

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** July 23, 2010

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

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

Docket No.: 2008-1631-RUL

Subject: Commission Approval for Proposed Rulemaking
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 it was working on rulemaking, the EPA strongly encouraged states to comply with the court decision "as quickly as possible."

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 has not yet been resolved. However, the EPA has continued to state publicly that they are 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.

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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 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas SIP (74 *Federal Register* 48467, September 23, 2009), together with proposed disapproval of rules adopted by the commission which were submitted to EPA on February 1, 2006. EPA is scheduled, as required by a lawsuit settlement with industry groups, to take final action on these rules by August 31, 2010. 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.

Scope of the proposed 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 nonattainment NSR 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 nonattainment NSR 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,

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§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:

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 will be provided after proposal.

Potential controversial concerns and legislative interest:

The EPA has made conflicting statements regarding the likelihood of federal rulemaking and it is not clear how the EPA will structure the maintenance plans.

Will 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?

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.

Are there alternatives to rulemaking?

The commission could decline to address EPA disapproval notices and wait for further EPA action.

Key points in proposed rulemaking schedule:

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Anticipated proposal date: August 11, 2010
Anticipated *Texas Register* publication date: August 27, 2010
Public hearing date: September 20, 2010
Public comment period: August 27, 2010 - September 27, 2010
Anticipated adoption date: January 12, 2011

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