The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §111.203 and §111.209. Section 111.209 is adopted *with change* to the proposed text as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 819). Section 111.203 is adopted *without change* to the proposed text and the text will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill (HB) 39, 79th Legislature, 2005, amended Texas Health and Safety Code (THSC), §382.018, Outdoor Burning of Waste and Combustible Material, by making it subject to Local Government Code, §352.082, Outdoor Burning of Household Refuse in Certain Residential Areas. Under Local Government Code, §352.082, a person commits a Class C misdemeanor if the person intentionally or knowingly burns household refuse outdoors on a lot that is located in a neighborhood or on a lot that is smaller than five acres. Local Government Code, §352.082, is applicable only to the unincorporated area of a county that is adjacent to a county with a population of 3.3 million or more, in which a planned community is located that has 20,000 or more acres of land that was originally established under the Urban Growth and New Community Development Act of 1970 (42 United States Code, §§4501 *et seq*.) and that is subject to restrictive covenants containing ad valorem or annual variable budget-based assessments on real property. The adopted rules will prohibit the burning of household refuse in the area delineated by Local Government Code, §352.082.

Senate Bill (SB) 1710, 79th Legislature, 2005, also amended THSC, §382.018, by adding subsections (b) and (c), which require the commission to authorize by rule the burning of waste consisting of plant growth in areas that meet the national ambient air quality standards (NAAQS) and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner. The commission is prohibited from requiring prior commission approval of the burning, or from authorizing the burning only when no practical alternative exists. Current rules do not make a distinction between attainment and nonattainment areas regarding outdoor disposal fires. The adopted rules will implement the authorization by rule required by THSC, §382.018.

SB 1710 also amended THSC, §382.018, by adding subsections (d) and (e), which prohibit the commission from controlling or prohibiting outdoor burning of waste consisting of plant growth at a site designated for burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised by a fire department employee acting in the scope of the person's employment. The current rules do not authorize the burning of waste at designated sites. The adopted rules will establish minimal compliance determination criteria to ensure that all activities meet the qualifications for burns at designated sites. The commission notes that only three counties, Chambers, Hardin, and Rockwall, are within designated nonattainment areas and have a population of less than 50,000. Burning of domestic waste, including plant growth, is already authorized in these counties for private residences when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction. To the commission's best available knowledge, no residential properties outside of municipalities in these

counties are provided with domestic waste collection by the local governmental entity having jurisdiction. Therefore, the adopted rules will not cause an increase in plant growth burning in designated nonattainment areas.

DEMONSTRATING NONINTERFERENCE UNDER FEDERAL CLEAN AIR ACT, SECTION 110(l)

Issue

The commission provides the following information to clarify why the amendments to §111.203 and §111.209 and the Texas SIP, will not negatively impact the status of the state's attainment areas.

The requirement for reasonable notice and public hearing is satisfied through the hearing held on March 7, 2006, and the public comment period, which was held from February 10, 2006, to March 13, 2006. EPA also issued draft guidance on June 8, 2005, "Demonstrating noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan." The guidance states (page 6) that ". . .areas have two options available to demonstrate noninterference for the affected pollutant(s)." This document provides detail of the identified existing measures in the rule preamble to show compliance with option (1) of EPA's guidance: Substitution of one measure by another with equivalent or greater emissions reduction/air quality benefits.

Background

In September 1996 (21 TexReg 8505), the commission approved revisions to the Texas outdoor burning regulations by repealing §§111.101, 111.103, 111.105, and 111.107 and adopting §§111.201, 111.203,

111.205, 111.207, 111.209, 111.211, 111.213, 111.215, 111.219, and 111.221. In October 1999 (64 FR 57983), EPA took a direct final action to approve these revisions to the state's outdoor burning regulations as amendments to the SIP. However, EPA received an adverse comment regarding the amendments and, therefore, withdrew the direct final rulemaking in December 1999 (64 FR 70592). EPA is now in the process of reviewing that action.

As this rulemaking is a revision of regulations currently under review and consideration by EPA for inclusion in the Texas SIP, the commission is asking EPA to review these revisions to §111.203 and §111.209 for inclusion in the SIP, concurrently with the previously submitted outdoor burning regulations.

Analysis of Revisions

a) Revision of §111.203 adds the definitions of "Neighborhood" and "Refuse" as repeated from THSC, §343.002. No air control measures have been removed.

b) Revisions to §111.209.

1) Section 111.209 has been made subject to Local Government Code, §352.082, which classifies certain types of outdoor burning as a Class C misdemeanor. This revision is more restrictive than current outdoor burning rules, which do not prohibit outdoor burning in the area specified in amended Local Government Code, §352.082 (Montgomery County). Furthermore, the adoption of this rule

revision and/or the SIP has no bearing on the implementation and enforcement of Local Government Code, §352.082. No air control measures have been removed.

