

The Texas Commission on Environmental Quality (commission) adopts the amendment to §111.209.

Section 111.209 is adopted *without change* to the proposed text as published in the May 28, 2004 issue of the *Texas Register* (29 TexReg 5276) and will not be republished.

The amendment is being adopted as a revision to the Texas state implementation plan, which will be submitted to the United States Environmental Protection Agency (EPA).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

A bill from the 77th Legislature, 2001 amended Texas Occupations Code, §801.361, Disposal of Animal Remains and allowed the burning of animal remains if the burning occurred in a county with a population of less than 10,000, on property owned by the veterinarian, and the veterinarian did not charge for disposal. This bill did not allow the burning of associated medical waste.

This rulemaking implements a subsequent amendment to Texas Occupations Code, §801.361. Senate Bill (SB) 216, 78th Legislature, 2003, amended Texas Occupations Code, §801.361, by allowing veterinarians to burn animal remains and associated medical waste. Associated medical waste includes: animal waste, blood, gloves, sleeves, newspapers, and plastic bags, but does not include sharps. SB 216 also changes the conditions under which a veterinarian may burn waste. The adopted amendment revises paragraph (3) by replacing the current language with a reference to amended Texas Occupations Code, §801.361. This provides an exception to the prohibition of outdoor burning by veterinarians in accordance with Texas Occupations Code, §801.361.

In compliance with House Bill 3061, 78th Legislature, 2003, this rule was developed in cooperation with and was approved by the Texas Animal Health Commission on May 25, 2004. The commission simultaneously adopts in this issue of the *Texas Register* an amendment to 30 TAC §330.4, Permit Required.

#### SECTION DISCUSSION

The amendment to §111.209, Exception for Disposal Fires, is necessary to make commission rules consistent with the burning revisions provided by SB 216. The amendment revises paragraph (3) by removing the current language and replacing it with a reference to amended Texas Occupations Code, §801.361. This amendment modifies the exception to the prohibition of outdoor burning relating to burning by veterinarians to make it consistent with Texas Occupations Code, §801.361.

#### 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 that statute. The amendment to §111.209 is only intended to make existing commission rules consistent with the new legislative changes made to the Texas Occupations Code, and the adopted rule does not 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. Therefore, the adopted amendment does not qualify as a “major environmental rule.” Furthermore, the analysis required by Texas Government Code, §2001.0225(c) does not apply because the rule does not meet any of the four applicable requirements of

a major environmental rule. The rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The rule is adopted specifically to make commission rules consistent with SB 216 and does not exceed the requirements of that bill.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the adopted rule is to make existing commission rules consistent with the new legislative changes made to the Texas Occupations Code by SB 216. The rule substantially advances this purpose by replacing existing language with a reference to the Texas Occupations Code as amended by SB 216. Promulgation and enforcement of the adopted rule is neither a statutory nor a constitutional taking of private real property. Specifically, the rule does not affect private real property rights because it does not burden, restrict, or limit an owner's property rights that would otherwise exist in the absence of the regulation. The rule actually expands the allowable uses of a veterinarian's private real property except those veterinarians in a municipality that is within a county of 10,000 or fewer people. The adopted rule does not meet the definition of a takings under Texas Government Code, §2007.002(5).

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rule 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 rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies.

The CMP goals applicable to the rule 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.

CMP policy applicable to the rule is 31 TAC §501.14(q), which states that commission rules under Texas Health and Safety Code, Chapter 382, governing emissions of air pollutants, shall comply with regulations in Code of Federal Regulations, Title 40, adopted in accordance with Clean Air Act, 42 United States Code Annotated, §§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 rule does not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rule is consistent with these CMP goals and policies. The rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

#### PUBLIC COMMENT

The commission conducted a public hearing on the rulemaking on June 24, 2004, in Austin. The Texas Veterinary Medical Association (TVMA) commented at the hearing. During the public comment period, which closed on June 28, 2004, the commission received written comments from TVMA, EPA, and Senator Judith Zaffirini. EPA stated no objection to the proposed amendment to §111.209, TVMA stated support of the changes to Chapter 111, while Senator Zaffirini only commented on the amendment to §330.4.

#### RESPONSE TO COMMENTS

TVMA stated support of the changes to Chapter 111. EPA stated no objection to the amendment to §111.209 as a revision to the SIP and noted that the revisions in this rulemaking reference Texas Occupational Code, §801.361, which will be included by reference in the SIP revision.

**The commission appreciates these comments.**

## **SUBCHAPTER B: OUTDOOR BURNING**

### **§111.209**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Health and Safety Code, 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, which authorizes the commission to adopt rules.

#### **§111.209. Exception for Disposal Fires.**

Outdoor burning shall be 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 which 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, and other plant growth 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.

(5) 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 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.

(6) 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.