

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §111.211 *without change* to the proposed text as published in the August 16, 2013, issue of the *Texas Register* (38 TexReg 5223), and will not be republished.

The amendment 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 Rule

The Texas Prescribed Burning Board (TPBB) petitioned the TCEQ to address wildfires in the state's prescribed burn rule. In particular, the TPBB asked for a revision that would add hazard mitigation to the rule. The commission approved the request at its February 27, 2013, Agenda meeting and issued an order on March 5, 2013, directing the executive director to initiate rulemaking (Project No. 2013-018-PET-NR).

The rule revision amends §111.211 by adding prescribed burning for wildfire hazard mitigation as an exception to the state's prohibition on outdoor burning. Currently, a prescribed burn is allowed only for forest, range and wildland/wildlife management purposes, and coastal salt-marsh management burning. The revision allows prescribed burning in other areas, such as where rural areas interface with urban areas, for the purpose of wildfire hazard mitigation in order to reduce the incidence, intensity, and

spread of wildfires. While the petitioner did not specifically request that the hazard mitigation provision be specific to wildfires, the exception added to §111.211(1) is specific to wildfire hazard mitigation in order to provide clarity and specificity consistent with the commission's interpretation of the TPBB's intent. The TPBB did not comment on the proposed rule.

Under current TCEQ rule §111.215, a prescribed burn for wildfire hazard mitigation is authorized only by written permission on a case-by-case basis from the TCEQ executive director. Prescribed burning has been underutilized due to lack of awareness of the authorization available under §111.215. Also, prescribed burning for hazard mitigation is currently subject to TCEQ enforcement action unless prior written permission from the executive director is received. Prescribed burning is not appropriate for land-clearing operations, which are addressed separately under §111.209.

A prescribed burn is defined in §111.203(5) as 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. The state's prohibition on outdoor burning is in Chapter 111, Subchapter B.

Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)

The revision to add wildfire hazard mitigation to Chapter 111 does not negatively impact

the state's attainment of the particulate matter National Ambient Air Quality Standard (NAAQS), does not interfere with control measures for NAAQS compliance, and does not prevent reasonable further progress toward attainment of the particulate matter NAAQS.

The outdoor burning rules in Chapter 111, Subchapter B, are included in the SIP as part of the state's strategy for control of particulate matter emissions. The revision does not interfere with applicable requirements for attainment and for reasonable further progress toward attainment, or with other applicable requirements of the Federal Clean Air Act (FCAA). While prescribed burning does result in some air emissions, controlled burning for wildfire hazard mitigation purposes helps reduce the incidence, intensity, and spread of wildfires. By reducing the likelihood of the significantly greater air emissions associated with wildfires, the rule revision is expected to help improve air quality. Additionally, as discussed elsewhere in this preamble, the executive director currently authorizes prescribed burning for wildfire hazard mitigation on a case-by-case basis as provided by §111.215. Section 111.215 is already an EPA-approved rule under the SIP. The commission's purpose in amending the rule is to streamline the existing process for authorization of prescribed burning for wildfire hazard mitigation provided by §111.215, consistent with the executive director's current enforcement of the outdoor burning rules in Chapter 111, Subchapter B.

Section Discussion

The amendment to §111.211 changes existing paragraph (1) to add "wildfire hazard mitigation" to the list of authorized prescribed burn purposes.

Final Regulatory Impact Determination

The commission reviewed the rule revision in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, Regulatory Analysis of Major Environmental Rules, and determined that the amendment does not meet the definition of a major environmental rule as defined in the statute. According to Texas Government Code, §2001.0225, a major environmental rule means "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." The purpose of this revision is to increase protection of the environment through wildfire hazard mitigation and reduce risk to human health; it is not expected that this revision will adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, no regulatory impact analysis is required.

Furthermore, even if the revision to the rule constituted a major environmental rule, a

regulatory impact analysis would not be required because the revision does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The revision does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the revision is designed to meet, not exceed the relevant standard set by federal law; 2) no contract or delegation agreement covers the topic that is the subject of this rule; and 3) the rule revision is authorized by specific sections of the Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), cited in the Statutory Authority section of this preamble.

The purpose of the rule revision is to allow prescribed burns for the purpose of wildfire hazard mitigation. Also, the rule revision will be incorporated into the Texas SIP. The revision will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the FCAA. In addition, the revision is expected to improve air quality by reducing the incidence,

intensity, and spread of wildfires.

Without the rule revision, a prescribed burn for wildfire hazard mitigation may be authorized only by written permission on a case-by-case basis from the TCEQ executive director under §111.215. Under current rules, prescribed burning is underutilized due to lack of awareness of the provision in §111.215. Without written permission from the executive director, prescribed burning for hazard mitigation is subject to TCEQ enforcement action.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to add in §111.211, prescribed burning for wildfire hazard mitigation as an exception to the state's prohibition on outdoor burning. Currently, a prescribed burn is allowed only for forest, range and wildland/wildlife management purposes, and coastal salt-marsh management burning. A prescribed burn is defined in §111.203(5) as 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.