2) THSC, §382.018(d) was amended to prohibit the commission from controlling or prohibiting outdoor burning of waste consisting of plant growth generated from specific residential properties on designated sites outside of a municipality and in counties with a population of less than 50,000. THSC, §382.018(d) is self-implementing. To address the statutory amendment, §111.209(5) authorizes outdoor burning at certain sites as designated by the property owner. However, this revision merely consolidates currently authorized outdoor burning, and does not authorize an increase in outdoor burning frequency. Burning waste consisting of plant growth generated from residential properties within the county but outside of municipalities is currently authorized under §111.209(1) as burning of domestic waste. To the commission's best available knowledge, county jurisdictions do not regularly provide domestic waste collection as that service is ordinarily provided by a municipality. The revision provides an option allowing homeowners to consolidate yard waste at a designated site before burning, rather than having many smaller fires throughout the neighborhood. Furthermore, the revision places additional restrictions on outdoor burning at such a designated site than currently exist for burning of domestic waste. Specifically, the revision requires mandatory notice to the commission prior to the burn and requires supervision by a fire department employee who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, that is acting in the scope of that person's employment. The required supervision of a fire department employee for each burn imposes limits on the frequency and number of outdoor burns and, therefore, would not constitute a relaxation of the SIP. No air control measures have been removed.

3) THSC, §382.018(b) was amended to require the commission to authorize by rule the burning of waste consisting of plant growth on the property of origin, if in an area that meets the NAAQS. Section 111.209(4)(B) authorizes the burning of plant growth on the property of origin in most areas of attainment, regardless of the type of activity that produced the waste. Current rules authorize the burning of waste plant growth on the property of origin, but limit activities to right-of-way maintenance, landclearing operations, and maintenance along water canals, and only when no practical alternative to burning exists.

However, most activities that generate plant waste are the result of right-of-way maintenance, landclearing operations, maintenance along water canals, or domestic activities. Plant waste generated from all of these activities is currently authorized. Therefore, no restriction on the type of activity for which waste plant growth may be burned has been removed.

THSC, §382.018(c) was amended to prohibit rules adopted under THSC, §382.018(b) from 1) requiring prior approval of the burn; and 2) authorizing the burning only when no practical alternative to burning exists. The removal of the requirement to burn only when no practical alternative to burning exists does not constitute the removal of a practical or effective air control measure. In response to comments during the 1996 rulemaking (21 Tex Reg 8509), the commission stated that "The commission's intent. . .is to foster an analysis of practical alternatives prior to burning." The current rule does not require approval of the practical alternative analysis prior to burning. Once the responsible party has determined that alternatives are not practical, it is unreasonable to dispute the determination due to the broad and vague nature of the definition of practical alternative, per

§111.101(4) (formerly §111.101(3)), "An economically, technologically, ecologically, and logistically viable option." TCEQ guidance document RG-049, Appendix D, states that when evaluating these four criteria the standard of judgment should be that of a "reasonable person." Therefore, practical alternative does not constitute an air control measure, but rather a measure to foster an analysis prior to burning, as was the commission's intent. To demonstrate this, there is no record in the commission's compliance database of any Notices of Violation or Enforcement for violation of the practical alternative clause. Actions on record regarding outdoor burning cite the burning of inappropriate material, burning in unauthorized locations, burning under unauthorized conditions (e.g. high winds, inappropriate hours, proximity to receptors, etc.), burning of domestic waste where waste collection is provided, or causing nuisance conditions. This further demonstrates that the appropriate air control measures to ensure noninterference with the Texas SIP are in place. Additionally, the commission stated during the 1996 rulemaking and in RG-049 that "The use of trench burners is a practical alternative under certain circumstances." The use of trench burners has not been demonstrated to significantly increase burning efficiency, but is rather a method used to prevent nuisance conditions. Therefore, the removal of practical alternative does not imply an increase in the quantity of material that may be burned, or an increase in air contaminants resulting from burning.

Finally, the current rule is subject to all of the air control measures in §111.219. The revised rules, for areas in attainment, are subject to the air control measures in §111.219(3), (4), (6), and (7), and subject to any local ordinances that prohibit burning inside the corporate limits of a city or town, consistent with Texas Clean Air Act (TCAA), Chapter 382, Subchapter E, Authority of Local Governments. The revised rules, for areas in nonattainment, maintain all of the air control measures in §111.219.

The commission does not anticipate increased burning or a relaxation of the Texas SIP for those municipalities in areas of attainment. Municipalities in areas of attainment remain subject to the prohibitions on outdoor burning in §111.219(3), (4), (6), and (7), which list prohibited burn materials, specify appropriate weather conditions, and prohibit causing adverse effects to any thoroughfares or off-site sensitive receptors. The adopted rules will confer control of allowable outdoor burning to local authorities but require that ordinances prohibiting or regulating outdoor burning comply with the TCAA, Chapter 382, Subchapter E, Authority of Local Governments. Regardless of whether in areas of attainment or nonattainment, persons conducting outdoor burns remain responsible for any consequences, damages, or injuries resulting from the burning in accordance with §111.221, Responsibility for Consequences of Outdoor Burning.

Conclusion

In addition to the above analysis of the rule, §101.4, General Nuisance, continues to provide a determination for whether an air contaminant release is a nuisance. The commission determined that there are sufficient rules and procedures in place to assure compliance with the Texas SIP, and that sufficient air control measures exist in this rulemaking so as not to constitute a relaxation of the Texas SIP.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §111.203, Definitions, adds the definition of "Neighborhood" and “Refuse” and renumbers subsequent definitions to accommodate the adopted new definitions. The adopted new definitions are repeated from THSC, §343.002.

The adopted amendment to §111.203 will also update the name “Texas Natural Resource Conservation Commission” to “Texas Commission on Environmental Quality.”

