AGENDA REQUESTED: January 18, 2017

DATE OF REQUEST: December 30, 2016

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

CAPTION: Docket No. 2016-0485-RUL. Consideration for publication of, and hearing on, proposed amended Section 111.203 and new Section 111.217 of 30 TAC Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter and corresponding revisions to the state implementation plan.

The proposed rulemaking would clarify and add more specific language to the current agency rules related to prescribed burning conducted by Certified and Insured Prescribed Burn Managers who are certified by the Prescribed Burning Board of the Texas Department of Agriculture. (Beryl Thatcher, Amy Prescott) (Rule Project No. 2016-027-111-CE)

Ramiro Garcia, Jr. ___________________________ K. Keel Linden ___________________________
Deputy Director Division Director

Kristina M. Hogan ___________________________
Agenda Coordinator

Copy to CCC Secretary? NO YES X
Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners

Date: December 30, 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

Docket No.: 2016-0485-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter
Amend Prescribed Burning Rules
Rule Project No. 2016-027-111-CE

Background and reason(s) for the rulemaking:
On April 6, 2016, the Texas Commission on Environmental Quality (commission or TCEQ) approved the initiation of rulemaking based on a petition received by the Texas Forestry Association. The petitioner requested the commission to 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.

Scope of the rulemaking:
The proposed rulemaking will amend the definitions in § 111.203 and add new § 111.217.

A.) Summary of what the rulemaking will do:
The proposed rulemaking will add clarification and more specific language to the current rules related to prescribed burning conducted by Certified and Insured Prescribed Burn Managers (CPBMs) who are certified by the Prescribed Burning Board. Amendments to the definitions in § 111.203 will address the petitioner’s request and add a new definition to TCEQ rules for Certified and Insured Prescribed Burn Managers. New § 111.217 will align commission rules with the Texas Department of Agriculture rules for CPBMs, as well as clarify commission rules for CPBMs.

B.) Scope required by federal regulations or state statutes:
TCEQ is required to revise the state implementation plan.

C.) Additional staff recommendations that are not required by federal rule or state statute:
There are no additional staff recommendations for the proposed rulemaking.

Statutory authority:
Texas Health and Safety Code, §§ 382.002, 382.011, 382.012, 382.017, and 382.051; Texas Water Code, §§ 5.102, 5.103, and 5.105; and Federal Clean Air Act, 42 United States Code, § 7401 et seq.
December 30, 2016

Re: Docket No. 2016-0485-RUL

Effect on the:

A.) Regulated community: This rulemaking would have a minimal effect on the regulated community. It will ensure that Certified and Insured Prescribed Burn Managers have clear applicable requirements.

B.) Public: This rulemaking would have a minimal effect on the public. It will ensure that Certified and Insured Prescribed Burn Managers are in compliance with all applicable requirements.

C.) Agency programs: This rulemaking would have a minimal effect on agency programs.

Stakeholder meetings:
A stakeholder meeting was held on June 16, 2016, at the TCEQ in Austin. Prescribed burn managers, industry, state agencies, and the public were in attendance. In general, stakeholders supported most of the recommended changes in the petition, however the TCEQ received many comments suggesting that additional changes be made to the Outdoor Burning rules. No additional changes were made in response to stakeholder comments as they were outside the scope of the petition.

Potential controversial concerns and legislative interest:
After an evaluation of safety and air quality concerns, not all of the recommended changes in the petition were included in this proposed rulemaking. There is no known legislative interest.

Will this rulemaking affect any current policies or require development of new policies?
The proposed rulemaking will not affect any current policies or require development of new policies.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
If the proposed rulemaking does not go forward, the Outdoor Burning rules for Certified and Insured Prescribed Burn Managers will not be clearly defined, which could lead to confusion with Texas Department of Agriculture requirements.

Key points in the proposal rulemaking schedule:
- Anticipated proposal date: January 18, 2017
- Anticipated Texas Register publication date: February 3, 2017
- Anticipated public hearing date (if any): February 28, 2017
- Anticipated public comment period: February 3, 2017 – March 6, 2017
- Anticipated adoption date: June 2017

Agency contacts:
Beryl Thatcher, Rule Project Manager, Program Support, (512) 239-2270
Amy Prescott, Staff Attorney, (512) 239-3668
Commissioners
Page 3
December 30, 2016

Re: Docket No. 2016-0485-RUL

Kris Hogan, Texas Register Rule/Agenda Coordinator, (512) 239-6812

**Attachments:**
Petition
Petition Order

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

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
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.\(^6\)

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\(^2\) 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).


\(^6\) 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 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.

