive Director, Texas Forestry Association

PETITION FOR RULEMAKING BY § BEFORE THE TEXAS COMMISSION
TEXAS FORESTRY ASSOCIATION TO §
MODIFY PORTIONS OF 30 TEXAS § ON ENVIRONMENTAL QUALITY
ADMINISTRATIVE CODE CHAPTER §
111 SUBCHAPTER B RELATED TO §
PRESCRIBED BURNING §

ORIGINAL PETITION FOR RULEMAKING

TO THE HONORABLE COMMISSIONERS:

NOW COMES, the Texas Forestry Association (“TFA” or “Petitioner”), and pursuant to the provisions of 30 Texas Administrative Code (“TAC”) Chapter 20 hereby presents this Petition for Adoption of an Amendment to a Rule (the “Petition”) to the Texas Commission on Environmental Quality (the “Commission”) seeking to amend 30 TAC Chapter 111, Subchapter B (collectively, the “Rule”), and respectfully requests that the Commission consider this Petition and the proposed amendment as set out herein (the “Amendment”) and initiate proceedings necessary to adopt the Amendment. Pursuant to the provisions of 30 TAC § 20.15, Petitioner would respectfully show as follows:

I. Introduction

The Texas Department of Agriculture, Prescribed Burning Board (“PBB”), certifies Certified and Insured Prescribed Burn Managers (“Certified Burn Managers”) who meet specific training and insurance requirements insuring their provision of safe, responsible prescribed burning services. The Commission’s current rules do not recognize Certified Burn Managers and their expertise in planning and overseeing responsible prescribed burns. The TFA proposes the Amendment to rectify this situation by aligning the Commission’s rules with the PBB’s statutory and regulatory requirements. The goal of the Amendment is to increase the ability of Certified Burn Managers to provide their services to landowners in rural areas thereby encouraging safer prescribed burns. Doing so will encourage more prescribed burning and allow

the developed and developing areas of the state to benefit from the associated positive effects of prescribed burning.

Prescribed burning has obvious benefits to the public health, safety, and welfare, to the environment, and to the economy by reducing the incidence, spread, and intensity of wildfires, assisting in the restoration of ecological habitats, and providing economic benefits.¹ Prescribed burning reduces the incidence, spread, and intensity of wildfires by reducing the available fuel for such fires which in turn protects the public health, safety, and welfare, and reduces the economic loss associated with such events.² Prescribed burning also benefits the environment by assisting the restoration, management, and maintenance of many plant and animal species.³ And, it ultimately reduces air pollution by reducing the incidence, spread, and intensity of wildfires.⁴ Benefits to forests and associated forest-dependent industries include preparing areas for reforestation, removing undesirable competing vegetation, expediting nutrient cycling, and controlling or eliminating certain forest pathogens.⁵ Benefits for rangelands and associated rangeland-dependent industries include improving the quality and quantity of herbaceous vegetation necessary for livestock production.⁶

¹ See *Managing Wild Fires*, United States Forest Service, available at <http://www.fs.fed.us/fire/management/rx.html> (last accessed December 15, 2015); *Prescribed Burning*, Texas Parks and Wildlife Department, available at http://tpwd.texas.gov/landwater/land/habitats/post_oak/habitat_management/fire/ (last accessed December 15, 2015).

² *Id.*

³ *Id.*; see also Larry D. White and C. Wayne Hanselka, *Prescribed Range Burning in Texas*, available at https://tpwd.texas.gov/publications/pwdpubs/media/pwd_bk_w7000_0196.pdf (last accessed December 15, 2015).

⁴ See *Review and Update of the 1995 Federal Wildland Fire Management Policy* (January 2001).

⁵ See *Managing Wild Fires*, United States Forest Service, available at <http://www.fs.fed.us/fire/management/rx.html> (last accessed December 15, 2015); *Prescribed Burning*, Texas Parks and Wildlife Department, available at http://tpwd.texas.gov/landwater/land/habitats/post_oak/habitat_management/fire/ (last accessed December 15, 2015); Larry D. White and C. Wayne Hanselka, *Prescribed Range Burning in Texas*, available at https://tpwd.texas.gov/publications/pwdpubs/media/pwd_bk_w7000_0196.pdf (last accessed December 15, 2015).