The adopted amendment to §111.209, Exception for Disposal Fires, is made subject to Local Government Code, §352.082. The proposed rule repeated Local Government Code, §352.082, in proposed subsection (b). All of adopted §111.209 is instead made subject directly to Local Government Code, §352.082. Local law enforcement will be the primary authority in the enforcement of Local Government Code, §352.082.

The adopted amendment to §111.209 also authorizes, as required by THSC, §382.018(b), the burning of plant growth on the property on which it was generated and by the owner of the property, or any person authorized by the owner, in counties that are not designated as nonattainment and that do not contain any part of a city that is part of a designated nonattainment area, by adding adopted new paragraph (4)(B), proposed as subsection (a)(4)(B). The adopted rule expands the existing options for on-site burning of plant growth in most attainment areas by removing the requirement to consider practical alternatives and by allowing on-site burning of plant growth by all property owners, rather than only for right-of-way maintenance, landclearing operations, and maintenance along waterways. The adopted rule, §111.209(4)(B), is subject to §111.219(3), (4), (6), and (7), and subject to any local

ordinances that prohibit burning inside the corporate limits of a city or town, consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments.

The adopted paragraph (4) does not expand the existing options for on-site burning of plant growth in nonattainment areas. Paragraph (4)(A), proposed as subsection (a)(4)(A), will continue to authorize burning in nonattainment areas, but only for right-of-way maintenance, landclearing operations, and maintenance along water canals, and only in the absence of a practical alternative. When proposed, subsection (a)(4)(A) covered the entire state. The adopted rule, §111.209(4)(A), is subject to §111.219.

The context of "plant growth" has been expanded in paragraph (4) to match the language used in SB 1710. When proposed, subsection (a)(4)(B) was explicitly subject to authorization by the owner of the property, per the requirement in SB 1710. All burning under adopted paragraph (4) is subject to authorization by the owner of the property. This is to clarify that while the language is required by SB 1710 for burning under paragraph (4)(B), the absence of the language elsewhere does not imply that burning on site without the consent of the property owner is authorized.

To protect human health and safety and environmental receptors, adopted §111.209(4)(B) is made subject to §111.219(3), (4), (6), and (7), relating to General Requirements for Allowable Outdoor Burning. In order to ensure that local authorities retain appropriate authority to enact ordinances controlling outdoor burning, adopted §111.209(4)(B) is made subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA,

Subchapter E, Authority of Local Governments. The commission also notes that all responsible persons engaged in outdoor burning are subject to §111.221, relating to Responsibility for Consequences of Outdoor Burning.

The adopted amendment to §111.209 also provides for the burning of waste plant growth generated from specific residential properties at designated sites located outside of municipalities and within counties with a population of less than 50,000, by adding adopted new paragraph (5), proposed as subsection (a)(4)(C). Under specific conditions, the commission is prohibited from controlling or prohibiting burning under THSC, §382.018(d). The burn must be at a designated burn site, located outside of a municipality, and within a county with a population of less than 50,000. All material burned must consist of plant growth generated at specific residential properties for which the site is designated. The burn must be supervised by a fire department employee acting in the scope of the person's employment, who must notify the commission of each supervised burn. To determine if burns under adopted paragraph (5) meet the conditions of THSC, §382.018(d), the adopted rule requires the owner of the site or the owner's authorized agent to post the designated site, maintain a description or list of specific residential properties for which the site is designated, ensure that all waste burned consists of plant growth generated from these properties, and to ensure that a qualified fire department employee supervises each burn at the site. The requirement under proposed subsection (a)(4)(C)(iii), now paragraph (5)(C), to include the name of each property owner on the record of designated residential properties has been struck from the adopted rule.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 the Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may 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. The primary purpose of the adopted rules is to protect the environment through the regulation of the outdoor burning of waste and combustible material. The adopted rules will not have an adverse material impact because the adopted rules are limited to revisions to the prohibition on and exception for disposal fires. The adopted revisions will: 1) prohibit the burning of domestic waste in residential areas that are in unincorporated areas of a county adjacent to a county with a population of 3.3 million or more and where there is a planned community of 20,000 acres or more. In these residential areas, domestic waste cannot be burned in a neighborhood or on a lot that is less than five acres; 2) allow for the burning of waste consisting of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner; and 3) allow for the outdoor burning of waste consisting of plant growth at a site designated for consolidated burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised at the time of the burning by a fire department employee acting in the scope of the person’s employment.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a), where the adopted rules: 1) are specifically required by state law, namely THSC, §382.018; 2) do not exceed the express requirements of THSC, §382.018; 3) do not exceed a requirement of a federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) are not an adoption of a rule solely under the general powers of the commission.

Based on this assessment, the adopted rulemaking does not constitute a major environmental rule and is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. Public comments were solicited. No public comments were received regarding the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rules is to protect the environment through the regulation of the outdoor burning of waste.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do 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 adopted rules are limited to revisions to the

prohibition on and exception for disposal fires. The adopted revisions will: 1) prohibit the burning of domestic waste in residential areas that are in unincorporated areas of a county adjacent to a county with a population of 3.3 million or more and where there is a planned community of 20,000 acres or more. In these residential areas, domestic waste cannot be burned in a neighborhood or on a lot that is less than five acres; 2) allow for the burning of waste consisting of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner; and 3) allow for the outdoor burning of waste consisting of plant growth at a site designated for consolidated burning of waste generated from specific residential properties located outside of a municipality and in a county with a population of less than 50,000, if supervised at the time of the burning by a fire department employee acting in the scope of the person's employment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the revision is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found that the adopted rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to the adopted rules include: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound

management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP policy applicable to the adopted rules requires that commission rules under THSC, Chapter 382, governing emissions of air pollutants, shall comply with regulations in 40 Code of Federal Regulations, adopted in accordance with Federal Clean Air Act (FCAA), 42 United States Code, §§7401, *et seq.*, to protect and enhance air quality in the coastal area so as to protect coastal natural resources areas and promote the public health, safety, and welfare.

