

The Texas Commission on Environmental Quality (commission) adopts the amendment to §116.112.

Section 116.112 is adopted *with change* to the proposed text as published in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8810).

The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The amendment implements House Bill 555, 78th Legislature, 2003. House Bill 555 amended Texas Health and Safety Code, §382.056, to specify that, for any air permit application subject to §382.056, the measurement of distances to determine compliance with any location or distance limitation in Texas Health and Safety Code, Chapter 382 (the Texas Clean Air Act), shall be taken toward structures that are in use at the time the application is filed with the commission. The amendment also separates by subsection distances required by the Texas Clean Air Act and those required elsewhere.

The amendment also implements House Bill 1287, 78th Legislature, 2003. House Bill 1287 amended Texas Health and Safety Code, §382.065, to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of a building that is in use as a residence, school, or place of worship at the time the application for a permit to operate the facility is filed with the commission. House Bill 1287 also establishes a method of making the measurement for the distance limitation and exempts certain facilities from the distance limitation.

## SECTION DISCUSSION

Adopted §116.112(a), relating to Distance Limitations, specifies that, for all facilities subject to the public notice requirements in Chapter 116, Subchapter B, Division 3, concerning Public Notification and Comment Procedures; 30 TAC Chapter 39, Subchapters A, D, H, or K, concerning Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications; respectively; or 30 TAC Chapter 122, Subchapter D, concerning Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition; the measurement for any location or distance limitation requirement in Texas Health and Safety Code, Chapter 382, will be taken towards structures that are in use at the time the application is filed with the commission. The commission revised the section after proposal to ensure that the intent of the rule is clear: to apply the requirements for the measurement of distances only to those distance limitations required by the text of the statute and not to all distance limitations in air authorizations or regulations. In §116.112(a), the phrase “required by” was changed to “requirement in.” The distance limitation requirements currently in this chapter include: a limitation for construction or modification of a facility within 3,000 feet of a school under Texas Health and Safety Code, §382.052; a 3,000-foot limitation for lead smelting plants under Texas Health and Safety Code, §382.053; a 440-yard limitation on qualifying for affected person status to request hearing for concrete plants authorized by permit-by-rule or standard permit under Texas Health and Safety Code, §382.058; and a 440-yard limitation for concrete crushing facilities under Texas Health and Safety Code, §382.065.

Existing §116.112(2), regarding distance limitations for hazardous waste management facilities, moves to a new subsection (c) to separate it from the distance requirements under the Texas Clean Air Act.

Adopted §116.112(c) deletes the language previously in §116.112(2)(A) - (F) and replaces it with a cross-reference to 30 TAC §335.204, concerning Unsuitable Site Characteristics, and 30 TAC §335.205, concerning Prohibition of Permit Issuance, where the applicable distance limitations are found, because the deleted language was duplicative of the provisions in §335.204 and §335.205.

Existing §116.112(3) moves to adopted §116.112(b)(2) and is reworded to prohibit the operation, but not the location, of a concrete crusher in close proximity to sensitive receptors. This change will allow the storage of concrete crushing equipment closer to populated areas. Paragraph (2) also specifies that the minimum distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is filed with the commission. The exemption from the distance limitation for facilities authorized to operate at the site as of September 1, 2001 has been revised and moved to new subparagraph (B).

Adopted §116.112(b)(2)(A) specifies that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility. Subparagraph (B) exempts those concrete crushing facilities authorized to operate at the site as of September 1, 2001 from the distance limitation. Subparagraph (C) exempts those facilities crushing concrete that is produced by the demolition of a structure, as long as those

facilities: are located on the site of the demolition; operate on-site during one period of no more than 180 calendar days; crush material that is used primarily on-site; comply with applicable conditions stated in commission rules, including operating conditions; and are not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. House Bill 1287 also restricts the exemption from the distance limitation and measurement requirements to facilities for which the commission determines that operation at the location will cause no adverse environmental or health effects. Compliance with this condition is determined during protectiveness review as part of permit development. Subparagraph (D) exempts buildings occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located from the distance limitation and measurement requirements of this section.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule does not meet the definition of a “major environmental rule.” A “major environmental rule” means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule modifies the existing rule to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission, and exempts certain facilities from the distance limitation. The adopted rule also establishes methods of

making the measurement for distance limitations relevant to concrete crushing facilities and to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing. The adopted rule does not impose any other restriction or control on any facility.

In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rule is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rule does not meet any of the four applicability requirements. Specifically, the adopted rule implements the requirements of Texas Health and Safety Code, §382.056(s) and §382.065.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to the adopted rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The adopted rule implements changes to Texas Health and Safety Code, §382.056,

specifically, the addition of subsection (s); and §382.065, which is substantially rewritten, and to which subsections (c) and (d) were added.

