The Texas Commission on Environmental Quality (commission) proposes an amendment to §116.112. The amended section is proposed to be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

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

SECTION DISCUSSION

The proposed amendment to §116.112, Distance Limitations, adds a new paragraph (3) to require all equipment and stockpiles 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for each year of the first five-year period the proposed amendment is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed amendment.

The proposed rulemaking is intended to make changes to the commission's new source review (NSR) rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location of or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment, because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations

existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the proposed amendment will be potentially increased environmental protection through the establishment of a minimum distance between concrete crushers and single or multi-family residences, schools, or places of worship.

The proposed rulemaking is intended to make changes to the commission's NSR rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment, because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment, which is intended to make changes to the commission's NSR rules in order to implement HB 2912, §5.07. The bill requires the agency to restrict the location or operation of new concrete crushing facilities to at least 440 yards from any building used as a single or multi-family residence, school, or place of worship.

The commission does not anticipate any significant fiscal implications due to the implementation of the proposed amendment, because the location or operation restriction for concrete crushing equipment would only affect new operations authorized after September 1, 2001. Concrete crushing operations existing as of September 1, 2001, would not be affected by the proposed amendment. This proposal only addresses location or operation and would not require installation of additional controls to the new facilities.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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." 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 proposed amendment would establish a minimum separation distance between concrete crushers and any building used as a single or multi-family residence, school, or place of worship. The proposed 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 proposed amendment to §116.112 is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed 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. The commission invites public comment regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed 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 proposed to implement the requirements of TCAA, §382.065. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal 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 preliminary consistency determination for the proposed rule in accordance with 31 TAC §505.22 found that the proposed 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 proposed amendment would establish 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 proposed 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. The commission invites public comment regarding the consistency of the proposed rule 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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 21, 2002 at 2:00 p.m. in Building F, Room 2210, 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 before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001-077-116-AI. Comments must be received by 5:00 p.m., October 28, 2002. Copies of the proposed rules can be obtained from the commission's website at *http://www.tceq.state.tx.us/oprd*. For further information, please contact Clifton Wise, Policy and Regulations Division, (512) 239-2263.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§116.112

STATUTORY AUTHORITY

The amendment is proposed 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 proposed under TCAA, §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the location of or operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship.

The amendment implements TWC, §5.103 and TCAA, §§382.011, 382.012, 382.017, and 382.065.

§116.112. Distance Limitations.

The following facilities must satisfy the following distance criteria.

(1) - (2) (No change.)

(3) Concrete crushing facilities. All equipment and stockpiles associated with 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.