Promulgation and enforcement of the rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rules are consistent with these CMP goals and policies. The rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Public comments were solicited. No public comments were received regarding the consistency with the coastal management program.

PUBLIC COMMENTS

The commission received written comments from four individuals, the City of Lufkin, Brazos River Authority (BRA), TXU Electric Delivery (TXU), Houston Regional Group of the Sierra Club (HSC),

Earthmoving Contractors Association of Texas (ECAT), Galveston County Health District (GCHD), and United States Environmental Protection Agency (EPA). A public hearing was held on March 7, 2006. The commission received oral comments from the Texas Illegal Dumping Resource Center (TIDRC), Texas Builder's Association (TBA), and ECAT.

Three individuals were opposed to authorizing landowners to burn within the city limits, while one individual supported burning in the city limits. The City of Lufkin was opposed to restricting burning to one hour after sunrise to one hour before sunset. BRA, TXU, HSC, and TBA generally supported the rulemaking. TIDRC did not oppose the rulemaking but made several suggestions. GCHD did not indicate support or opposition to the rulemaking. ECAT's comments were outside the scope of the rulemaking.

RESPONSE TO COMMENTS

One individual commented that due to her allergies and her husband's emphysema there should be no burning allowed within the city limits. She also commented that she has had to leave her house and seek medical attention as a result of burning in her neighborhood. Two individuals would like to see a statewide ban on burning within a city limit and would like the ban to be enforced.

The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 requires the commission to authorize by rule the burning of plant growth in most attainment areas, if burned on the property of origin. The commission believes the intent of the legislation, in part, is to direct and delegate appropriate authority to local governments in efforts to ensure that regulatory

policies address the concerns of affected citizens. In response to the comment, the commission has made §111.209(4)(B) subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent the TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the concerns of affected citizens. Allowable outdoor burning is not permitted at any time to rise to a level of nuisance conditions. Anyone may report a nuisance condition to the commission and file a complaint by calling 1-888-777-3186.

One individual commented that she is concerned that her current practice of burning leaves in her yard at her residence in the city limits will be prohibited or limited under the proposed amendments to outdoor burning in 30 TAC Chapter 111.

Under current rules, there is no provision allowing a person to burn yard waste on site where waste collection is provided by the local entity having authority. Under the adopted rule, however, this type of burning will be authorized even when waste collection is provided. As noted in the response to the previous comment, this authority is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the concerns of affected citizens. The commission believes city governments should be allowed to control burning within their limits at the local level. No change has been made in response to the comment.

The City of Lufkin commented that §111.219(6)(A) was too restrictive and that the requirement to begin burning no earlier than one hour after sunrise and to have the burn completed no later than one hour before sunset should be changed. The city commented that the winds are generally calmer and the humidity higher early in the morning and later in the evening which would reduce the possibility for the burn to get out of control.

The commission agrees that in many instances the meteorological conditions early in the morning and late in the evening may reduce the risk of an out of control burn. The requirements of §111.219 are intended to improve the dispersion conditions necessary to reduce the potential impacts of smoke and related emissions from burns subject to the requirements of this section. No change to the rule has been made.

BRA commented that overall it supported the rule changes; however, it expressed concern that the requirement under proposed §111.209(a)(4)(C)(i) and §111.209(a)(4)(C)(vi) that the burning be "directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Local Government Code, §419.021, and is acting in the scope of the person's employment," was too restrictive. BRA commented that this requirement "does not recognize the considerable skill and training that volunteer firefighters have in fighting brush fires, grass fires and wildfires," and "in contrast to the vast wildfire experience of volunteer firefighters, most municipal firefighter's training focuses primarily on structural firefighting." BRA was concerned that this requirement eliminates most of rural Texas, where local governments rely solely upon volunteer fire departments for fire protection, from taking advantage of the revised outdoor burning rules.

The commission recognizes the considerable skill and training that volunteer firefighters have in fighting brush fires, grass fires, and wildfires. However, the commission has undertaken this rulemaking to comply with SB 1710. SB 1710 is specific in its requirement that the burning be "directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Local Government Code, §419.021, and is acting in the scope of the person's employment." No change to the rule has been made in response to the comment.

TXU commented that it supported the rule as proposed and emphasized the importance of two sections contained in the proposed rule: 1) TXU supports the additional flexibility in specific circumstances and/or operations that the applicability of §111.209(a)(4)(A) and §111.209(a)(4)(B) provides for "on-site burning" for "right-of-way (ROW) management." Sections 111.209(a)(4)(A) and §111.209(a)(4)(B) of the proposed rule allows outdoor burning regardless of whether a practical alternative to burning exists. The ability to conduct outdoor burning without having to provide evidence of practical alternatives would greatly expedite cleanup and management of ROW. For example, Hurricanes Katrina and Rita resulted in large amounts of wood and brush, some in remote areas inaccessible by most vehicles; and 2) TXU supports allowing a "contractual easement document" to be acceptable documentation that an individual or company is an "authorized agent," and supports the inclusion of an "authorized agent" in §111.209(a)(4)(B). TXU may not be the actual property owner, but may have a contractual easement agreement with the owner to maintain the ROW.