⁶ *Id.*

The Amendment will allow landowners to better take advantage of Certified Burn Managers which will result in more frequent and safer prescribed burns. This will in turn reduce the available fuel thereby decreasing the incidence, intensity, and spread of wildfires and the associated damage to human health and property and increase the benefits to the public, environment, and economy associated with prescribed burning.

II. Petitioner's Name and Address

The Texas Forestry Association is a private, non-profit, non-governmental organization dedicated to enhancing and perpetuating Texas forests. For purposes of this Petition, contact with the TFA can be made by directing all correspondence to the following:

Texas Forestry Association
Attn: Ron Hufford
P.O. Box 1488
Lufkin, Texas 75902-1488
Telephone: (936) 632-8733
Facsimile: (936) 632-9461
Website: www.texasforestry.org

III. Brief Explanation of the Amendment

The TFA proposes the Amendment as an effort to promote prescribed burning by Certified Burn Managers in order to benefit the public, the environment, and the economy. The Amendment proposes to add a new subsection to Section 111.211 to allow Certified Burn Managers to conduct prescribed burning for forest, range and wildland/wildlife management, and wildlife hazard mitigation purposes, excluding coastal salt-marsh management burning. The Amendment proposes that Certified Burn Managers will comply with specific requirements designed to enhance the protection to the public health and safety already provided through the training and insurance of the Certified Burn Managers. Rather than requiring Certified Burn Managers to comply with existing Section 111.211(1) and Section 111.219, the Amendment proposes requirements which target Certified Burn Managers, considering the requirements

already placed on such individuals by the PBB and their own insurance and training. Essentially, the Amendment would align the Commission's regulations with the PBB's statutory and regulatory requirements for Certified Burn Managers and facilitate safe, prescribed burning through Certified Burn Managers.

IV. Text of the Amendment

The text of the Amendment in its entirety is provided as Attachment A hereto. TFA proposes three revisions to the Definitions contained in the Rule and significant revisions to Section 111.211 related to prescribed burning. Each proposed revision is addressed below:

Section 111.201. Definitions:

(2) Landclearing operation – The uprooting, cutting, or clearing of vegetation in connection with conversion for the construction of buildings, rights-of-way, residential, commercial, or industrial development, or the clearing of vegetation to enhance property value, access, or production. It does not include the maintenance of on-site property wastes such as fallen limbs, branches, or leaves, or other wastes from routine property clean-up activities, nor does it include burning following clearing for ecological restoration or prescribed burning.

(5): Prescribed burn – The controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions and confined to a predetermined area, following appropriate planning and precautionary measures.

(7): Structure containing sensitive receptor(s) – A man-made structure utilized for human residence or business, the containment of livestock, or the housing of sensitive live vegetation. The term “man-made structure” does not include such things as range fences, roads, bridges, hunting blinds and hunting camps, or facilities used solely for the storage of hay or other livestock feeds. The term “sensitive live vegetation” is defined as vegetation that has potential to be damaged by smoke and heat, examples of which include, but are not limited to, nursery production, mushroom cultivation, pharmaceutical plant production, or laboratory experiments involving plants.

TFA proposes the addition of the words “or prescribed burning” to the definition of “Landclearing operation” to clarify that prescribed burning is not considered “landclearing

operations.” The TCEQ has additional regulatory requirements for landclearing operations which, due to the broad definition of landclearing operations, could conceivably be applied to prescribed burning. While one could read the definition of prescribed burning to exclude it from “landclearing operations” and the related regulations, this revision will eliminate any potential confusion.

TFA proposes the addition of the words “or naturalized” to the definition of “Prescribed burn” to bring the definition in line with Texas Natural Resources Code § 153.047(1) which states: “Minimum standards established by the board for prescribed burning must: (1) ensure that prescribed burning is the controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions in accordance with a written plan . . .” (emphasis added).

TFA proposes adding the words “and hunting camps” to the definition of “Structure containing sensitive receptor(s)” to clarify that hunting camps, which include primitive lodging used by hunters at the discretion of the landowner and are frequently located on large rural tracts of land for which prescribed burning is particularly useful, do not meet the definition of a “structure containing sensitive receptors.” Hunting camps, where no one resides permanently and thus do not constitute a “residence,” should be excluded from the definition of “structure containing sensitive receptor(s)” because it would be for all practical purposes impossible to give notice to an “occupant” of a hunting camp prior to commencing a prescribed burn. By amending the definition, the TCEQ would not put prescribed burners in a situation where they would likely (although inadvertently) be in violation of the regulations due to an inability to notify the “occupant” of a hunting camp which has no occupants at the time of the burn.

