

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 21, 2011

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G. Executive Director

From: Richard A. Hyde P.E., Deputy Director
Office of Permitting and Registration

Docket No.: 2008-1631-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 101, General Air Quality Rules
Chapter 116, Control of Air Pollution by Permits for
New Construction or Modification
One-hour Ozone Major Source Thresholds and
Emission Offsets
Rule Project No. 2008-030-116-PR

Background and reason(s) for the rulemaking:

In implementing the 1997 eight-hour ozone national ambient air quality standard (NAAQS) the United States Environmental Protection Agency (EPA) finalized rules (known as the Phase I Rule) that did not require regulated entities to continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone NAAQS that previously applied to them when implementing new source review (NSR) and Title V permitting (referred to later in this document as the EPA's NSR permitting anti-backsliding requirement).

The EPA's Phase I Rule for implementing the 1997 eight-hour ozone NAAQS was challenged on several grounds, including the NSR permitting anti-backsliding requirement. The District of Columbia Circuit Court of Appeals issued its opinion in *South Coast Air Quality Management District v. Environmental Protection Agency*, on December 22, 2006, vacating the Phase I Rule, which it later amended on June 8, 2007, to limit the vacatur to those parts of the rule that were successfully challenged. The mandate (the order of the court to enforce the decision) was issued by the court on August 29, 2007, and the United States Supreme Court denied the appeal on January 14, 2008.

After the court vacated the Phase I Rule and amended its opinion providing for partial vacatur and remand of the Phase I Rule, the EPA issued a guidance memo on October 3, 2007, documenting the effect of the court's ruling to restore NSR applicability thresholds and emission offset requirements under the one-hour ozone standard, and stating that it intended to undertake rulemaking to conform its NSR rules to the court's decision. The memo also noted that while the EPA was working on rulemaking, it strongly encouraged states to comply with the court decision "as quickly as possible."

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The EPA representatives later verbally told the TCEQ staff that the *South Coast* decision was self-implementing and did not require rulemaking by the EPA to be effective. This position has been reiterated in a letter to the TCEQ regarding the issuance of a prevention of significant deterioration and nonattainment NSR (NNSR) air quality permit to Calpine Deer Park Energy Center, documenting the EPA's concerns regarding the permit issued by the TCEQ, which have not yet been resolved. However, the EPA has continued to state publicly that it is in the process of drafting rules to address the *South Coast* decision, and in particular the NSR permitting anti-backsliding requirement, which may or may not include action or discussion regarding the appropriate implementation date.

Because the one-hour ozone standard has been revoked, the EPA is no longer making redesignations or reclassifications under this standard. However, the EPA is making determinations under its Clean Data Policy that areas are currently attaining the one-hour ozone NAAQS. The EPA has indicated that states must continue to meet the obligations for one-hour NSR. Currently, the EPA is developing two proposed rules to address the Court's vacatur and remand. These proposed rules will address how the one-hour obligations will continue to apply under the EPA's anti-backsliding rule (as interpreted by the Court) where the EPA has made a determination that the area attained the one-hour ozone NAAQS by its attainment date. One possible outcome from the EPA rulemaking on this issue may be to direct states that want to remove one-hour ozone nonattainment NSR requirements to submit state implementation plan (SIP) revisions demonstrating that removing one-hour ozone nonattainment NSR requirements will not interfere with attainment or maintenance of the ozone NAAQS.

On June 10, 2005, the TCEQ submitted amendments to §116.12 and § 116.150 to the EPA as revisions to the NSR SIP. On September 15, 2010, the EPA published notice of the final disapproval of these revisions to the Texas SIP (75 *Federal Register* 56424), together with proposed disapproval of rules adopted by the commission which were submitted to EPA on February 1, 2006. This rulemaking and the companion rulemaking (Rule Project No. 2010-008-116-PR) will address those sections submitted as revisions to the NSR SIP and subsequently disapproved by the EPA. Additionally, on October 20, 2010, EPA published a final rule to approve the redesignation of the Beaumont-Port Arthur (BPA) 1997 eight-hour ozone nonattainment area to attainment, and clarify EPA's previous approval of the El Paso § 110(a)(1) maintenance plan for the 1997 eight-hour ozone standard (75 *Federal Register* 64675, October 20, 2010). This final rule noted EPA's new position regarding NSR anti-backsliding and whether one-hour ozone major source thresholds and emission offset requirements continue to apply in an area. Therefore, although the Texas SIP has always applied PSD in an area upon redesignation, the commission is adopting changes to 30 TAC Chapter 116 to make clear that PSD applies once an area has been redesignated to attainment for a particular criteria pollutant. This is an issue of extreme importance to the commission, the regulated community, and the public, and there should be no room for ambiguity or argument. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program meet the requirements of the Federal Clean Air Act (FCAA) and are approvable into the SIP, the commission is adopting an amendment to

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provide clarity and eliminate any deficiencies that would prevent approval of the rule changes.