This revision is expected to improve air quality by reducing the incidence, intensity, and spread of wildfires. In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rule amendment because this is an action that is taken in response to a real and substantial threat to public health and safety, that is designed to significantly advance the health and safety purpose, and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found the revision is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and, therefore, requires that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and has

no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Because Chapter 111 contains applicable requirements under 30 TAC Chapter 122, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise operating permits to include the revised Chapter 111 requirements for emissions affected by the revisions to Chapter 111 at their site.

Owners or operators must revise operating permits to include the new Chapter 111 requirements upon the effective date of the adopted rulemaking.

Public Comment

The commission held a public hearing on September 10, 2013. The comment period closed on September 16, 2013. The commission received comments from the Houston Regional Group of the Sierra Club (Sierra Club), the Harris County Attorney's Office (HCAO), Harris County Pollution Control Services Department (HCPCSD), and the

EPA. The comments from the Sierra Club were generally in support of the revision.

Response to Comments

Comment

The Sierra Club expressed support for this proposal, but believes it is unnecessary since the prescribed burning already allowed under §111.211 is usually flexible enough to allow burning in areas as necessary for wildfire hazard mitigation. Sierra Club also encouraged the commission to understand that this form of prescribed burn is not needed or recommended in streamside management zones or in riparian areas since it can severely damage these areas for the native wildlife and vegetation.

Response

The commission appreciates the support. The amendment adopted in this rulemaking specifically addresses the mitigation of wildfire hazards to human population. The purpose of the amendment is to include prescribed burning for wildfire hazard mitigation as an exception to the type of outdoor burning that requires approval of the executive director on a case-by-case basis. The amendment streamlines the authorization process for prescribed burning for wildfire hazard mitigation by authorizing, without prior approval from the executive director, a form of prescribed burning that has consistently been approved in the past. No change was made as a

result of this comment.

Comment

The Sierra Club urged the commission to allow prescribed burning that begins naturally or as a result of human carelessness.

Response

A prescribed burn is one that is intentionally set with the purpose of an end benefit. Fires that begin naturally or by human carelessness are not examples of prescribed burning. Prescribed burning for wildfire hazard mitigation is an intentionally set fire designed to reduce the frequency, intensity, and duration of a wildfire by consuming the fuel load under controlled conditions with the goal to reduce the potential fire hazard between unpopulated and populated areas. No change was made as a result of this comment.

Comment

EPA, HCAO, and HCPCSD commented on the need for the revised rule to define "wildfire hazard" and "wildfire hazard mitigation." They are concerned that, without the requested definitions, burning of large piles of brush from land-clearing operations would take place under this exception. In its comment, EPA questioned the TCEQ's

ability to ensure that the burning would not be conducted for another reason, such as land-clearing, if the executive director's case-by-case approval is not required.

Response

The TCEQ does not believe a definition of wildfire hazard or of wildfire hazard mitigation in the amended rule is necessary to prevent unauthorized burning under the amended rule. A prescribed burn is defined in §111.203(5) as: "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." It is also defined in 4 TAC §225.1(10) as: "The controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions in accordance with a written prescribed burn plan." The accumulation of cleared and piled vegetation is considered a waste and therefore is not considered a naturally occurring fuel. Compliance with the streamlined authorization for prescribed burning for wildfire hazard mitigation does not change whether the approval is made on a case-by-case basis or approved under the conditions set forth in this proposed rule. No change was made as a result of these comments.

Comment

HCAO and HCPCSD commented on the lack of requirements that define who may carry out a prescribed burn and how prescribed burning takes place. They recommend that the proposed rule be revised to define who can conduct prescribed burning, and that the rule include training and qualification criteria.

Response

The TPBB is responsible for regulating certified and insured prescribed burn managers. For more information about the TPBB's certification and training programs, go to

<http://www.texasagriculture.gov/Home/ProductionAgriculture/Prescribe dBurnProgram.aspx>. No change was made as a result of these comments.

Comment

HCAO and HCPCSD commented on the lack of pre-approval or pre-inspection requirements of the site or area that is the subject of the prescribed burn. They recommended prior notification to local authorities be made part of the revised rule. They proposed a specific wording for the notification requirement, and requested that the notification requirement be extended to all types of prescribed burning in §111.211.

Response

The purpose of the amendment is to streamline the process for prescribed burning for wildfire hazard mitigation. Requiring notification to local authorities is not always possible due to time restraints and emergency situations. Notification would not facilitate streamlining the authorization process for this type of prescribed burning. No change was made in response to these comments.

