

The Texas Commission on Environmental Quality (commission) proposes amendments to §111.203 and §111.209.

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 subjecting it 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, and 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 proposed rules would 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 make no distinction between attainment and nonattainment areas regarding outdoor disposal fires. The proposed rules would 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 proposed rules would 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 proposed rules would not cause an increase in plant growth burns in designated nonattainment areas.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are proposed 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 proposed amendment to §111.203, Definitions, would add the definition of "Neighborhood" and "Refuse" and renumber subsequent definitions to accommodate the proposed new definitions. The proposed new definitions are repeated from THSC, §343.002.

The proposed amendment to §111.203 would also update the name "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality."

The proposed amendment to §111.209, Exception for Disposal Fires, would prohibit the burning of household refuse outdoors in areas delineated in Local Government Code, §352.082, by adding new subsection (b). Local law enforcement will be the primary authority in the enforcement of Local Government Code, §352.082.

The proposed amendment to §111.209 would also authorize by rule, 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 proposed new subsection (a)(4)(B). THSC, §382.018(c), prohibits the commission from requiring prior commission approval for outdoor burning or considering practical alternatives when authorizing burning under this rule. To protect human health and safety and environmental receptors, proposed subsection (a)(4)(B) would be subjected to §111.219(3), (4), (6), and (7), relating to General Requirements for Allowable Outdoor Burning. 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 proposed amendment to §111.209 would also provide 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 proposed new subsection (a)(4)(C). Under certain conditions, the commission is prohibited from controlling or prohibiting burning under THSC, §382.018(d). To meet these conditions, 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 proposed subsection (a)(4)(C) meet the conditions of THSC, §382.018(d), the proposed rule would require 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 generated, 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state government. Although not anticipated to be significant, local governments may experience fiscal implications as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would implement the provisions of HB 39 and SB 1710. HB 39 altered provisions of the Local Government Code concerning the outdoor burning of domestic waste. SB 1710 altered provisions of THSC, §382.018, regarding the outdoor burning of plant wastes.

The proposed rules, in accordance with the requirements of HB 39, would 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 could not be burned in a neighborhood or on a lot that is less than five acres.

The proposed rules would also implement the requirements of SB 1710, which authorizes outdoor burning of plant material in qualifying attainment areas and for residences in qualifying counties if

there is a designated burn site. In qualifying attainment areas, plant waste must be burned on the property where it was generated and the waste must be burned by the owner of the property or an authorized representative. The commission cannot require property owners to obtain prior approval of the burn or to consider using practical alternatives to burns. In qualifying counties, plant waste can be burned at designated sites in counties where the population is less than 50,000, where the site is located outside a municipality, where the site serves designated residential properties, and where the burn is supervised by a fire department employee.

Local law enforcement organizations in areas where the outdoor burning of household refuse is prohibited under the proposed rulemaking could see enforcement costs increase if more resources are required to investigate complaints or incidents. The proposed rules regarding outdoor burning of household refuse apply to one demographic area of the state. Since the potential number of future enforcement incidences is not known, enforcement costs cannot be accurately estimated.

The fire departments in the areas of the state where designated burns can take place have the choice of whether to supervise burns. The number of fire departments that would choose to supervise burns is not known at this time. Fire departments participating in outdoor burning at designated sites may decide to charge fees for supervising these types of burns. Since employee costs and the method each fire department may choose to supervise such burns can vary widely, the amount of costs recovered and revenue generated cannot be estimated. However, the fiscal implications, if any, of supervised burns is not anticipated to be significant.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater protection of air quality in one demographic area of the state where the outdoor burning of refuse will be prohibited. In attainment areas, there will be greater flexibility for the outdoor burning of plant wastes.

Individuals in areas of the state where outdoor burning of household refuse will be prohibited under the proposed rules may see disposal costs increase if alternatives for the disposal of such refuse do not currently exist. However, the cost of this waste disposal is not anticipated to be significant.