Scope of the rulemaking:

A) Summary of what the rulemaking will do:

The rulemaking would amend the definitions in Chapter 101 to remove language regarding specific maintenance and nonattainment areas and provide direction regarding the federal one-hour ozone standard; amend Chapter 116 to remove language indicating that the one-hour thresholds and offsets are not effective unless the EPA promulgates rules; and amend Chapter 116 to add a requirement for continued applicability of one-hour NNSR until the EPA approves its removal for areas attaining the ozone NAAQS.

B) Scope required by federal regulations or state statutes:

This rulemaking would change the definitions of the terms maintenance area and nonattainment area in Chapter 101 by removing language regarding specific areas and referencing the definitions in the federal rule. Also, it would revise §116.150 to apply the requirements of this section as of the date of issuance of the permit rather than the date when the permit is declared administratively complete. The rulemaking would remove language stating that one-hour ozone thresholds and offsets will not be required unless the EPA promulgates rules. Additionally, it would add language to Chapter 116 that makes clear that areas subject to NNSR requirements remain so until the EPA approves removal.

C) Additional staff recommendations that are not required by federal rule or state statute:

This rulemaking would make additional nonsubstantive edits and changes to references.

Statutory authority:

In addition to the general authority in Texas Water Code, §§ 5.102, 5.103, and 5.105 and Texas Health and Safety Code (THSC), § 382.002 and § 382.017, the authority is as follows: THSC, § 382.011, concerning General Power and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA); THSC, § 382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air; THSC, § 382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of facilities that emit air contaminants; THSC, § 382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with THSC, Chapter 382; THSC, § 382.0518, concerning Preconstruction Permit, which requires that a permit be obtained from the commission prior to new construction or modification of an existing facility; and THSC, § 382.055, concerning Review and Renewal of Preconstruction Permit, which provides the requirements for renewal of preconstruction permits.

Effect on the:

A) Regulated community:

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Due to decreased thresholds, sources may be more likely to be subject to federal NSR nonattainment review and some may be subject to retroactive review. If a facility is required to have a federal NSR permit, the cost will be approximately one-half million dollars or more.

B) Public:

Members of the public working or residing in nonattainment areas may benefit due to reduced emissions resulting from more stringent permitting requirements.

C) Agency programs:

There should not be any impact on agency programs.

Stakeholder meetings:

No stakeholder meetings have been held. However, background documents related to this rulemaking have been posted on TCEQ's external website. Also, standard notice of this action and an opportunity for comment was provided after proposal. A public hearing on this rule proposal was scheduled for September 20, 2010, however no comments were received.

Public comment:

Industry commented that the rulemaking was unnecessary to prevent backsliding; would be superseded by a rulemaking from the EPA; and would create an unnecessary hardship business. Industry also commented that removal of specific definitions and referencing federal regulations would not accomplish the stated goal of reducing confusion over nonattainment area designations. The EPA made several requests for specific changes in §116.150 to clarify the intent of the rule. These changes are summarized in the "Significant changes from proposal" section below.

Significant changes from proposal:

As the result of comments received from the EPA on the proposal of these amendments staff recommends changes to the following:

§ 116.150(a)(1)-(4) to make clear that the conditions on which these exceptions are based must exist on the date of issuance of the permit;

§ 116.150(d)(3)(A) to make clear that this exception only applies in a serious or severe ozone nonattainment area; and

§ 116.150(d)(3)(B) to make clear that this exception only applies in a serious or severe ozone nonattainment area and to specifically state that the best available control technology (BACT) equivalent required by the rule is federal BACT as identified in § 116.160(c)(1)(A).

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Also, as the result of staff comment on this rule, the commission is removing the language "to prevent anti-backsliding" in § 101.(70) and replacing it with "for the purposes of anti-backsliding" since the intent of the rule is to prevent backsliding and promote anti-backsliding.

Additionally, the commission is making a change from the proposal to remove the second sentence of footnote 3 of Table I in § 116.12(18) regarding the El Paso ozone nonattainment area. As the result of the EPA's final notice regarding the Beaumont/Port Arthur ozone nonattainment area redesignation, which clarified the EPA's approval of the El Paso area's eight-hour ozone nonattainment maintenance plan, the requirement for El Paso in footnote 3 is no longer necessary.

Potential controversial concerns and legislative interest remaining after proposal and public comment:

The EPA has proposed federal rulemaking and has redesignated the Beaumont/Port Arthur area as attainment for the one-hour standard reducing the likelihood of public controversy regarding these amendments.

Does this rulemaking affect any current policies or require development of new policies?

Although not an official agency policy, the Air Permits Division (APD) currently requests that permit applicants evaluate permitting requirements based on the one-hour ozone major source thresholds and emission offset requirements.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Language in Chapter 116 will continue to be interpreted as limiting the TCEQ's ability to require evaluation of NSR permit applications under the one-hour ozone standard. The EPA will continue to make adverse comments related to specific NSR permit actions and federal delegation of NSR permitting to the TCEQ will be jeopardized.

Key points in adoption rulemaking schedule:

***Texas Register* proposal publication date:** August 27, 2010

Anticipated *Texas Register* publication date: February 25, 2011

Anticipated effective date: March 3, 2011

Six-month *Texas Register* filing deadline: February 28, 2011

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