Section 111.211: Exception for Prescribed Burn

Outdoor burning shall be authorized for:

(3) Prescribed burning, under the direction of a Certified and Insured Prescribed Burn Manager, as defined in 4 Texas Administrative Code Section 225.1(7), for forest, range and wildland/wildlife management, and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning, subject to the requirements in (A)-(F) below. Whenever possible, prior notification should be made to local county fire officials or Texas A&M Forest Service. Commission notification or approval is not required.

- (A) To minimize impacts to public roads, landing strips, navigable waters, or sensitive receptors, prescribed burning for forest, range, wildlife management, and wildfire hazard mitigation purposes shall be conducted within the parameters of a written prescribed burn plan.
- (B) When planning a prescription burn within 300 feet (90 meters) of any structure containing a sensitive receptor, prior notification shall be given to the occupant with possessory control.
- (C) The initiation of prescribed burning shall commence no earlier than sunrise. Burning should be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering object continue to omit smoke after this time, potentially hazardous conditions shall be mitigated.
- (D) Prescribed burn shall not commence when surface wind speed is predicted to be less than four miles per hour (MPH) (three knots) or greater than 23 MPH (20 knots) during the burning period.
- (E) Prescribed burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.
- (F) Provisions in 111.211(A)-(E) supersede the requirements found in 111.219 when the Prescribed Burn is conducted by a Certified and Insured Prescribed Burn Manager.

TFA's proposed new Section 111.211(3) provides that Certified Burn Managers conducting prescribed burning will not be subject to the requirements in Section 111.219 but instead will be subject to the new requirements in Section 111.211(3)(A)-(F). Further, Certified Burn Managers are required by PBB rules to provide certain notifications, and the proposed

Section 111.211(3) aligns with these requirements and accounts for the similar notice requirement in Section 111.219(1). *See* 4 Tex. Admin. Code § 228.2.

TFA's new proposed Section 111.211(3)(A)-(F) incorporates the existing requirements in Section 111.211(1) and Section 111.219 and the requirements of the PBB in a manner appropriate for Certified Burn Managers. Proposed Subsection (3) tracks the language of existing Subsection (1) but eliminates the requirement to comply with Section 111.219, eliminates the requirement to avoid "negatively affecting" structures containing sensitive receptors, and eliminates the notification to the appropriate regional office. As explained above, Certified Burn Managers will be required to comply with new subparts (A)-(E), which are similar to the requirements in Section 111.219. Because what constitutes a "negative effect" on "structures containing sensitive receptors" is unclear and because Certified Burn Managers have experience, training, and insurance as required by the PBB, it is not necessary to include this requirement in the new Subsection (3). Finally, the PBB rules require certain notifications so the additional notification "when possible" to the regional commission office is unnecessary.

Part (A) modifies the requirement in Section 111.219(3) and requires that prescribed burns be conducted in accordance with a written prescribed burn plan which is required by the PBB, the specifications of which are set forth in 4 TAC § 228.1.

Part (B) imposes a requirement on Certified Burn Managers that is similar to that found in the existing 30 TAC § 111.219(5) and aligns it with the PBB rule found in 4 TAC § 228.2. It also eliminates the separate TCEQ requirement to obtain written approval from the occupant with possessory control of any structure containing sensitive receptors located on adjacent properties. This change is critical to encouraging prescribed burning, as it is frequently difficult, if not impossible, to obtain written approval from a rural occupant of a "sensitive receptor" to

perform activities on adjacent property. In addition, this requirement currently exists within the PBB's rules, so Certified Burn Managers are currently required to comply with a similar directive from the PBB.

Parts (C) and (D) are a modifications of the requirements found in 30 TAC § 111.219(6) to incorporate the greater experience, training, and skill of a Certified Burn Manager in conducting a prescribed burn. Specifically, Certified Burn Managers have greater experience with conducting burns and therefore are qualified to determine if it is safe to begin a burn at sunrise rather than an hour after sunrise. Further, many weather services only provide wind speeds in 5 MPH increments. Thus, a requirement that burning not commence if the wind speed is predicted to be less than 6 MPH essentially requires individuals to wait until weather forecasters predict the wind speed is 10 MPH in order to conduct burning. This eliminates the ability to burn when wind speeds are very safe which actually increases the risks associated with burning.

