

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §111.209. Section 111.209 is adopted *without changes* to the proposed text as published in the March 1, 2002 issue of the *Texas Register* (27 TexReg 1447) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, Article 17, 77th Legislature, 2001, amended the Occupation Code by adding a new §801.361, Disposal of Animal Remains, to allow veterinarians to dispose of animal remains by burial or burning under limited circumstances. Occupation Code, §801.361, allows veterinarians to burn or bury animal remains only if they do so on their own property; the property is in a county with a population of less than 10,000; and they do not charge for the burning or burial. The section also restricts the commission from adopting a rule that prohibits conduct authorized by the section. The commission adopts an amendment to Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter, in order to make existing rules on burning consistent with the new legislation. The revisions necessary in 30 TAC Chapter 330 to make existing rules on burial consistent with the new legislation were proposed in a separate rulemaking published in the March 29, 2002 issue of the *Texas Register* (27 TexReg 2412).

The existing rules in Chapter 111 prohibit outdoor burning in the State of Texas except as provided by Subchapter B, Outdoor Burning, or by orders or permits of the commission. The existing exceptions in Subchapter B regarding disposal of animal carcasses allows only for the burning of diseased animal carcasses when burning is the most effective means of controlling the spread of disease. The commission adopts an additional exception to implement the authorization added by HB 2912.

SECTION DISCUSSION

The adopted amendment to §111.209, Exception for Disposal Fires, is necessary to implement the burning authorization provided by HB 2912. The amendment adds a new paragraph (3) to provide an exception to the prohibition of outdoor burning for animal remains burning by a veterinarian if the burning is conducted on property owned by the veterinarian; the property is in a county with a population of less than 10,000; and the veterinarian does not charge for the burning. Animal remains refer to an animal that dies in the care of the veterinarian and does not include any other type of medical waste.

Texas Government Code, §311.005, General Definitions, defines “population” to mean population according to the most recent federal decennial census. Therefore, the population figure of 10,000 specified in the adopted rule amendment is based on the most recent federal decennial census.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the adopted rule is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. The adopted amendment to §111.209 is only intended to make existing commission rules consistent with the new legislative changes made to the Occupation Code, and the rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the amendment does not qualify as a “major environmental rule.” Furthermore, the analysis required by §2001.0225(c) does not apply because the

adopted rule does not meet any of the four applicability requirements of a major environmental rule.

The rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The rule is adopted specifically to comply with HB 2912, and does not exceed the requirements of that bill. The commission invited public comment on the regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rule is to make existing commission rules consistent with the new legislative changes made to the Occupation Code by HB 2912. The adopted rule will substantially advance this purpose by giving veterinarians doing business in sparsely populated counties the option of burning to dispose of an animal that dies in the care of the veterinarian.

Promulgation and enforcement of the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the rule will not affect private real property rights because it will not burden, restrict, or limit an owner's property rights which would otherwise exist in the absence of the regulation. The adopted rule will actually expand the allowable uses of a veterinarian's private real property. Consequently, the adopted rule does not meet the definition of a taking under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs) (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.14(q)) that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.14(q)).

The specific purpose of the adopted rule is to make existing commission rules consistent with the new legislative changes made to the Occupation Code by HB 2912. The adopted rule authorizes veterinarians to burn animal remains if they do so on their own property; the property is in a county with a population of less than 10,000; and they do not charge for the burning. Because of the limited circumstances under which burning is authorized, the commission anticipates that promulgation and enforcement of the adopted rule will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on CMP consistency determination, and no comments were received.

HEARING AND COMMENTERS

A public hearing on the proposal was offered in Austin on March 28, 2002. The public comment period closed on April 1, 2002, and no comments were received.

SUBCHAPTER B: OUTDOOR BURNING

§111.209

STATUTORY AUTHORITY

The amendment is adopted under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.018, which authorizes the commission to control outdoor burning; and §382.085, which prohibits unauthorized air emissions; and Texas Water Code, §5.103, which authorizes the commission to adopt rules.

§111.209. Exception for Disposal Fires.

Outdoor burning shall be authorized for:

(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 which 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) Animal remains burning by a veterinarian if the burning is conducted on property owned by the veterinarian; the property is in a county with a population of less than 10,000; and the veterinarian does not charge for the burning. Animal remains refer to an animal that dies in the care of the veterinarian and does not include any other type of medical waste.

(4) On-site burning of trees, brush, and other plant growth for right-of-way maintenance, landclearing operations, and maintenance along water canals when no practical alternative to burning exists and when the materials are generated only from that property. Structures containing sensitive receptors must not be negatively affected by the burn. Such burning shall be subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). When possible, notification of intent to burn should be made to the appropriate commission regional office prior to the proposed burn. For a single project entailing multiple days of burning, an initial notice delineating the scope of the burn is sufficient if the scope does not constitute circumvention of the rule for a continual burning situation. Commission notification or approval is

not required.

(5) 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 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.

(6) Brush, trees, and other plant growth causing a detrimental public health and safety condition may be 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.