Proposed §111.209(a)(4)(A) and §111.209(a)(4)(B) were intended to be two separate authorizations, i.e., a person would have to choose whether he intended to burn under

subparagraph (A) or (B), but could not pick and choose from both. Subparagraph (A) was intended to apply statewide but only to the listed activities (i.e., ROW, landclearing, maintenance along water canals), and only when no practical alternative to burning exists. Subparagraph (B) was intended to apply only in certain areas of the state, but for all activities including, but not limited to, ROW, landclearing, and maintenance along water canals, and only by the landowner or any person authorized by the landowner. Under proposed subparagraph (A), burning for ROW in nonattainment areas would be permitted, as long as no practical alternatives existed. Under proposed subparagraph (B), burning for ROW would be permitted, but only with landowner authorization.

In response to TXU's first point, the commission has made the authorizations under subparagraphs (A) and (B) mutually exclusive. Subparagraph (A) applies only in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area. Subparagraph (B) applies in all other areas. Under subparagraph (A), only the listed activities are authorized and practical alternatives must be considered. Subparagraph (B) includes, but is not limited to, the listed activities and consideration of practical alternatives is not required. Burning under either subparagraph (A) or subparagraph (B) is restricted to plant growth generated on the property on which it is burned.

In response to TXU's second point, the proposed rule did not contain language allowing a "contractual easement document" to be acceptable documentation that an individual or company is an "authorized agent." SB 1710 is specific in that the burning must be by the property owner

or any other person authorized by the owner. The commission authorizes burning of plant growth, but does not authorize the infringement of the property rights of landowners. Whether or not a "contractual easement document" is acceptable documentation that an individual or company is authorized by the landowner to burn plant growth is a matter between the parties to the document. The adopted rule makes both subparagraphs (A) and (B) subject to the requirement that burning must be by the property owner or any other person authorized by the owner.

HSC commented that it supported the rule change that makes the burning of household waste a Class C misdemeanor. Unfortunately, HSC commented, the way HB 39 is worded, TCEQ must apply this rule only to areas near The Woodlands. Therefore, other areas will not receive commensurate protection.

HB 39 created a Class C misdemeanor in Local Government Code, Chapter 352. The commission has undertaken this rulemaking, as it relates to HB 39, to ensure that the exceptions for disposal fires contained in §111.209 are consistent with the new criminal statute. No change to the rule has been made in response to the comment.

HSC commented that it does not support the implementation of the language in SB 1710 which prohibits the commission from requiring prior approval for outdoor burning under the proposed rules. HSC commented that approval by the TCEQ of outdoor burning provides public protection and information.

The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 is specific in its requirement that the commission cannot require prior commission approval. No change to the rule has been made in response to the comment.

HSC commented that the phrase "plant growth" is not defined in §111.203 and the TCEQ should "strictly define this phase so that there are no unintended legal surprises when the rule is tested in court."

The commission has expanded the context of the term "plant growth" to include "trees, brush, grass, leaves, branch trimmings, or other plant growth," and believes the meaning is clear from the expanded context. The term has not been strictly defined in 30 TAC §101.203.

HSC commented that it supported the requirements under §111.209(a)(4)(C)(i) - (vi), as reasonable things for an owner of a designated site or the owner's agent to do.

The commission appreciates the comment. No change to the rule has been made in response to the comment.

TBA commented that it supported the proposed rules. It pointed out four issues which it stated probably do not affect the substance of the rule but may help eliminate ambiguities.

In §111.209(a)(4), the proposed rule uses the language "brush, trees, and other plant growth." Using the language "brush, trees, grass, leaves, branch trimmings, or other plant growth" would expand the language a little and be consistent with the language used in SB 1710, and in proposed §111.209(a)(4)(C)(i).

The commission agrees that using the language "brush, trees, grass, leaves, branch trimmings, or other plant growth" would expand the language and be consistent with the language used in SB 1710. The language has been revised as recommended.

TBA commented that in §111.209(a)(4)(B), the proposed rule uses the language "In a county that is not part of {a} designated nonattainment area." TBA recommends using the language "In an area," rather than, "In a county." The statute uses the word "area" rather than "county." "County" could be ambiguous; does it mean both the incorporated and the unincorporated areas of the county? Or does it mean the unincorporated areas only? TBA prefers that the language "municipality that extends into a designated nonattainment area," read "municipality that is designated nonattainment area." TBA believes this may not be substantive but might help clarify the rule.

The commission believes that the term "county" represents the only comprehensive set of legally defined areas in Texas. Furthermore, nonattainment areas are designated along county lines. No change has been made in response to the comment.

The commission believes that the language "in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area" is necessary to concisely define the counties in which proposed §111.209(a)(4)(B) is not applicable. The rule is not applicable in two types of counties: 1) all counties in designated nonattainment areas; and 2) counties in attainment areas that both border a nonattainment county and in which a municipality extends across the county line into both the attainment and nonattainment areas. No change has been made in response to this comment.

