The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §111.209.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 is proposing 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 are being proposed in a future rulemaking.

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 proposes adding an additional exception to implement the authorization added by HB 2912.

SECTION DISCUSSION

The proposed amendment to §111.209, Exception for Disposal Fires, is necessary to implement the burning authorization provided by HB 2912. The proposed 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 proposed rule amendment is based on the most recent federal decennial census.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal impacts to units of state or local government as a result of administration and enforcement of the proposed rule.

This rulemaking is intended to implement certain provisions of HB 2912. This bill allows a veterinarian to dispose of animal remains by burial or burning only if the disposal occurs on property owned by the veterinarian, the veterinarian does not charge for the disposal, and if the disposal occurs in a county with a population of less than 10,000. In order to comply with the legislation, this

rulemaking is intended to add an additional exemption to existing commission outdoor burning rules to implement the authorization added by HB 2912.

The provisions in this rulemaking are voluntary and only apply to veterinarians in counties with a population less than 10,000. The commission does not anticipate this rulemaking will affect any units of state or local government.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from administration of the proposed rule would be compliance with the terms of HB 2912 regarding the authority for a veterinarian that meets certain conditions to dispose of animal remains on-site through burial or burning.

This rulemaking is intended to implement certain provisions of HB 2912, which allows a veterinarian to dispose of animal remains by burial or burning only if the disposal occurs on property owned by the veterinarian, the veterinarian does not charge for the disposal, and if the disposal occurs in a county with a population of less than 10,000. In order to comply with the legislation, this rulemaking is intended to add an additional exemption to existing commission outdoor burning rules to implement the authorization added by HB 2912.

The proposed voluntary provisions do not add additional regulatory requirements for affected individuals and businesses and only apply to veterinarians in counties with a population less than

10,000. This rulemaking is intended to increase disposal flexibility by providing qualifying veterinarians authorization to dispose of animal remains on-site. This authorization could result in cost savings for veterinarians that would no longer be required to have animal remains shipped and disposed of offsite. Additionally, individuals that have deceased animals disposed of by veterinarians on-site would not have to pay for the disposal. According to a random sampling of veterinarians by the Texas Veterinary Medical Association, the cost for offsite animal disposal ranges between approximately $30 to $250, depending on the location of disposal site and the size of the animal being disposed.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to small or micro-businesses as a result of the proposed amended section, which is intended to implement provisions of HB 2912, which allows a veterinarian to dispose of animal remains by burial or burning only if the disposal occurs on property owned by the veterinarian, the veterinarian does not charge for the disposal, and if the disposal occurs in a county with a population of less than 10,000. In order to comply with the legislation, this rulemaking is intended to add an additional exemption to existing commission outdoor burning rules to implement the authorization added by HB 2912.

The proposed voluntary provisions do not add additional regulatory requirements for affected small and micro-businesses and only apply to veterinarians in counties with a population less than 10,000. This rulemaking is intended to increase disposal flexibility by providing qualifying veterinarians authorization to dispose of animal remains on-site. This authorization could result in cost savings for veterinarians that would no longer be required to have animal remains shipped and disposed of offsite.

Additionally, individuals that have deceased animals disposed of by veterinarians on-site would not have to pay for the disposal. According to a random sampling of veterinarians by the Texas Veterinary Medical Association, the cost for offsite animal disposal ranges between approximately $30 to $250, depending on the location of disposal site and the size of the animal being disposed.

LOCAL EMPLOYMENT IMPACT

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 rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The proposed 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 proposed amendment does not qualify as a "major environmental rule." Furthermore, the analysis required by §2001.0225(c) does not apply because the proposed rule does not meet any of the four applicability requirements of a major environmental rule. The proposed 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 proposed specifically to comply with HB 2912, and does not exceed the requirements of that bill. The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

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

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed rule will actually expand the allowable uses of a veterinarian's private real property. Consequently, the proposed 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 proposed rulemaking and found that the proposal 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, will require 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 proposed 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 proposed rule is to make existing commission rules consistent with the new legislative changes made to the Occupation Code by HB 2912. The proposed 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 proposed 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 seeks public comment on this preliminary consistency determination.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on March 28, 2002 at 2:00 p.m. at the

commission's central office in Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to 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 Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-088-111-AI. Comments must be received by 5:00 p.m., April 1, 2002. For further information, please contact Jill Burditt, Regulation Development Section, (512) 239-0560.

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, 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; §382.085, which prohibits unauthorized air emissions; and Texas Water Code, §5.103, which authorizes the commission to adopt rules.

The proposed amendment implements Texas Health and Safety Code, TCAA, §382.002, concerning Policy and Purpose; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; §382.017, concerning Rules; §382.018, concerning Outdoor Burning of Waste and Combustible Material; Texas Water Code, §5.103, concerning Rules; and Occupation Code, §801.361, concerning Disposal of Animal Remains.

SUBCHAPTER B: OUTDOOR BURNING

§111.209. Exception for Disposal Fires.

Outdoor burning shall be authorized for:

(1) (No change.)

(2) (No change.)

(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) [(3)] 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) [(4)] 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) [(5)] 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.