The commission further performed an assessment of the adopted rule and whether it constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this adopted rule is to provide greater certainty for the regulated community in making siting and compliance decisions. The adopted rule substantially advances this purpose by providing for a method of making measurements to satisfy existing distance limitations requirements in Texas Health and Safety Code, Chapter 382, and specifying that such distance requirements are pertinent only to structures in use at the time the permit application is filed with the commission. The adopted rule also specifies a method for making measurements for the existing distance requirement for concrete crushing facilities, specifies some of the conditions under which operation of such facilities may occur, and details limited exemptions from this distance requirement. The adopted rule does not impose any other restriction or control on any facility.

Promulgation and enforcement of the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule is no more restrictive than existing rules, and it does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rule does not operate to affect private property in a manner that restricts or limits an owner's right to the property

that would otherwise exist in the absence of a governmental action. Therefore, the adopted rule does not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rule is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore, required that applicable goals and policies of the Texas Coastal Management Program were considered during the rulemaking process.

The commission's consistency determination for the adopted rule in accordance with 31 TAC §505.22 found that the adopted rulemaking is consistent with the applicable Texas Coastal Management Program goal to protect and preserve the quality and values of coastal natural resource areas (31 TAC §501.12(1)), and the policy which requires that the commission protect air quality in coastal areas (31 TAC §501.14(q)). The adopted rulemaking establishes that for all facilities subject to the public notice requirements in Chapter 116, Subchapter B, Division 3; TAC Chapter 39, Subchapters A, D, H, or K; or Chapter 122, Subchapter D, the measurement for any distance requirement will be taken towards structures that are in use at the time the application is filed with the commission. The adopted rulemaking also prohibits the operation, but not the location of a concrete crusher in close proximity to sensitive receptors. The adopted rulemaking also specifies that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility. The adopted rulemaking also specifies

that the minimum distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is filed with the commission. The adopted rulemaking exempts from the distance limitation and measurement requirements those facilities crushing concrete produced by the demolition of a structure as long as those facilities: are located on the site of the demolition; operate on-site for one period of no more than 180 calendar days; crush material that is used primarily on-site; comply with applicable conditions stated in commission rules, including operating conditions; and are not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. The adopted rulemaking also exempts buildings occupied or used solely by the owner of the property upon which the facility is located from the distance limitation and measurement requirements. The adopted rulemaking does not authorize any new air emissions. Therefore, the rulemaking is consistent with the Texas Coastal Management Program.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Because Chapter 116 contains applicable requirements under Chapter 122, Federal Operating Permits, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 116 requirements for each emission unit at their sites that is affected by the revisions to Chapter 116.

#### PUBLIC COMMENT

A public hearing on this proposal was held on October 29, 2003, but no members of the public appeared in order to participate. During the comment period, which closed on October 29, 2003, the commission received written comments from the EPA, the Houston Sierra Club (HSC), and Baker

Botts, L.L.P. on behalf of Southern Crushed Concrete, Inc. (SCC). All of the commenters opposed specific parts of the proposal.

#### RESPONSE TO COMMENTS

The HSC commented that because Texas has no state zoning or land use regulations that the distance requirements in air authorizations are one of the few effective means of preventing nuisance conditions. HSC believes that the rule amendment that requires distances as specified by Texas Health and Safety Code, Chapter 382 to be measured to structures in use at the time of permit application will result in additional nuisance conditions.

**The commission is not revising the rule in response to this comment. The commission disagrees that this rule amendment will result in additional nuisance conditions. This amendment does not exempt any facility from compliance with 30 TAC §101.4, Nuisance. The amendment will ensure that the affected facilities, upon meeting buffer distance requirements at the time the application is filed with the commission, will not be responsible for subsequent location choices made by surrounding landowners over which they have no control. Further, the language implements a specific statutory requirement in House Bill 555.**

The HSC stated its opposition to the amendment that exempts temporary concrete crushers that recycle concrete from building demolition for use on site from the distance limitation for concrete crushers. It also suggested that a requirement that a concrete crushing facility not create an air pollution nuisance should be a condition of operation.

**The commission is not revising the rule in response to this comment. House Bill 1287, 78th Legislature, 2003, modified the Texas Clean Air Act to exempt these temporary facilities from the distance limitation in Texas Health and Safety Code, §382.065.**

**The exemption from the minimum distance limitation for temporary concrete crushers will not apply in Harris County and counties adjacent to Harris County. In addition, this amendment does not exempt any facility from compliance with §101.4, which prohibits any facility from creating an air pollution nuisance.**

SCC suggested that the phrase, “at the time of application,” in §116.112(a) be replaced with, “at the time the application is filed with the commission,” in order to be more consistent with the statutory language.

**The commission is revising the rule in response to this comment to make the language consistent with the language of the statute.**

SCC also requested: that the phrase, “was made,” in §116.112(b)(2) be replaced with, “was filed,” to be more consistent with the statutory language; the removal of the phrase, “to operate,” from §116.112(b)(2) to eliminate any potential confusion between applications for preconstruction permits and federal operating permits; and the addition of a phrase specifying that subsequent applications for permit amendment or renewal will not change the date of application.