Part (E) is identical to the existing requirement found in 30 TAC § 111.219(6)(C) and Part (F) merely clarifies that, except as incorporated into Parts (A)-(E), Section 111.219 does not apply to Certified Burn Managers.

Because Certified Burn Managers generally work in rural areas and because their burning is limited to natural areas, the requirements in Section 111.219(2) and (7) are not necessary. Further, the requirement in Section 111.219(4) to post signs and flagpersons is not necessary. First, the Texas Department of Transportation governs when and if signs and flagpersons are appropriate. Second, due to their experience and training, it would be a rare occurrence for smoke to blow across a road or highway. Third, Certified Burn Managers take their responsibilities, and the potential insurance liability if someone were to be harmed, very

seriously and will comply with TxDOT approvals and requirements in setting signs or flagpersons, if appropriate to protect the safety of individuals on roads. Finally, the safety of individuals on the roads is arguably outside the Commission's jurisdiction in protecting the public health and safety from air contaminants resulting from outdoor burning. Therefore, this requirement is not appropriate for the proposed Subsection (3).

V. Statement of Legal Authority for the Amendment

The Amendment is proposed under Texas Water Code ("TWC") § 5.102, General Powers, § 5.103, Rules, and § 5.105, General Policy, which authorize the Commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code ("THSC") § 382.017 and Rules, which authorizes the Commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The Amendment is also proposed under THSC § 382.018, which authorizes the Commission to control outdoor burning.

VI. Injury or Inequity Resulting from Failure to Adopt the Amendment

Failing to adopt the Amendment would result in the following injuries and inequities:

- The continued failure to recognize the training and insurance of Certified Burn Managers designed to insure safe, responsible prescribed burning will reduce the incidence of prescribed burning by such individuals;
- The continued inconsistency between Texas Department of Agriculture requirements for Certified Burn Managers and the Commission's exemptions to the prohibition on burning will result in unnecessary red-tape for Certified Burn Managers reducing the incidence of prescribed burning by such individuals;
- The inability of landowners to take advantage of the skills of Certified Burn Managers in practicing safe, responsible prescribed burning will reduce the incidence of prescribed burning generally;
- Less prescribed burning by Certified Burn Managers means less prescribed burning overall and therefore fewer opportunities to take advantage of the benefits of prescribed burning including the reduction of the incidence, spread, and intensity of wildfires and other associated environmental and economic benefits.

VII. Prayer

WHEREFORE, premises considered, the Texas Forestry Association respectfully requests that the Commission consider this Petition, and the Amendment as proposed herein, and initiate proceedings necessary to adopt the Amendment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ron Hufford', written over a horizontal line.

Ron Hufford
Executive Director, Texas Forestry
Association

Attachment A

SUBCHAPTER B: OUTDOOR BURNING

**§§111.201, 111.203, 111.205, 111.207, 111.209, 111.211, 111.213,
111.215, 111.219, 111.221**

Effective February 6, 2014

§111.201. General Prohibition.

No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. Outdoor disposal or deposition of any material capable of igniting spontaneously, with the exception of the storage of solid fossil fuels, shall not be allowed without written permission of the executive director. The term "executive director," as defined in Chapter 3 of this title (relating to Definitions), includes authorized staff representatives.

Adopted August 21, 1996 Effective September 16, 1996

§111.203. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Commission on Environmental Quality (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Extinguished**-The absence of any visible flames, glowing coals, or smoke.

(2) **Landclearing operation**-The uprooting, cutting, or clearing of vegetation in connection with conversion for the construction of buildings, rights-of-way, residential, commercial, or industrial development, or the clearing of vegetation to enhance property value, access, or production. It does not include the maintenance burning of on-site property wastes such as fallen limbs, branches, or leaves, or other wastes from routine property clean-up activities, nor does it include burning following clearing for ecological restoration or prescribed burning.

(3) **Neighborhood**-A platted subdivision or property contiguous to and within 300 feet of a platted subdivision.

(4) **Practical alternative**-An economically, technologically, ecologically, and logistically viable option.

(5) **Prescribed burn**-The controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions and confined to a predetermined area, following appropriate planning and precautionary measures.