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 possessor 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,

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 decaying and nondecaying 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.

(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 possessor 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 possessor 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, asphalitic 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
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: APR 08 2016

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., P.E., Chairman
The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the amendment of §111.203 and new §111.217.

If adopted, the commission will submit amended §111.203 and new §111.217 to the United States Environmental Protection Agency as a revision to the State Implementation Plan (SIP).

**Background and Summary of the Factual Basis for the Proposed Rules**

In response to a petition for rulemaking (Project No. 2016-024-PET-NR), the commission proposes this rulemaking to amend outdoor burning rules as they relate to prescribed burning.

On February 24, 2016, Jackson Walker LLP submitted a petition for rulemaking on behalf of the Texas Forestry Association (TFA). In their petition, TFA requested that the commission amend Chapter 111 to provide specific rules 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. At the commission’s agenda on April 6, 2016, the commission approved the initiation of a rulemaking based on TFA’s petition.

CPBMs are regulated by the PBB under the Texas Department of Agriculture rules in 4 TAC Part 13. The standards established by the PBB represent the minimum requirements for prescribed burning in Texas for CPBMs.
The commission proposes to amend §111.203 and add new §111.217 to the outdoor burning rules.

**Section by Section Discussion**

§111.203, *Definitions*

The commission proposes to add §111.203(1) to include a definition for "Certified and Insured Prescribed Burn Manager." This definition aligns with the Texas Department of Agriculture rule definition of CPBMs.

The commission proposes to renumber the definitions in §111.203 to accommodate the added definition.

The commission proposes to amend the definition of "Landclearing operation" in renumbered §111.203(3) to specify that prescribed burning is not considered a landclearing operation. The commission has additional regulatory requirements for landclearing operations which do not apply to prescribed burning.

The commission proposes to amend the definition of "Prescribed burn" in renumbered §111.203(6) to include the use of naturalized vegetative fuels in order to align the definition with that of the Texas Natural Resources Code, which allows for the use of naturalized vegetative fuels for prescribed burning.
§111.217, Requirements for Certified and Insured Prescribed Burn Managers

The commission proposes new §111.217 to add requirements for prescribed burning when conducted under the direction of a CPBM. The commission proposes new §111.217(1) to align the requirements of commission rules with the Texas Department of Agriculture rules in 4 TAC Chapter 227 (Requirements for Certified and Insured Prescribed Burn Managers) and Chapter 228 (Procedures for Certified and Insured Prescribed Burn Managers) set forth by the PBB. The commission proposes new §111.217(2)-(7) requiring CPBMs to follow the same general requirements of §111.219 (General Requirements for Allowable Outdoor Burning), which are not required by the PBB.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The rulemaking is proposed in response to a petition submitted on behalf of TFA. The proposed rulemaking would add clarification and more specific language to the current agency rules related to prescribed burning conducted by CPBMs who are certified by the PBB of the Texas Department of Agriculture. The proposed rules would not add any new requirements for CPBMs or prescribed burns, but would clarify the current
requirements and definitions and ensure commission rules align with Texas Department of Agriculture rules. Because the proposed changes to the outdoor burning rules simply clarify the current requirements and because CPBMs are already following the proposed rules and requirements, no fiscal implications are anticipated for the agency, the Texas Department of Agriculture, or other units of state or local government.

**Public Benefits and Costs**

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be efficient state administration and oversight of CPBMs and prescribed outdoor burning.

The proposed rules are not expected to result in fiscal implications for businesses or individuals. The proposed rules do not add or delete any regulatory requirements for CPBMs, nor are there any changes to fees for the CPBMs or their activities. The proposed rules simply clarify the current requirements for CPBMs and ensure that commission rules align with Texas Department of Agriculture rules.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. The proposed rules simply clarify the current
requirements for CPBMs and prescribed outdoor burning and ensures that TCEQ rules align with Texas Department of Agriculture rules.

**Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

**Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent 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. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed, the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

The proposed rules implement requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP
containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is to implement changes within Chapter 111, Subchapter B, Outdoor Burning rules for prescribed burning conducted by CPBMs who are certified by the PBB of the Texas Department of Agriculture. The proposed revisions seek to amend §111.203 and add new §111.217 to the outdoor burning rules in order to increase clarity and consistency within the outdoor burning rules in this subchapter as well as
consistency with applicable laws found outside this subchapter.