**The commission is revising the rule to replace “was made” with “is filed” in response to this comment to match the statutory language in Texas Health and Safety Code, §382.065(b)(2). The commission is removing the phrase “permit to operate” and replacing it with the statutory language, “initial authorization for the operation of” which should address the last two issues raised by the commenter.**

SCC requested that the phrase, “structure housing a residence . . .” in §116.112(b)(2)(A) be replaced with the phrase, “building used as a residence . . .” to eliminate any potential confusion that might result over the meaning of the term “structure.”

**The commission is revising the rule in response to this comment to match the statutory language in Texas Health and Safety Code, §382.065(a), which specifies, “a building in use as a residence . . .”**

SCC requested that §116.112(b)(2)(B) and (C) be reworded to indicate that §116.112(b) imposes only an operational restriction.

**The commission is not revising the rule based on this comment. The commission believes that §116.112(b)(2) specifies that the distance limitation only applies to the operation of facilities.**

SCC commented that the commission should eliminate the reference to “consecutive calendar” days of operation in §116.112(b)(2)(C) because House Bill 1287 did not specify that the exemption for temporary crushers was based on consecutive calendar days.

**The commission is revising the rule to specify the agency’s interpretation that the operation of a concrete crusher under this exemption is limited to one period of 180 calendar days, regardless of the number of days within that time period that the facility is in operation. The word “consecutive” has been removed not because the time period is not limited to 180 consecutive days once operation begins, but to specify that operation during that period of time need not take place on consecutive days. The limited period of operation at the site begins with the first day of operation and runs until the last day of operation. That period must be 180 days or less to qualify for the exemption in subparagraph (C). Not interpreting the statute to mean one 180-day period of operation could allow operation at a particular site for an indefinite period of time. In order to avoid confusion, the commission is specifying its interpretation in the rule.**

The EPA commented that the removal of the existing SIP-approved distance requirements for hazardous waste facilities in §116.112(2) and replacement with a cross-reference to §335.205 in proposed §116.112(c) should also include a cross-reference to §335.204 since §335.204(b)(6) and (e)(6) are equivalent to existing §116.112(2). EPA also stated that such a cross-reference would include limitations not currently in §116.112 in the SIP. The EPA also commented that facilities permitted under the requirements of existing §116.112(2) would continue to be subject to the requirements of §116.112(2). Finally, it is the EPA’s position that it would deem the cross-reference to §335.204 and

§335.205 to refer to the version of §335.204 adopted on August 6, 2003 and the version of §335.205 adopted on October 24, 2001.

**The commission has revised the rule to reflect EPA's comments.**

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 1: PERMIT APPLICATION**

**§116.112**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and Texas Health and Safety Code, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission; and §382.056(s), concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which establishes a method of making the measurement for distance limitations relevant to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing.

**§116.112. Distance Limitations.**

(a) For any facility subject to the notice and hearing requirements of Subchapter B, Division 3 of this chapter (relating to Public Notification and Comment Procedures); Chapter 39, Subchapters A, D, H, or K of this title (relating to Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications); or Chapter 122, Subchapter D of this title (relating to Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition), the measurement of distances to determine compliance with any location or distance limitation requirement in Texas Health and Safety Code, Chapter 382, shall be taken toward structures that are in use at the time the permit application is filed with the commission, and that are not occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located.

(b) The following facilities must satisfy the following distance criteria.

(1) Lead smelters. New lead smelting plants shall be located at least 3,000 feet from any individual's residence where lead smelting operations have not been conducted before August 31, 1987. This subsection does not apply to:

(A) a modification of a lead smelting plant in operation on or before August 31, 1987;

(B) a new lead smelting plant or modification of a plant with the capacity to produce 200 pounds or less of lead per hour; or

(C) a lead smelting plant that was located more than 3,000 feet from the nearest residence when the plant began operations.

(2) Concrete crushing facilities. A concrete crushing facility must not be operated within 440 yards of any building in use as a single or multi-family residence, school, or place of worship at the time the application for the initial authorization for the operation of that facility at that location is filed with the commission.

(A) The measurement of distances shall be taken from the point on the concrete crushing facility nearest to the residence, school, or place of worship to the point on the building in use as a residence, school, or place of worship that is nearest the concrete crushing facility.

(B) The minimum distance limitation and measurement requirements of this paragraph do not apply to concrete crushing facilities that were authorized to operate at the site as of September 1, 2001.

(C) Unless the facility is located in, or located in a county adjacent to, a county with a population of 2.4 million or more, the minimum distance limitation and measurement requirements of this paragraph do not apply to facilities operated on a site during one period of no more

than 180 calendar days that crush concrete resulting from the demolition of a structure on that site for use primarily at that site, and which comply with all applicable conditions stated in commission rules, including operating conditions.

(D) The minimum distance limitation and measurement requirements of this paragraph do not apply to structures occupied or used solely by the owner of the facility or the owner of the property upon which the facility is located.

(c) For applicable distance limitations at hazardous waste management facilities, see §335.204 of this title (relating to Unsuitable Site Characteristics), as amended and adopted in the August 22, 2003 issue of the *Texas Register* (28 TexReg 6915), and §335.205 of this title (relating to Prohibition of Permit Issuance), as amended and adopted in the November 9, 2001 issue of the *Texas Register* (26 TexReg 9135).