(6) **Refuse**-Garbage, rubbish, paper, and other decayable and nondecayable waste, including vegetable matter and animal and fish carcasses.

(7) **Structure containing sensitive receptor(s)**-A man-made structure utilized for human residence or business, the containment of livestock, or the housing of sensitive live vegetation. The term "man-made structure" does not include such things as range fences, roads, bridges, hunting blinds and hunting camps, or facilities used solely for the storage of hay or other livestock feeds. The term "sensitive live vegetation" is defined as vegetation that has potential to be damaged by smoke and heat, examples of which include, but are not limited to, nursery production, mushroom cultivation, pharmaceutical plant production, or laboratory experiments involving plants.

(8) **Sunrise/Sunset**-Official sunrise/sunset as set forth in the United States Naval Observatory tables available from National Weather Service offices.

(9) **Wildland**-Uncultivated land other than fallow, land minimally influenced by human activity, and land maintained for biodiversity, wildlife forage production, protective plant cover, or wildlife habitat.

Adopted June 28, 2006 Effective July 19, 2006

§111.205. Exception for Fire Training.

(a) Outdoor burning shall be authorized for training fire-fighting personnel when requested in writing and when authorized either verbally or in writing by the local air pollution control agency. In the absence of such local entities, the appropriate commission regional office shall be notified. The burning shall be authorized if notice of denial from the local air pollution control agency, or commission regional office is not received within 10 working days after the date of postmark or the date of personal delivery of the request.

(b) Facilities dedicated solely for fire-fighting training, at which training routinely will be conducted on a frequency of at least once per week, shall submit an annual written notification of intent to continue such training to the appropriate commission regional office and any local air pollution control agency.

(c) Facilities dedicated solely for fire-fighting training, at which training is conducted less than weekly, shall provide an annual written notification of intent, with a telephone or electronic facsimile notice 24 hours in advance of any scheduled training session. No more than one such notification is required for multiple training sessions scheduled within any one-week period, provided the initial telephone/facsimile notice includes all such sessions. Both the written and telephone notifications shall be submitted to the appropriate commission regional office and any local air pollution control agency.

(d) Authorization to conduct outdoor burning under this provision may be revoked by the executive director if the authorization is used to circumvent other prohibitions of this subchapter.

Adopted August 21, 1996 Effective September 16, 1996

§111.207. Exception for Fires Used for Recreation, Ceremony, Cooking, and Warmth.

Outdoor burning shall be authorized for fires used solely for recreational or ceremonial purposes, or in the noncommercial preparation of food, or used exclusively for the purpose of supplying warmth during cold weather. Such burning shall be subject to the requirements of §111.219(7) of this title (relating to General Requirements for Allowable Outdoor Burning).

Adopted August 21, 1996 Effective September 16, 1996

§111.209. Exception for Disposal Fires.

Except as provided in Local Government Code, §352.082, outdoor burning is authorized for the following:

(1) domestic waste burning at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property. Provision of waste collection refers to collection at the premises where the waste is generated. The term "domestic waste" is defined in §101.1 of this title (relating to Definitions). Wastes normally resulting from the function of life within a residence that can be burned include such things as kitchen garbage, untreated lumber, cardboard boxes, packaging (including plastics and rubber), clothing, grass, leaves, and branch trimmings. Examples of wastes not considered domestic waste that cannot be burned, include such things as tires, non-wood construction debris, furniture, carpet, electrical wire, and appliances;

(2) diseased animal carcass burning when burning is the most effective means of controlling the spread of disease;

(3) veterinarians in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains;

(4) on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth, by the owner of the property or any other person authorized by the owner, and when the material is generated only from that property:

(A) in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area; if the plant growth was generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals when no practical alternative to burning exists. Such burning is subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). Commission notification or approval is not required; or

(B) in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area; this provision includes, but is not limited to, the burning of plant growth generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals. Such burning is subject to local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with the Texas Clean Air Act, Chapter 382, Subchapter E, Authority of Local Governments, and the requirements of §111.219(3), (4), (6), and (7) of this title. Commission notification or approval is not required.