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633 or bill), 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or those that are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This
conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis, unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has
complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission’s SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed, the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm’n on Envtl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is merely an update to Chapter 111, Subchapter B, §111.203, to add clarity to certain definitions and create consistency with applicable definitions found outside this subchapter, and the addition of new §111.217, which merely cross-references the applicable requirements for outdoor burning found in 4 TAC Chapters 227 and 228, relating to prescribed burns conducted by CPBMs, as well as those in §111.219. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC,
§382.012 and §382.017. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The requirements relating to outdoor burning, and specifically prescribed burns, are control measures for particulate matter emissions and are essential for attainment and maintenance of the particulate matter NAAQS. Specifically, the proposed rulemaking provides a definition for "Certified and Insured Prescribed Burn Manager" that aligns with the definition provided by the Texas Department of Agriculture; clarifies that prescribed burning is not considered a landclearing operation, which has additional regulatory requirements that do not apply to prescribed burning; expands the definition of "Prescribed burn" to include naturalized vegetative fuels, which aligns with the definition under the Texas Natural Resources Code; renumbers the definitions for organizational purposes; and adds new §111.217 that provides requirements for prescribed burns conducted under CPBMs, which aligns with the Texas Department of Agriculture's rules for such, as set forth by the PBB, and requires CPBMs to follow the same general requirement of
§111.219, which are not required by the PBB. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The specific intent of the proposed rulemaking is to clarify the rule requirements for prescribed burning and align the requirements in this subchapter with those found outside this subchapter to allow for more streamlined, consistent, and clear rules to be applied to prescribed burning, which leads to the increased protection of health and safety. The proposed rulemaking adds a definition for "Certified and Insured Prescribed Burn Manager" that aligns with the Texas Department of Agriculture definitions and clarifies that prescribed burning is not considered a landclearing operation, which has additional regulatory requirements that do not apply to prescribed burning. The proposed rulemaking expands the definition of "Prescribed burn" to include naturalized vegetative fuels, which aligns with the definition under the Texas Natural Resources Code, and renumbers the definitions for organizational purposes. The proposed rulemaking also adds a section that provides specific requirements for prescribed
burns conducted under CPBMs, which aligns with the Texas Department of Agriculture’s rules for such, as set forth by the PBB, and requires CPBMs to follow the same general requirement of §111.219, which are not required by the PBB.

Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to actions and rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with the CMP goals and policies.

Written comments on the consistency of this rulemaking with the CMP may be submitted to the contact person at the address listed under the Submittal of Comments.
Effect on Sites Subject to the Federal Operating Permits Program

Because Chapter 111 contains applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program), owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 111 requirements for each emission unit affected by the revisions to Chapter 111 at their site.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on February 28, 2017, at 10:00 a.m. in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.
Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: http://www1.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-027-111-CE. The comment period closes on March 6, 2017. Copies of the proposed rulemaking can be obtained from the commission’s website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Beryl Thatcher, Program Support Section, (512) 239-2270.
SUBCHAPTER B: OUTDOOR BURNING
§111.203, §111.217

Statutory Authority

The amendment and new section are proposed under the authority of the 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 as well as all general policies under the TWC; Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.002, Policy and Purpose, which establishes the commission’s purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amendment and new section are also proposed under THSC, §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382, and under the Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, et seq., which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.
The proposed amendment and new section implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, and 382.051; and FCAA, 42 USC, §§7401 et seq.

§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 subchapter [chapter], have the following meanings, unless the context clearly indicates otherwise.

(1) Certified and Insured Prescribed Burn Manager--A person with ultimate authority and responsibility for a prescribed burn, who has been certified by the Prescribed Burning Board of the Texas Department of Agriculture. The certification issued by the Prescribed Burning Board must be considered effective, and to have met the certification requirements found in 4 TAC Chapter 226 (relating to Requirements for Certification by the Board), at the time the prescribed burn is conducted.

(2) [1] Extinguished--The absence of any visible flames, glowing coals, or smoke.
(3) 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 prescribed burning or burning following clearing for ecological restoration.

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

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

(6) 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) Refuse--Garbage, rubbish, paper, and other decayable and nondecayable waste, including vegetable matter and animal and fish carcasses.
(8) [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, 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.


(10) [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.

§111.217. Requirements for Certified and Insured Prescribed Burn Managers.

Prescribed burning shall be authorized when conducted under the direction of a Certified and Insured Prescribed Burn Manager, as defined in §111.203 of this title (relating to Definitions), for forest, range and wildland/wildlife management and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning. 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. Such burning shall be subject to the following requirements.

(1) 4 TAC Chapter 227 (relating to Requirements for Certified and Insured Prescribed Burn Managers) and Chapter 228 (relating to Procedures for Certified and Insured Prescribed Burn Managers).

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

(3) 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.

(4) 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).

(5) 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.
(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.