

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §111.211.

If adopted, amended §111.211 will be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan (SIP).

### **Background and Summary of the Factual Basis for the Proposed 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 would amend §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 proposed revision would allow 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

commission is proposing that the exception added to §111.211(1) be specific to wildfire hazard mitigation in order to provide clarity and specificity consistent with the commission's understanding of the TPBB's intent.

Without the proposed rule revision, a prescribed burn for wildfire hazard mitigation is 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 authorization available under §111.215. Without written permission from the executive director, prescribed burning for hazard mitigation is subject to TCEQ enforcement action. 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 found in Chapter 111, Subchapter B.

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

The proposed revision to add wildfire hazard mitigation to Chapter 111 will not

negatively impact the state's attainment of the particulate matter National Ambient Air Quality Standard (NAAQS), will not interfere with control measures for NAAQS compliance, and will 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 would 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. 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. 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 proposed amendment to §111.211 would change existing paragraph (1) to add "wildfire hazard mitigation" to the list of authorized prescribed burn purposes.

### **Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule is in response to a petition from the TPBB. The proposed rule would add prescribed burning for wildfire hazard mitigation as an exception to the state's prohibition on outdoor burning at §111.211. A prescribed burn is defined in §111.203(5) as the controlled application of fire to naturally occurring vegetative fuels. Currently, a prescribed burn is allowed without written authorization from the TCEQ only for forest, range and wildland/wildlife management purposes, and coastal salt-marsh management burning.

This proposed revision would not change or increase the equipment, training, or other resources needed to conduct a prescribed burn, and the agency, other state agencies, and units of local government are not expected to experience a fiscal impact as a result

of the proposed rule.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be a reduction in the incidence spread, and intensity of wildfires by reducing the naturally occurring available fuel load.

The proposed rule would not have an immediate significant fiscal impact on individuals or business. The proposed rule would not change or increase the equipment, training, or other resources needed to conduct a prescribed burn, but the proposed rule would reduce the naturally occurring available fuel load and mitigate the effects of a wildfire thereby reducing the possible loss from a wildfire.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses.

### **Small Business Regulatory Flexibility Analysis**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years

that the proposed rule is in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the 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 would be incorporated into the Texas SIP. The revision would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Federal Clean Air Act. 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **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 at §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 proposed 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 proposed rulemaking and found the proposal 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 will, therefore, require 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 will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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.

### **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.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on September 10, 2013, at 10:00 a.m. in Building E, room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-023-111-CE. The comment period closes September 16,

2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Joe Janecka, (512) 239-1353.

## **SUBCHAPTER B: OUTDOOR BURNING**

### **§111.211**

#### **Statutory Authority**

The amendment is proposed 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 proposed 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; §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; §382.018, which authorizes the commission to control outdoor burning; and §382.085, which prohibits unauthorized air emissions.

The proposed amendment will implement 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.