TBA commented that in §111.209(a)(4)(B), the proposed rule is subject to the requirements of §111.219(3), (4), (6), and (7). TBA believes paragraph (7) may be redundant. Paragraph (7) talks about burning oil, non-wood construction items, and similar things. The rule itself does not contemplate the burning of things like oil or non-wood construction materials.

While the commission acknowledges that proposed §111.209(a)(4)(B) does not contemplate the burning of items such as those prohibited in §111.219(7), the commission believes that making §111.209 subject to §111.219(7), emphasizes the necessity and importance of complying with the general restriction. No change has been made in response to the comment.

TBA commented that in §111.209(a)(4)(C)(iii), the proposed rule requires the owner of a designated site to maintain records of the designated residential properties for which the site is designated. The record must contain the description of a platted subdivision and/or a list of each property address and the name of each property owner. TBA believes the language is confusing. Does it mean you must

maintain the description of the platted subdivision or a list of each address, and in any event the name of each property owner? Or does it mean you must maintain the description or both the address and name of each property owner? TBA suggests the requirement to maintain the name of each property owner may not be necessary and that removing it would eliminate the confusion. The owner of the designated site may not have the name of the residential property owner, but if he has the description of the subdivision and the address of each property, then he knows the locations designated for the site.

The commission agrees that the requirement to include the name of each property owner may be an unnecessary restriction and may be the cause of confusion. The requirement has been struck from the rule.

TIDRC commented that while HB 39 created a Class C misdemeanor, located under Local Government Code, §352.052, the commission created a crime with a larger penalty under Texas Water Code, §7.177(a)(5), by restating this prohibition against outdoor burning in proposed §111.209(b).

The commission has undertaken this rulemaking as it relates to HB 39 to ensure that the exceptions for disposal fires contained in §111.209 are consistent with the new criminal statute located in Local Government Code, Chapter 352. TIDRC is correct that under Texas Water Code, §7.177(a)(5), an intentional or knowing violation of commission rules adopted under THSC, Chapter 382, carries penalties of up to $50,000 for an individual and up to 180 days confinement. The commission has made §111.209 subject directly to Local Government Code, §352.052, rather

than repeating the restriction in proposed §111.209(b). This will provide notice of this new criminal statute without creating a larger penalty than HB 39 intended.

TIDRC commented that SB 1710 specifically refers to areas that meet the NAAQS, but proposed §111.209(a)(4)(B), uses language that would have the rule change apply everywhere except nonattainment areas, which would include the undetermined areas, which constitute most of Texas. This would greatly expand the area that the rule would be applicable to beyond that specified in SB 1710.

The commission concurs that the language in proposed §111.209(a)(4)(B) encompasses most attainment areas, and the language in SB 1710 does not encompass the undetermined areas. However, the language in SB 1710 does not describe an enforceable area. It is possible for an area to meet the NAAQS one day, and fail to meet the NAAQS for a particular pollutant on the next day, depending on atmospheric conditions and pollutant transport from other areas. On the other hand, nonattainment areas are designated and legally defined areas. No change has been made in response to the comment.

TIDRC commented that not all cities have local ordinances to deal with illegal burning. Some of them rely on the criminal application of Texas Water Code, §7.177 to address local burning within the city limits. By removing the criminal penalty for burning of brush and limbs and other plant waste inside the city limit, some cities will have to change their ordinances to ensure that their local policies will criminalize outdoor burning.

The commission concurs that removing the criminal penalty for burning inside the city limit could prove a significant inconvenience to many Texas municipalities. The commission has undertaken this rulemaking to comply with SB 1710. SB 1710 requires the commission to authorize by rule the burning of plant growth in most attainment areas, if burned on the property of origin. The commission believes the intent of the legislation, in part, is to direct and delegate appropriate authority to our local governments in efforts that regulatory policies address the concerns of affected citizens. In response to the comment, the commission has made §111.209(4)(B) subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. This will allow each affected municipality to determine and address the concerns of affected citizens.

GCHD commented that the proposed revisions authorize the burning of plant growth in areas that meet the NAAQS and do not contain any part of a city that does not meet the NAAQS if the waste is burned on the property of origin and by the owner of the property or any other person authorized by the owner. GCHD asked the question, "What about burning of plant material in nonattainment areas on property of origin by the owner of the property or any other person authorized by the owner?"

The adopted rule does not authorize outdoor burning in designated nonattainment areas on the property of origin by the owner or the property or any other person authorized by the owner. No change to the rule has been made in response to the comment.

ECAT commented that it is a statewide organization made up of contractors who specialize in heavy dirt work, with a major portion of their work in the area of agriculture and natural resource conservation type work. ECAT does mechanical brush control as it relates to pasture conditions, and primarily as it relates to increasing and conserving both groundwater and surface water. ECAT has major concerns and interests in how the contractors dispose of the brush in their business. Burning in most of their applications is the only practical method. Therefore, it concerns ECAT when there are discussions at the state environmental agency that could possibly limit, or put unrealistic controls on this best practice. ECAT offers its services in the future to the commission whenever work on rules concerning agricultural burning is considered.

The commission's proposed rule §111.209(a)(4)(A) and (B) will not prohibit any landclearing activity that is authorized under the current rule. The proposed amendment to the rule would remove the requirement of practical alternative in attainment areas. The commission thanks ECAT for its comments and welcomes suggestions on any future rule proposals concerning agricultural burning.