(5) at a site designated for consolidated burning of waste generated from specific residential properties. A designated site must be located outside of a municipality and within a county with a population of less than 50,000. The owner of the designated site or the owner's authorized agent shall:

(A) post at all entrances to the site a placard measuring a minimum of 48 inches in width and 24 inches in height and containing, at a minimum, the words "DESIGNATED BURN SITE - No burning of any material is allowed except for trees, brush, grass, leaves, branch trimmings, or other plant growth generated from specific residential properties for which this site is designated. All burning must be supervised by a fire department employee. For more information call {PHONE NUMBER OF OWNER OR AUTHORIZED AGENT}." The placard(s) must be clearly visible and legible at all times;

(B) designate specific residential properties for consolidated burning at the designated site;

(C) maintain a record of the designated residential properties. The record must contain the description of a platted subdivision and/or a list of each property address. The description must be made available to commission or local air pollution control agency staff within 48 hours, if requested;

(D) ensure that all waste burned at the designated site consists of trees, brush, grass, leaves, branch trimmings, or other plant growth;

(E) ensure that all such waste was generated at specific residential properties for which the site is designated; and

(F) ensure that all burning at the designated site is directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, and is acting in the scope of the person's employment. The fire department employee shall notify the appropriate commission regional office with a

telephone or electronic facsimile notice 24 hours in advance of any scheduled supervised burn. The commission shall provide the employee with information on practical alternatives to burning. Commission approval is not required;

(6) crop residue burning for agricultural management purposes when no practical alternative exists. Such burning shall be subject to the requirements of §111.219 of this title and structures containing sensitive receptors must not be negatively affected by the burn. When possible, notification of the intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required. This section is not applicable to crop residue burning covered by an administrative order; and

(7) brush, trees, and other plant growth causing a detrimental public health and safety condition burned by a county or municipal government at a site it owns upon receiving site and burn approval from the executive director. Such a burn can only be authorized when there is no practical alternative, and it may be done no more frequently than once every two months. Such burns cannot be conducted at municipal solid waste landfills unless authorized under §111.215 of this title (relating to Executive Director Approval of Otherwise Prohibited Outdoor Burning), and shall be subject to the requirements of §111.219 of this title.

Adopted June 28, 2006 Effective July 19, 2006

§111.211. Exception for Prescribed Burn.

Outdoor burning shall be authorized for:

(1) Prescribed burning for forest, range and wildland/wildlife management, and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning. Such burning shall be subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning), and structures containing sensitive receptors must not be negatively affected by the burn. When possible, notification of intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required.

(2) Coastal salt-marsh management burning conducted in Aransas, Brazoria, Calhoun, Chambers, Galveston, Harris, Jackson, Jefferson, Kleberg, Matagorda, Nueces, Orange, Refugio, and San Patricio Counties. Coastal salt-marsh burning in these counties shall be subject to the following requirements:

(A) All land on which burning is to be conducted shall be registered with the appropriate commission regional office using a United States Geological Survey map or equivalent upon which are identified significant points such as roads, canals, lakes, and streams, and the method by which access is made to the site. For large acreage, the map should be divided into manageable blocks with identification for each defined block. The information must be received for review at least 15 working days before the burning takes place.

(B) Prior to any burning, notification, either verbal or written, must be made to, and authorization must be received from the appropriate commission regional office. Notification must identify the specific area and/or block to be burned, approximate start and end time, and a responsible party who can be contacted during the burn period.

(C) Such burning shall be subject to the requirements of §111.219 of this title.

(3) Prescribed burning, under the direction of a Certified and Insured Prescribed Burn Manager, as defined in 4 Texas Administrative Code Section 225.1(7), for forest, range and wildland/wildlife management, and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning, shall be subject to the requirements in (A)-(F) below.

Whenever possible, prior notification should be made to local county fire officials or Texas A&M Forest Service. Commission notification or approval is not required.

(A) To minimize impacts to public roads, landing strips, navigable waters, or sensitive receptors, prescribed burning for forest, range, wildlife management, and wildfire hazard mitigation purposes shall be conducted within the parameters of a written prescribed burn plan.

(B) When planning a prescription burn within 300 feet (90 meters) of any structure containing a sensitive receptor, prior notification shall be given to the occupant with possessory control.

(C) The initiation of prescribed burning shall commence no earlier than sunrise. Burning should be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, potentially hazardous conditions shall be mitigated.

(D) Prescribed burn shall not commence when surface wind speed is predicted to be less than four miles per hour (MPH) (three knots) or greater than 23 MPH (20 knots) during the burning period.

