

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 RULES

The proposed amendment will implement House Bill 555, 78th Legislature, 2003. House Bill 555 amended Texas Health and Safety Code, §382.056, to specify that, for any air permit application subject to §382.056, the measurement of distances to determine compliance with any location or distance limitation in Texas Health and Safety Code, Chapter 382 (the Texas Clean Air Act), shall be taken toward structures that are in use at the time of the application. The amendment will also separate by subsection distances required by the Texas Clean Air Act and those required elsewhere.

The proposed amendment will also implement House Bill 1287, 78th Legislature, 2003. House Bill 1287 amended Texas Health and Safety Code, §382.065, to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of a structure that is in use as a residence, school, or place of worship at the time the application for a permit to operate the facility is filed with the commission. House Bill 1287 also establishes a method of making the measurement for the distance limitation and exempts certain facilities from the distance limitation.

SECTION DISCUSSION

Proposed §116.112(a), relating to Distance Limitations, would specify that, for all facilities subject to the public notice requirements in 30 TAC Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures); 30 TAC Chapter 39, Subchapters A, D, H, or K (relating to

Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications; respectively); or 30 TAC Chapter 122, Subchapter D (relating to Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition); the measurement for any location or distance limitation required by Texas Health and Safety Code, Chapter 382, will be taken towards structures that are in use at the time of application. Currently, the structures, referenced by the sections of Texas Health and Safety Code, Chapter 382, that specify a location or distance limitation, include single or multi-family residences, schools, and places of worship.

Proposed §116.112(b)(2), regarding distance limitations for hazardous waste management facilities, would be moved to a new subsection (c) to separate it from the distances required under the Texas Clean Air Act. Proposed new §116.112(c) would delete the language previously in §116.112(b)(2) and replace it with a cross-reference to 30 TAC §335.205, Prohibition of Permit Issuance, where the applicable distance limitations are found, because the deleted language was duplicative of the provisions in §335.205.

Proposed §116.112(b)(2) would be reworded to prohibit the operation, but not the location of a concrete crusher in close proximity to sensitive receptors. This change would allow the storage of concrete crushing equipment closer to populated areas. Paragraph (2) would also specify that the minimum distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is made. The exemption from the distance limitation for facilities authorized to operate at the site as of September 1, 2001 has been revised and moved to new subparagraph (B).

Proposed §116.112(b)(2)(A) would specify that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the structure housing the receptor that is nearest the concrete crushing facility. Subparagraph (B) would exempt those concrete crushing facilities authorized to operate at the site as of September 1, 2001 from the distance limitation. Subparagraph (C) would exempt those facilities crushing concrete that is produced by the demolition of a structure, as long as the crushing facility is located on the site of the demolition; the facility operates on-site no more than 180 consecutive calendar days; the crushed material is used primarily on-site; the facility complies with applicable conditions stated in commission rules, including operating conditions; and the facility is not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. House Bill 1287 also restricts the exemption from the distance limitation and measurement requirements to facilities for which the commission determines that operation at the location will cause no adverse environmental or health effects. Compliance with this condition is determined during protectiveness review as part of permit development.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Janak, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rule is in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rule.

The proposed amendment is intended to implement House Bill 555 and House Bill 1287. House Bill 555 amended Texas Health and Safety Code, §382.056, to specify that, for any air permit application

subject to §382.056, the measurement of distances to determine compliance with any location or distance limitation required by Texas Health and Safety Code, Chapter 382, shall be taken toward structures that are in use at the time of the application.

House Bill 1287 amended Texas Health and Safety Code, §382.065, to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of a structure that is used as a residence, school, or place of worship at the time the application for a permit to operate the facility is filed with the commission. House Bill 1287 also establishes a method of making the measurement for the distance limitation and exempts certain facilities from the distance limitation.

For all facilities subject to the public notice requirements under Texas Health and Safety Code, §382.056, the measurement for any Texas Health and Safety Code, Chapter 382, distance limitation between the proposed permitted facility and other structures will be taken towards structures that are in use at the time of the application. These changes would allow facilities some flexibility, in that distance requirements would not apply for structures that were abandoned, not in use, or not existing at the time the permit application was submitted.