EPA commented that a comparison of Texas' revisions to §111.203 and §111.209 to current SIP-approved rules (including those currently under EPA consideration) seem to relax outdoor burning in some areas. EPA is concerned that a relaxation on outdoor burning would make it difficult for some areas to remain in attainment due to potential increases in direct emissions of particulate matter and other pollutants such as nitrogen oxides, volatile organic compounds, and sulfur dioxide. EPA stated that the proposal does not show noninterference with any of the Clean Air Act requirements,

particularly with regard to FCAA, §110(l). EPA commented that the Texas SIP does not include §111.203 to §111.221, but instead an earlier approved version of rules including §§111.101, 111.103, 111.105, and 111.107. EPA pointed out that the remaining sections not in the SIP are currently under EPA review and have not yet been approved.

EPA suggested that the commission provide an explanation on how the amendments to §111.203 and §111.209, and how §§111.101, 111.103, 111.105, and 111.107 would not interfere with any of the FCAA requirements. EPA also commented that there must be an opportunity for notice and public comment.

The 79th Legislature in 2005 amended THSC, §382.018(a), making it subject to the Local Government Code, §352.082, which classified certain types of outdoor burning, as designated in this rulemaking, as a Class C misdemeanor. 30 TAC §111.209 was amended accordingly to prohibit the burning of household refuse in a limited demographic area. The amendment to §111.209 would be more restrictive than current outdoor burning rules, which do not criminalize or prohibit outdoor burning in the specified area. The commission does not expect any increases in outdoor burning in the specified area and, therefore, this rulemaking would not constitute a relaxation of the Texas SIP. The commission made no changes to §111.209 in response to this comment.

Through the enactment of SB 1710, the 79th Legislature in 2005 amended THSC, §382.018(b) and (d). The current rules under revision (§111.203 and §111.209) require consideration of practical

alternatives, incorporate all of the controls in §111.219, and do not make a distinction between areas of attainment and nonattainment. The adopted rules, however, make a distinction between allowable burning in areas of attainment and nonattainment. Section 111.209(4)(A) still incorporates all of the controls in §111.219. Section 111.209(4)(B) is subject to the controls in §111.219(3), (4), (6), and (7), is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments, and no longer require consideration of practical alternatives.

THSC, §382.018(b) allows burning in areas that meet the NAAQS without requiring prior commission approval or consideration of practical alternatives. During proposal of the regulation, 30 TAC §111.209 was amended to authorize on-site outdoor burning in attainment areas without consideration of practical alternatives and incorporated §111.219(3), (4), (6), and (7). For areas in attainment, §111.209(4)(B) is subject to the controls in §111.219(3), (4), (6), and (7), and is subject to any local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with TCAA, Chapter 382, Subchapter E, Authority of Local Governments. For areas of nonattainment, §111.209(4)(A) is subject to the air control measures in §111.219. Section 111.219 will maintain the necessary controls on outdoor burning in nonattainment areas, such as delineating appropriate burn times, weather conditions, distances from sensitive receptors, prohibitions against burning certain materials, and prohibitions on burns within corporate limits of a city. Areas in attainment will also be subject to the controls in §111.219, with the distinction that controls on allowable outdoor burning within the corporate limits of a city will be delegated to local authorities to enact ordinances consistent with the TCAA. The removal of practical

alternatives in areas of attainment was specified by the legislature in the amendments made to THSC, §382.018(b). The removal of practical alternatives in areas of attainment will not constitute a relaxation of the SIP as the consideration was primarily for a demonstration of economic feasibility rather than a control on outdoor burn emissions. Controls on outdoor burn emissions remain in place because they are included in the requirements in §111.219, particularly with regard to areas in nonattainment so as not to constitute a relaxation of the SIP. The commission has adopted regulations to conform with the changes made to the statute without compromising controls on allowable outdoor burning.

THSC, §382.018(d) was amended to allow for outdoor burning of plant growth generated from specific residential properties on designated sites outside of a municipality and in counties with a population less than 50,000. Section 111.209 currently does not allow for burning on designated sites. The amendment to §111.209 for designated sites requires mandatory notice to the commission prior to the burn, and requires supervision by a fire department employee. Only three counties in nonattainment areas meet the requirements for designated site burns (Hardin, Rockwall, and Chambers). The commission anticipates changes to the adopted rule would consolidate currently authorized outdoor burning rather than increasing it. Burning of domestic waste, including plant growth, is already authorized in these counties for private residences when collection of domestic waste is not provided or authorized by the local government having jurisdiction. To the commission's best available knowledge, no residential properties outside of the municipalities in these counties are provided with domestic waste collection by the local government having jurisdiction. The adopted rules are not expected to result in an increase in

outdoor burning as the counties that were previously conducting outdoor burns will be permitted to continue doing so, but with the requirement that the burns be conducted on a designated site and conducted within the requirements in §111.209. The additional controls, such as the required presence of a fire department employee supervising each burn, impose limits on the frequency and number of outdoor burns and, therefore, would not relax the SIP. The commission made no changes to the rules in response to this comment.