Individuals or other entities in attainment areas may see costs for disposing of plant waste decrease since the proposed rules allow for the burning of such wastes and do not require individuals or other entities to consider practical alternatives to outdoor burning of plant wastes. Owners of residential property where outdoor burning of plant wastes must be burned at designated sites may see disposal costs increase if local fire departments collect fees to supervise these burns. The cost decrease or increase of outdoor burning of plant wastes depend on various factors and may vary. However, any cost decrease or increase is not anticipated to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rulemaking. Plant waste disposal costs for small or micro-businesses in certain attainment areas may

decrease since the proposed rules do not require small or micro-businesses to consider practical alternatives to outdoor burning in these cases; however, the cost decrease is 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule as defined in 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 proposed rules is to protect the environment through the regulation of the outdoor burning of waste and combustible material. The proposed rules will not have an adverse material impact because the proposed rules are limited to revisions to the prohibition on and exception for disposal fires. The proposed revisions would: 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 proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a), where the proposed 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 proposed rulemaking does not constitute a major environmental rule and is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

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

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed 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 proposed rules are limited to revisions to the prohibition on and exception for disposal fires. The proposed revisions would: 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 proposed rulemaking and found that the proposal 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 proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found that the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to the proposed 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 proposed 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, 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 proposed 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on Tuesday, March 7, 2006, at 10:00 a.m., at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle, Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Office of Legal Services, at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-041-111-CE. Comments must be received by 5:00 p.m., Monday, March 13, 2006. Copies of the proposed rules can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Ronnie Kramer, Field Operations Division, at (512) 239-0194.

SUBCHAPTER B: OUTDOOR BURNING

§111.203, §111.209

STATUTORY AUTHORITY

The amendments are proposed 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 proposed 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 [Natural Resource Conservation] 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 [which] are defined by the TCAA, the following terms, when used in this chapter, [shall] have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

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

(5) [(4)] **Prescribed burn**--The controlled application of fire to naturally occurring [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) [(5)] **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 [which] 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) [(6)] **Sunrise/Sunset**--Official sunrise/sunset as set forth in the United States Naval Observatory tables available from National Weather Service offices.

(9) [(7)] **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.

(a) Except as provided in subsection (b) of this section, outdoor [Outdoor] burning shall be authorized for the following: [.]

(1) domestic [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 [which] cannot be burned, include such things as tires, non-wood construction debris, furniture, carpet, electrical wire, and appliances; [.]

(2) diseased [Diseased] animal carcass burning when burning is the most effective means of controlling the spread of disease; [.]

(3) veterinarians [Veterinarians] in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains; [.]

(4) on-site [On-site] burning of trees, brush, and other plant growth;

(A) for right-of-way maintenance, landclearing operations, and maintenance along water canals when no practical alternative to burning exists and when the materials are generated only from that property. Structures containing sensitive receptors must not be negatively affected by the burn. Such burning shall be subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). When possible, notification of intent to burn

should be made to the appropriate commission regional office prior to the proposed burn. For a single project entailing multiple days of burning, an initial notice delineating the scope of the burn is sufficient if the scope does not constitute circumvention of the rule for a continual burning situation. Commission [notification or] approval is not required; [.]

(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; and on the property on which it was generated and by the owner of the property or any other person authorized by the owner. Such burning shall be subject to the requirements of §111.219(3), (4), (6), and (7) of this title. Commission approval is not required; or

(C) 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:

(i) 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;

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

(iii) 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 and
the name of each property owner. The description must be made available to commission or local air
pollution control agency staff within 48 hours, if requested;

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

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

(vi) 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;

(5) crop [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 [.]

(6) brush [Brush], trees, and other plant growth causing a detrimental public health and safety condition [may be] burned by a county or municipal government at a site it owns upon receiving site and burn approval from the executive director. Such a burn can only be authorized when there is no practical alternative, and it may be done no more frequently than once every two months. Such burns cannot be conducted at municipal solid waste landfills unless authorized under §111.215 of this title (relating to Executive Director Approval of Otherwise Prohibited Outdoor Burning), and shall be subject to the requirements of §111.219 of this title.

(b) No person may cause, suffer, allow, or permit the burning of household refuse on a lot that is smaller than five acres or located in a neighborhood and in an unincorporated area of a county:

(1) that is adjacent to a county with a population of 3.3 million or more; and

(2) 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.