

The Texas Commission on Environmental Quality (commission) adopts an amendment to §116.112. Section 116.112 is adopted *with change* to the proposed text as published in the September 27, 2002 issue of the *Texas Register* (27 TexReg 9106). The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

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

The amendment implements House Bill (HB) 2912, §5.07, 77th Legislature, 2001. HB 2912, §5.07 amended Texas Health and Safety Code (THSC) to add new §382.065, which requires the commission, by rule, to restrict the location or operation of new concrete crushing facilities.

#### SECTION DISCUSSION

The amendment to §116.112, Distance Limitations, adds a new paragraph (3) to require all equipment associated with a concrete crushing facility to be located or operated at least 440 yards from any building used as a single or multi-family residence, school, or place of worship. The rule is meant to prohibit location or operation. If the crusher is subject to this rule, it cannot be located within 440 yards of a single or multi-family residence, school, or place of worship, regardless of whether the crusher is operating. The distance limitation does not apply to existing concrete crushing facilities. An existing facility is one which was authorized as of September 1, 2001 (the effective date of the legislation), and actually located or operating at the site as of that date. An existing facility does not include a concrete crushing facility authorized as of September 1, 2001, but not located or operating at the site as of that date. On November 2, 2001, the commission requested an opinion from the attorney general concerning the interpretation of the term “existing facility” in THSC, §382.065(b). The

opinion (Attorney General Opinion No. JC-0493) states that “. . . an ‘existing’ facility is a facility actually located at a site on September 1, 2001, and not merely a proposed facility that has not become a tangible entity.” The opinion further states that the dictionary definition of “existing” is consistent with the use of “existing” elsewhere in THSC, Chapter 382. The opinion notes that under THSC, §382.051(a)(1), the commission may issue a permit “to construct a new facility or modify an existing facility. The distinction between construction of a ‘new facility’ and modification of an ‘existing facility’ shows that an ‘existing facility’ is to be contrasted with one that has not yet been built.” The rule’s definition of “existing” is consistent with the attorney general opinion.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule 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.” 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 amendment establishes a minimum separation distance between concrete crushers and any building used as a single or multi-family residence, school, or place of worship. 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 amendment to §116.112 is not subject to the regulatory analysis provisions of §2001.0225(b), because the rule does not meet any of the four applicability requirements. Specifically, the amended section would implement the requirements of THSC, Texas Clean Air Act (TCAA), §382.065.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rule. Promulgation and enforcement of the rule will not burden private real property. The amended section will not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. The amendment to §116.112 is specifically adopted to implement the requirements of TCAA, §382.065. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and therefore, will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission's consistency determination for the adopted rule in accordance with 31 TAC §505.22 found that the rulemaking is consistent with the applicable CMP 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 amendment establishes a minimum separation distance between concrete crushing facilities and any building used as a single or multi-family residence, school, or place of worship. The rulemaking does not authorize any new air emissions and will potentially increase environmental protection through the establishment of a minimum distance between concrete crushers and any building used as a single or multi-family residence, school, or place of worship. Therefore, the rulemaking is consistent with the CMP.

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

Because Chapter 116 contains applicable requirements under 30 TAC 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 permit to include the revised Chapter 116 requirements for each emission unit affected by the revisions to Chapter 116 at their site.

#### PUBLIC COMMENT

The commission conducted a public hearing on October 21, 2002 on the proposed rule. During the public comment period which closed on October 28, 2002, the commission received written comments from the EPA, Southern Crushed Concrete, Inc. (SCC), and Bracewell Patterson, LLP on behalf of Jobe Concrete Products, Inc. (Jobe). EPA supported the amendment, and SCC and Jobe opposed including stockpiles within the distance limitation of the amendment.

## RESPONSE TO COMMENTS

Jobe commented that stockpiles are not included in the definition of “facility” as they are not structures, devices, items, or enclosures. Jobe also stated that in THSC, §382.058(c) and 30 TAC §106.142, Rock Crushers, the commission simply uses the word “plant.” For these reasons Jobe requested that the commission not include stockpiles within the distance restriction and stated that this would more accurately reflect legislative intent.

SCC opposed the inclusion of stockpiles under the distance restriction and commented that stockpiles in their normal state have a 6% to 8% moisture content with particles of a size that cannot become airborne. SCC also stated that the inclusion of stockpiles with the 440-yard distance restriction would require that concrete crushing operations be located on a square 198 acre parcel of land in order to meet the restriction.

**The commission has changed the rule in response to these comments. The commission disagrees with SCC that the particles in the stockpiles cannot become airborne. The stockpiles are generally composed of concrete demolition debris which will contain fine dust, and the handling of this debris during transport to the crushing equipment will entrain that dust. In response to the comments from Jobe, the commission has revised the rule to exclude stockpiles from the 440- yard distance restriction. This rule is meant to implement THSC, §382.065, which uses the term “facility.” A stockpile by itself is not a facility, and for consistency with THSC, §382.065 and the THSC definition of “facility,” the rule is being changed to remove the reference to stockpiles.**

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 1: PERMIT APPLICATION**

**§116.112**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; TCAA, §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 TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under TCAA, §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the location or operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship.

**§116.112. Distance Limitations.**

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) Hazardous waste permits. Permits for hazardous waste management facilities shall not be issued if the facility is to be located in the vicinity of specified public access areas under the following circumstances.

(A) No permit shall be issued for a new hazardous waste landfill or land treatment facility or an areal expansion of an existing facility if the boundary of the facility or expansion is to be located within 1,000 feet of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park.

(B) No permit shall be issued for a new commercial hazardous waste management facility or the subsequent areal expansion of such a facility or unit of that facility if the boundary of the unit is to be located within 1/2 mile (2,640 feet) of an established residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park.

(C) For a subsequent areal expansion of a new commercial hazardous waste management facility that is required to comply with subparagraph (B) of this paragraph, distances shall be measured from a residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park only if such structure, water supply, or park was in place at the time the distance was certified for the original permit.

(D) No permit shall be issued for a new commercial hazardous waste management facility unless the applicant demonstrates that the facility will be operated so as to safeguard public health and welfare and protect physical property and the environment.

(E) The measurement of distances shall be taken toward an established residence, church, school, day care center, surface water body used for a public drinking water supply, or dedicated public park that is in use when the permit application is filed with the commission. The restrictions imposed by subparagraphs (A) - (C) of this paragraph do not apply to a residence, church, school, day care center, surface water body used for a public drinking water supply, or a dedicated

public park located within the boundaries of a commercial hazardous waste management facility, or property owned by the permit applicant.

(F) The measurement of distances shall be taken from a perimeter around the proposed hazardous waste management unit. The perimeter shall be no more than 75 feet from the edge of the proposed hazardous waste management unit.

(3) Concrete crushing facilities. A concrete crushing facility must not be located or operated within 440 yards of any building used as a single or multi-family residence, school, or place of worship. This paragraph does not apply to existing concrete crushing facilities, which are those facilities that were authorized and actually located or operating at the site as of September 1, 2001.