Through the enactment of HB 39 and SB 1710, the 79th Legislature in 2005, amended THSC, §382.018(a) - (e), and §111.203 and §111.209 were amended accordingly to conform to the statutes. Sections 111.101, 111.103, 111.105, 111.107, 111.205, and 111.207 were not proposed to be amended as HB 39 and SB 1710 did not affect these sections. Additionally, §§111.101, 111.103, 111.105, and 111.107 were repealed on August 21, 1996, and replaced with §§111.201 - 111.221 (64 FR 57983). The sections under EPA consideration for approval have now been amended (§111.203 and §111.209); therefore, there has only been a SIP revision for these sections and consideration or revisions of other sections in Chapter 111 would be outside the scope of SB 1710 and HB 39. In response, a new section, DEMONSTRATING NONINTERFERENCE UNDER FEDERAL CLEAN AIR ACT, SECTION 110(l), has been incorporated in the rule preamble.

The commission held a stakeholder meeting on September 26, 2005, in Austin and gained input from county and local law enforcement agencies, city governments, land developers, and utility

companies. The amendments and public hearing notice were published in the *Texas Register* on February 10, 2006, and the public hearing was held on March 7, 2006, to obtain comment.

SUBCHAPTER B: OUTDOOR BURNING

§111.203, §111.209

STATUTORY AUTHORITY

The amendments are adopted under THSC, §382.002, relating to Policy and Purpose, 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 and §5.105, which authorizes the commission to adopt rules.

The adopted amendments implement THSC, §§382.002, 382.011, 382.017, and 382.018.

§111.203. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Commission on Environmental Quality (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Extinguished**--The absence of any visible flames, glowing coals, or smoke.

(2) **Landclearing operation**--The uprooting, cutting, or clearing of vegetation in connection with conversion for the construction of buildings, rights-of-way, residential, commercial, or industrial development, or the clearing of vegetation to enhance property value, access, or production. It does not include the maintenance burning of on-site property wastes such as fallen limbs, branches, or leaves, or other wastes from routine property clean-up activities, nor does it include burning following clearing for ecological restoration.

(3) **Neighborhood**--A platted subdivision or property contiguous to and within 300 feet of a platted subdivision.

(4) **Practical alternative**--An economically, technologically, ecologically, and logistically viable option.

(5) **Prescribed burn**--The controlled application of fire to naturally occurring vegetative fuels under specified environmental conditions and confined to a predetermined area, following appropriate planning and precautionary measures.

(6) **Refuse**--Garbage, rubbish, paper, and other decayable and nondecayable waste, including vegetable matter and animal and fish carcasses.

(7) **Structure containing sensitive receptor(s)**--A man-made structure utilized for human residence or business, the containment of livestock, or the housing of sensitive live vegetation. The term "man-made structure" does not include such things as range fences, roads, bridges, hunting blinds, or facilities used solely for the storage of hay or other livestock feeds. The term "sensitive live vegetation" is defined as vegetation that has potential to be damaged by smoke and heat, examples of which include, but are not limited to, nursery production, mushroom cultivation, pharmaceutical plant production, or laboratory experiments involving plants.

(8) **Sunrise/Sunset**--Official sunrise/sunset as set forth in the United States Naval Observatory tables available from National Weather Service offices.

(9) **Wildland**--Uncultivated land other than fallow, land minimally influenced by human activity, and land maintained for biodiversity, wildlife forage production, protective plant cover, or wildlife habitat.

§111.209. Exception for Disposal Fires.

Except as provided in Local Government Code, §352.082, outdoor burning is authorized for the following:

(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 that 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) veterinarians in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains;

(4) on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth, by the owner of the property or any other person authorized by the owner, and when the material is generated only from that property:

(A) in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area; if the plant growth was generated as a result of right-of-way maintenance, landclearing operations, and maintenance along

water canals when no practical alternative to burning exists. Such burning is subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). Commission notification or approval is not required; or

(B) in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area; this provision includes, but is not limited to, the burning of plant growth generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals. Such burning is subject to local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with the Texas Clean Air Act, Chapter 382, Subchapter E, Authority of Local Governments, and the requirements of §111.219(3), (4), (6), and (7) of this title. Commission notification or approval is not required.

(5) at a site designated for consolidated burning of waste generated from specific residential properties. A designated site must be located outside of a municipality and within a county with a population of less than 50,000. The owner of the designated site or the owner's authorized agent shall:

(A) post at all entrances to the site a placard measuring a minimum of 48 inches in width and 24 inches in height and containing, at a minimum, the words "DESIGNATED BURN SITE - No burning of any material is allowed except for trees, brush, grass, leaves, branch trimmings, or other plant growth generated from specific residential properties for which this site is

designated. All burning must be supervised by a fire department employee. For more information call {PHONE NUMBER OF OWNER OR AUTHORIZED AGENT}." The placard(s) must be clearly visible and legible at all times;

(B) designate specific residential properties for consolidated burning at the designated site;

(C) maintain a record of the designated residential properties. The record must contain the description of a platted subdivision and/or a list of each property address. The description must be made available to commission or local air pollution control agency staff within 48 hours, if requested;

(D) ensure that all waste burned at the designated site consists of trees, brush, grass, leaves, branch trimmings, or other plant growth;

(E) ensure that all such waste was generated at specific residential properties for which the site is designated; and

(F) ensure that all burning at the designated site is directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, and is acting in the scope of the person's employment. The fire department employee shall notify the appropriate commission regional office with a telephone or

electronic facsimile notice 24 hours in advance of any scheduled supervised burn. The commission shall provide the employee with information on practical alternatives to burning. Commission approval is not required;

(6) 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 the 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; and

(7) brush, trees, and other plant growth causing a detrimental public health and safety condition 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.