The proposed amendment would also modify the existing rule to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission, and would exempt from the distance requirement facilities that were authorized to operate at the site as of September 1, 2001. This change would allow the storage of concrete crushing equipment closer to populated areas. The proposed amendment would also specify that the minimum

distance limitation applies only to the residence, school, or place of worship that is in use at the time the permit application is made.

The proposed amendment would also modify the distance measurement requirements for concrete crushing facilities. The proposed amendment would specify that the measurement for determining compliance with the distance requirement shall be taken from the point on the concrete crushing facility nearest to the residence, school, or place of worship to the point on the structure housing the residence, school, or place of worship that is nearest the concrete crushing facility. Concrete crushing facilities authorized to operate at the site as of September 1, 2001, are exempt from the distance measurement limitation. The proposed amendment would exempt facilities crushing concrete that is produced by the demolition of a structure from the minimum distance and measurement requirements, as long as the crushing facility is located on the site of the demolition; the facility operates on-site no more than 180 consecutive calendar days; the crushed material is used primarily on-site; the facility complies with applicable conditions stated in commission rules, including operating conditions; and the facility is not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more.

The proposed rule reauthorizes distance limitations and provides exemptions from the limitations for some concrete crushing facilities. The proposed rule is not expected to result in significant fiscal implications for the commission or units of local government. Units of local government do not typically own concrete crushing facilities, but if they do and are engaged in structure demolition there may be cost savings resulting from the use of old concrete on-site rather than taking it to a landfill, and from the ability to store concrete crushing equipment in populated areas. There may be a slight

increase in commission air permitting workload due to the new exemptions from distance and location limitations, but the costs are not anticipated to be significant, if any.

PUBLIC BENEFITS AND COSTS

Mr. Janak also has determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the administration and enforcement of the proposed amendment will be compliance with state law and a potential increase in the reuse of concrete from building demolition on-site, along with a potential reduction in the amount of demolition concrete in landfills.

No significant fiscal implications are anticipated for owners or operators of concrete crushing facilities that are temporarily located to recycle concrete produced by the demolition of a structure, or who wish to store concrete crushing equipment in populated areas. Fiscal implications, if any, are anticipated to result in some cost savings resulting from the use of the old concrete on-site rather than taking the materials to a landfill. There are currently 441 rock crushers authorized to operate in the state.

Approximately 10% of those facilities might be crushing concrete from a demolition project at any one time. The proposal exempts from the distance limitation those concrete crushing facilities located on a site for not more than 180 consecutive calendar days that crush concrete resulting from the demolition of a structure on that site; the crushed concrete is used primarily on-site; and the facility complies with applicable conditions stated in commission rules, including operating conditions, unless the facility is located in, or adjacent to, a county with a population of 2.4 million or more. Any cost savings would depend upon the size of the building and the amount of concrete present in the demolition, as well as the cost of any material being replaced by the recycled concrete (such as road base) and the amount of

tipping fees that would have been assessed had the material been taken to a landfill.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses involved in concrete crushing. It is not known how many of the 441 rock crushers authorized to operate in the state are owned or operated by small or micro-businesses. But for those that are, fiscal implications, if any, are anticipated to result in cost savings as a result of administration or enforcement of the proposed amendment, although these savings are not anticipated to be significant.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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.” A “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 modify the existing rule to prohibit only the operation, rather than the location or operation, of a concrete crushing facility within 440 yards of any residence, school, or

place of worship in use at the time the application for a permit to operate the facility is filed with the commission, and would exempt certain facilities from the distance limitation. The proposed amendment would also establish methods of making the measurement for distance limitations relevant to concrete crushing facilities and to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing. The amendment 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 proposed amendment would implement the requirements of Texas Health and Safety Code, §382.056(s) and §382.065. The commission invites public comment regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rule because this is an

action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The amended rule implements changes to Texas Health and Safety Code, §382.056, specifically, the addition of subsection (s); and §382.065, which is substantially rewritten, and to which subsections (c) and (d) were added.