(E) Prescribed burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.

(F) Provisions in 111.211(A)-(E) supersede the requirements found in 111.219 when the Prescribed Burn is conducted by a Certified and Insured Prescribed Burn Manager.

Adopted January 15, 2014 Effective February 6, 2014

§111.213. Exception for Hydrocarbon Burning.

Outdoor burning shall be authorized for hydrocarbon burning from pipeline breaks and oil spills only upon proper notification as set forth in §101.6 of this title (relating to Notification Requirements for Major Upset), and if the executive director has determined that the burning is necessary to the protect welfare. Sampling and monitoring may be required to determine and evaluate environmental impacts. Adopted August 21, 1996 Effective September 16, 1996

§111.215. Executive Director Approval of Otherwise Prohibited Outdoor Burning.

If not otherwise authorized by this chapter, outdoor burning may be authorized by written permission from the executive director if there is no practical alternative and if the burning will not cause or contribute to a nuisance, traffic hazard or to a violation of any federal or state primary or secondary ambient air standard. The executive director may specify procedures or methods to control or abate emissions from outdoor burning authorized pursuant to this rule. Authorization to burn may be revoked by the executive director at any time if the burning causes nuisance conditions, is not conducted in accordance with the specified conditions, violates any provision of an applicable permit, or causes a violation of any air quality standard.

Adopted August 21, 1996 Effective September 16, 1996

§111.219. General Requirements for Allowable Outdoor Burning.

Outdoor burning which is otherwise authorized shall also be subject to the following requirements when specified in any section of this subchapter.

(1) Prior to prescribed or controlled burning for forest management purposes, the Texas Forest Service shall be notified.

(2) Burning must be outside the corporate limits of a city or town except where the incorporated city or town has enacted ordinances which permit burning consistent with the Texas Clean Air Act, Subchapter E, Authority of Local Governments.

(3) Burning shall be commenced and conducted only when wind direction and other meteorological conditions are such that smoke and other pollutants will not cause adverse effects to any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s).

(4) If at any time the burning causes or may tend to cause smoke to blow onto or across a road or highway, it is the responsibility of the person initiating the burn to post flag-persons on affected roads.

(5) Burning must be conducted downwind or at least 300 feet (90 meters) from any structure containing sensitive receptors located on adjacent properties unless prior written approval is obtained from the adjacent occupant with possessory control.

(6) Burning shall be conducted in compliance with the following meteorological and timing considerations:

(A) The initiation of burning shall commence no earlier than one hour after sunrise. Burning shall be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.

(B) Burning shall not be commenced when surface wind speed is predicted to be less than six miles per hour (mph) (five knots) or greater than 23 mph (20 knots) during the burn period.

(C) Burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.

(7) Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.

Adopted August 21, 1996 Effective September 16, 1996

§111.221. Responsibility for Consequences of Outdoor Burning.

The authority to conduct outdoor burning under this regulation does not exempt or excuse any person responsible from the consequences, damages, or injuries resulting from the burning and does not exempt or excuse anyone from complying with all other applicable laws or ordinances, regulations, and orders of governmental entities having jurisdiction, even though the burning is otherwise conducted in compliance with this regulation.

Adopted August 21, 1996 Effective September 16, 1996

Texas Commission on Environmental Quality



**DECISION OF THE COMMISSION
REGARDING THE PETITION FOR RULEMAKING
FILED BY JACKSON WALKER LLP ON BEHALF OF THE TEXAS
FORESTRY ASSOCIATION**

Docket No. 2016-0277-PET
Rule Project No. 2016-024-PET-NR

On April 6, 2016, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by Jackson Walker LLP on behalf of the Texas Forestry Association (Petitioner) on February 24, 2016. Petitioner requests that the Commission amend 30 TAC Chapter 111, Subchapter B, concerning Outdoor Burning, to provide specific requirements for prescribed burning conducted by Certified and Insured Prescribed Burn Managers as certified by the Prescribed Burning Board of the Texas Department of Agriculture.

IT IS THEREFORE ORDERED BY THE COMMISSION pursuant to Administrative Procedure Act, Texas Government Code, § 2001.021, that the Executive Director examine the request and initiate rulemaking.

This Decision constitutes the decision of the Commission required by the Texas Government Code, § 2001.021(c).

Date Signed:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., P.E., Chairman