Comment

HCAO and HCPCSD commented that the exception would allow an increased number of fires that could impact the Houston-Galveston-Brazoria (HGB) PM_{2.5} attainment status. Since the HGB attainment status is currently under review, the commenters requested a re-evaluation of the proposed exception if future PM_{2.5} monitoring data indicates an impact from prescribed burning for wildfire hazard mitigation.

Response

Prescribed burning for wildfire hazard mitigation is already conducted on a case-by-case basis, requiring approval from the TCEQ Regional Director. The purpose of this rulemaking is to "pre-authorize" prescribed burning with the intention of streamlining the decision-making process under a specific set of conditions. The result of controlled burns for wildfire hazard mitigation should be the reduced frequency, intensity, and duration of

wildfires, and therefore less atmospheric loading of airborne particulates.

If the HGB area's PM_{2.5} attainment status changes in the future, the TCEQ will be required to develop SIP revisions to address all contributing factors.

The allowance of this type of prescribed burning is not expected to be a contributing factor for PM_{2.5} non-attainment. No change was made in response to these comments.

Comment

EPA noted in their comment that a SIP revision must meet §110(l) of the FCAA and requested that the TCEQ address several points. Specifically, the EPA asked what analysis has the TCEQ done to support its statement that the proposed revision to add wildfire hazard mitigation to Chapter 111 is expected to improve air quality by reducing the incidence, intensity, and spread of wildfires. Additionally, the EPA asked if the TCEQ had done any analysis to estimate the additional amount of acreage that may be annually burned as a result of this amendment to Chapter 111. Finally, the EPA stated that the TCEQ should provide an analysis to show that the revision will not interfere with attainment or maintenance of the ozone, as well as the particulate matter standards.

Response

The commission did not perform any modeling or other technical analysis regarding the expected benefits associated with wildfire hazard mitigation. Nor has the commission performed an analysis to estimate the additional acreage that may be burned annually from wildfire hazard mitigation purposes. The commission considers it to be self-evident that while prescribed burns for wildfire hazard mitigation will result in some emissions of particulate matter, nitrogen oxides, and other pollutants, these emissions will be significantly less than a wildfire which would burn uncontrolled and consume substantially more fuel. Additionally, such analyses are not necessary for the purposes of FCAA, §110(I) and the adopted revision to Chapter 111. The commission already has the ability to allow prescribed burns for wildfire hazard mitigation purposes on a case-by-case basis under §111.215, which is an EPA-approved rule under the SIP. Therefore, the adopted rule revision is not authorizing an activity that could not already be allowed under the current rules included in the SIP. As such, the revision cannot be backsliding under the SIP for the purposes of FCAA, §110(I) for either the particulate matter or the ozone NAAQS. The purpose of the rulemaking is to better facilitate the process of allowing prescribed burns for wildfire hazard mitigation by specifically allowing the activity under the rule rather than through case-by-case determinations. No change has been made to the rule in response to this comment.

Comment

EPA commented that, by removing the existing approval process from §111.215, the executive director no longer has "methods to specify control or abate emissions."

Response

Section 111.215 stipulates that the executive director *may* specify procedures or methods to control or abate emissions. Because emissions controls or abatement are not practical in all cases of outdoor burning, not every request is conducive to abating or controlling emissions. Other than the general requirements in the exception, there are no practical methods to control or abate emissions from prescribed burning, thus the executive director is not waiving or eliminating this requirement. No change was made in response to this comment.

SUBCHAPTER B: OUTDOOR BURNING

§111.211

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.018, which authorizes the commission to control outdoor burning; and THSC, §382.085, unauthorized emissions prohibited.

The adopted amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.018, and 382.085; and Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*

§111.211. Exception for Prescribed Burn.

Outdoor burning shall be authorized for:

(1) Prescribed burning for forest, range and wildland/wildlife management, and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning. Such burning shall be subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning), and structures containing sensitive receptors must not be negatively affected by the burn. When possible, notification of intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required.

(2) Coastal salt-marsh management burning conducted in Aransas, Brazoria, Calhoun, Chambers, Galveston, Harris, Jackson, Jefferson, Kleberg, Matagorda, Nueces, Orange, Refugio, and San Patricio Counties. Coastal salt-marsh burning in these counties shall be subject to the following requirements:

(A) All land on which burning is to be conducted shall be registered with the appropriate commission regional office using a United States Geological Survey

map or equivalent upon which are identified significant points such as roads, canals, lakes, and streams, and the method by which access is made to the site. For large acreage, the map should be divided into manageable blocks with identification for each defined block. The information must be received for review at least 15 working days before the burning takes place.

(B) Prior to any burning, notification, either verbal or written, must be made to, and authorization must be received from the appropriate commission regional office. Notification must identify the specific area and/or block to be burned, approximate start and end time, and a responsible party who can be contacted during the burn period.

(C) Such burning shall be subject to the requirements of §111.219 of this title.