Nevertheless, the commission further evaluated the proposed amendment to §116.112 and performed a preliminary assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this proposed rule is to provide greater certainty for the regulated community in making siting and compliance decisions. The proposed rule would substantially advance this purpose by providing for a method of making measurements to satisfy existing distance limitations required by Texas Health and Safety Code, Chapter 382, and specifying that such distance requirements are pertinent only to structures in use at the time the permit application is filed. The proposed rule also would specify a method for making measurements for the existing distance requirement for concrete crushing facilities, specify some of the conditions under which operation of such facilities may occur, and detail limited exemptions from this distance requirement. The proposed rule does not impose any other restriction or control on any facility.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule is no more restrictive than existing rules, and it does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The amended rule will not operate to affect private property in a manner that restricts or limits an owner's right to the

property that would otherwise exist in the absence of a governmental action. Therefore, the proposed rule will 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 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 Texas Coastal Management Program 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 that for all facilities subject to the public notice requirements in 30 TAC Chapter 116, Subchapter B, Division 3; 30 TAC Chapter 39, Subchapters A, D, H, or K; or 30 TAC Chapter 122, Subchapter D, the measurement for any distance requirement will be taken towards structures that are in use at the time of application. The proposed amendment would also prohibit the operation, but not the location of a concrete crusher in close proximity to sensitive receptors. The proposed amendment would also specify that the measurement for determination of compliance with the distance requirement shall be taken from the point on the concrete crushing facility that is nearest to the receptor to the point on the structure housing the receptor that is nearest the concrete crushing facility. The proposed amendment would also specify that the minimum distance limitation applies only to the residence, school, or place of worship that is in

use at the time the permit application is made. The proposed amendment would also exempt those facilities crushing concrete produced by the demolition of a structure as long as the crushing facility is located on the site of the demolition; the facility operates on-site no more than 180 consecutive calendar days; the crushed material is used primarily on-site; the facility complies with applicable conditions stated in commission rules, including operating conditions; and the facility is not located in a county with a population of 2.4 million or more, or in a county adjacent to a county with a population of 2.4 million or more. The proposed rulemaking does not authorize any new air emissions. Therefore, the rulemaking is consistent with the Texas Coastal Management Program. The commission invites public comment regarding the consistency of the proposed rule with the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 29, 2003 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 Joyce Spencer, 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 2003-046-116-AI. Comments must be received by 5:00 p.m., October 29, 2003. Copies of the proposed rule can be obtained from the commission's Web site at <http://www.tnrcc.state.tx.us/oprdrules/propadop.html>. 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, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and Texas Health and Safety Code, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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 §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.065, concerning Certain Locations for Concrete Crushing Facility Prohibited, which requires the commission to prohibit by rule the operation of a new concrete crushing facility within 440 yards of any residence, school, or place of worship in use at the time the application for a permit to operate the facility is filed with the commission; and §382.056(s), concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which establishes a method of making the measurement for distance limitations relevant to permit applications under Texas Health and Safety Code, Chapter 382, that are subject to notice and opportunity for hearing.

The proposed amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.011, 382.012, 382.017, 382.056(s), and 382.065.

§116.112. Distance Limitations.

(a) For any facility subject to the notice and hearing requirements of Subchapter B, Division 3 of this chapter (relating to Public Notification and Comment Procedures); Chapter 39, Subchapters A, D, H, or K of this title (relating to Applicability and General Provisions, Public Notice of Air Quality Applications, Applicability and General Provisions, and Public Notice of Air Quality Applications); or Chapter 122, Subchapter D of this title (relating to Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition), the measurement of distances to determine compliance with any location or distance limitation required by Texas Health and Safety Code, Chapter 382, shall be taken toward structures that are in use at the time of application.

(b) 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.]

(2) [(3)] Concrete crushing facilities. A concrete crushing facility must not be [located or] operated within 440 yards of any building in use [used] as a single or multi-family residence, school, or place of worship at the time the application for a permit to operate was made. [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.]

(A) The measurement of distances shall be taken from the point on the concrete

crushing facility nearest to the residence, school, or place of worship to the point on the structure housing the residence, school, or place of worship that is nearest the concrete crushing facility.

(B) The minimum distance limitation and measurement requirements of this paragraph do not apply to concrete crushing facilities that were authorized to operate at the site as of September 1, 2001.

(C) Unless the facility is located in, or located in a county adjacent to, a county with a population of 2.4 million or more, the minimum distance limitation and measurement requirements of this paragraph do not apply to facilities operated on a site for no more than 180 consecutive calendar days that crush concrete resulting from the demolition of a structure on that site for use primarily at that site, and which comply with all applicable conditions stated in commission rules, including operating conditions.

(c) For applicable distance limitations at hazardous waste management facilities, see §335.205 of this title (relating to Prohibition of Permit Issuance).

