

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §80.128, Specific Admissibility of Evidence for Concrete Batch Plants, without changes to the proposed text as published in the April 21, 2000 issue of the *Texas Register* (25 TexReg 3418).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1298, 76th Legislature, 1999, amended the Texas Health and Safety Code (THSC), §382.058, Limitation on Commission Exemption for Construction of Certain Concrete Plants, by adding subsection (d), to prohibit evidence regarding air dispersion modeling from being submitted at a hearing under THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing, for concrete batch plants which register under THSC, §382.057, Exemptions.

Senate Bill 766, which also passed during the 76th Legislature, 1999, amended THSC, §382.058, to reference permits by rule and standard permits instead of exemptions for concrete batch plants. In order to give effect to both SB 1298 and SB 766, the commission will implement the intent of the language "adoption of exemption under §382.057" to include "issuance of standard permit under §382.05195" and the procedures which are codified under 30 TAC Chapter 116, Subchapter F.

It is anticipated that concrete batch plants will be eligible for a standard permit from the commission instead of an exemption. The commission has concluded extensive research, including air dispersion modeling, to ensure that the standard permit for concrete batch plants will be protective. Prior to the approval of a registration for a standard permit, certain concrete batch plants will be required to provide public notice and may be subject to a contested case hearing. Under these circumstances, when air

dispersion modeling is introduced at a public hearing for a concrete batch plant registering under a standard permit, it would be redundant with air dispersion modeling already conducted by the commission. Senate Bill 1298 creates a prohibition on submittal of evidence regarding air dispersion modeling during a public hearing when a standard permit considering modeling and impacts review for these facilities has been issued by the commission. This prohibition will begin to apply upon the issuance of a standard permit for concrete batch plants by the commission which is anticipated shortly after the adoption of this rule.

SECTION BY SECTION DISCUSSION

The new adopted §80.128 prohibits evidence regarding air dispersion modeling to be submitted at a hearing under THSC, §382.056, if the commission considers air dispersion modeling information in the course of adopting the standard permit under Texas Clean Air Act (TCAA), §382.05195, for a concrete plant.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 that statute. Section 80.128 contains a change in the procedural rules which prohibits the introduction of modeling in a contested case hearing. It is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. Since extensive modeling was performed by the commission regarding concrete batch plants and the emissions from these plants has

been shown to be insignificant, this prohibition will not affect the protection of the environment.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. It is anticipated certain concrete batch plants will be eligible for a standard permit from the commission. The commission has concluded extensive research, including air dispersion modeling, to ensure that the standard permit for concrete batch plants will be protective. Prior to the approval of a registration for a standard permit, certain concrete batch plants will be required to provide public notice and may be subject to a contested case hearing. When air dispersion modeling is introduced at a public hearing, it would be redundant with air dispersion modeling already conducted by the commission. Section 80.128 creates a prohibition on submittal of evidence regarding air dispersion modeling during a public hearing involving a concrete batch plant standard permit. This rule is simply a procedural rule and does not burden private real property. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted section is not subject to the Texas Coastal Management Program (CMP). The adopted action concerns only the procedural rules of the commission and general agency operations, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC

§§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on this proposal was held in Austin on May 16, 2000 and no oral comments were received. The comment period closed on May 22, 2000. The Residents for A Better Community, a citizen group, submitted two written comments with suggested changes concerning §80.128.

ANALYSIS OF TESTIMONY

The Residents for A Better Community commented that there was a lack of public notification to the changes to the TNRCC rules and regulations as required by SB 1298.

The commission disagrees with this comment as it relates to the specific regulatory procedure.

The commission followed the procedures in accordance with Texas Government Code, §2001.023, Notice of Proposed Rules. Section 2001.023(a) states that a state agency shall give at least 30 days notice of its intention to adopt a rule before it adopts the rule and §2001.023(b) states that a state agency must file notice of the proposed rule with the secretary of state for publication in the *Texas Register*. These requirements were met. A notice regarding the proposed new rule appeared in the *Texas Register* (25 TexReg 3418) on April 21, 2000, and a notice for a public hearing was published by April 14, 2000 in the following newspapers: Austin American-Statesman, El Paso Times, Fort Worth Star-Telegram, and the Houston Chronicle. This meets the requirement for publication in the *Texas Register* as well as the 30-day requirements.

The commission also disagrees with the comment as it relates to the specific adopted rule. Senate Bill 1298 amended the THSC, §382.058, by adding subsection (d) which prohibits evidence regarding air dispersion modeling to be submitted at a hearing under THSC, §382.056, for concrete batch plants. In accordance with this amendment, the new adopted §80.128 prohibits evidence regarding air dispersion modeling to be submitted at a public hearing, if the commission considers air dispersion modeling information in the course of adopting a concrete batch plant standard permit. There is no reference to public notification in the legislation or new adopted rule, and therefore the issue of public notice for these facilities is outside the scope of this rulemaking.

The Residents of a Better Community commented that the new regulation should not be retroactive.

The commission agrees with this comment. The new §80.128 will only apply to a new standard permit for concrete batch plants once it is effective and does not apply to existing permit applications or registrations for permit by rule.

STATUTORY AUTHORITY

The new section is adopted under THSC, §382.058(d), to prohibit evidence regarding air dispersion modeling submitted at a hearing under THSC, §382.056, for concrete batch plants which register under TCAA, §382.05195; §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, §382.051, which authorizes the commission to issue a permit for numerous similar sources; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA; and §382.05195, which authorizes the commission to issue a standard permit.

CHAPTER 80: CONTESTED CASE HEARINGS

SUBCHAPTER C: HEARING PROCEDURES

§80.128

§80.128. Specific Admissibility of Evidence for Concrete Batch Plants.

If the commission considers air dispersion modeling information in the course of issuing a standard permit under Chapter 116, Subchapter F of this title (relating to Standard Permits) for a plant that performs wet batch, dry batching, or central mixing, evidence regarding air dispersion modeling may not be submitted at a hearing under Texas Health and Safety Code, §382.056.