

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: June 12, 2024

DATE OF REQUEST: May 24, 2024

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

CAPTION: Docket No. 2023-1000-RUL. Consideration of the adoption of an amendment to Section 116.150(e) of 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, and corresponding revisions to the state implementation plan.

The adoption would amend the language in 30 TAC Section 116.150(e) to clarify the NO_x exemption for the El Paso nonattainment area applies only to the 1979 one-hour ozone standard, in accordance with EPA's approval of the NO_x waiver. The proposed rules were published in the January 26, 2024, issue of the *Texas Register* (49 TexReg 381). (Suzanne Alexander, Abigail Adkins, Terry Salem, Rule Project No. 2023-121-116-AI)

Richard C. Chism
Director

Donna F. Huff
Division Deputy Director

Gwen Ricco
Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 24, 2024

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Executive Director

From: Richard C. Chism, Director *RCC*
Office of Air

Docket No.: 2023-1000-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 116, Control of Air Pollution by Permits for New Construction or
Modification
Clarification of Nonattainment New Source Review NO_x Requirements for the El
Paso Ozone Nonattainment Area
Rule Project No. 2023-121-116-AI

Background and reason(s) for the rulemaking:

Federal Clean Air Act (FCAA), §§172(c)(5), 173, 182(a)(2)(C), and 182(f) require areas designated nonattainment for the ozone national ambient air quality standard (NAAQS) to include nonattainment new source review (NNSR) permitting requirements that require preconstruction permits for the construction and operation of new or modified major stationary sources (with respect to ozone) located in the nonattainment area. Emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_x) are precursor pollutants that in the presence of sunlight combine to form ozone. FCAA, §182(f) requires states to apply the same requirements to major stationary sources of NO_x as are applied for VOC, but further specifies that if the U.S. Environmental Protection Agency (EPA) administrator determines that “net air quality benefits are greater in the absence of reductions of oxides of nitrogen” the requirement for nonattainment plans to address NO_x emission reductions does not apply (a NO_x waiver).

A NO_x waiver was conditionally approved for the El Paso 1979 one-hour ozone nonattainment area, effective November 21, 1994 (59 *FedReg* 60714), conditioned on EPA approving the FCAA, §179B, demonstration that the El Paso one-hour ozone nonattainment area would attain the ozone NAAQS, but for international emissions from Mexico. Under §179B of the Act, EPA approved the 1979 one-hour ozone standard attainment demonstration SIP for El Paso County on June 10, 2004 (69 *FedReg* 32450). The NO_x waiver was codified in 30 Texas Administrative Code (TAC) §116.150(e), which specified that NNSR requirements were not applicable in El Paso County but did not explicitly state that they did not apply for the 1979 one-hour ozone standard.

The El Paso County area was originally designated as attainment for the 2015 ozone NAAQS effective August 3, 2018, published June 4, 2018, (83 *FedReg* 25776). On November 30, 2021, 86 *FedReg* 67864, effective December 30, 2021, EPA redesignated the area nonattainment through a boundary change combining El Paso County with Dona Ana County, New Mexico and applying a retroactive attainment date of August 3, 2021, to the El Paso County area. In response to the nonattainment designation, the commission began state implementation plan (SIP) planning efforts to meet the FCAA obligations applicable for the El Paso County 2015 eight-hour ozone nonattainment area.

In response to the request for comment on the proposed El Paso County Emissions Inventory (EI) SIP Revision for the 2015 eight-hour ozone NAAQS, EPA noted that the NNSR requirement that is currently approved for the El Paso ozone nonattainment area does not include NNSR requirements for NO_x based on a NO_x waiver that was approved for the area under the revoked 1979 one-hour ozone standard. EPA also recommended that the Texas Commission on Environmental Quality (TCEQ) revise the NNSR rule to include the requirements for NO_x.

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In response, on November 28, 2022, TCEQ committed to initiate rulemaking for a proposal to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard; and therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard.

While in the process of SIP planning to comply with the nonattainment designation, the commission challenged the redesignation and the application of a retroactive attainment date. The D.C. Circuit Court of Appeals reversed EPA's redesignation in its opinion issued on June 30, 2023, in *Board of County Comm'n of Weld County v. EPA*, 72 F.4th 284 (D.C. Cir. 2023). The 2015 eight-hour ozone nonattainment designation is no longer effective in the El Paso County area; thus, NNSR is no longer required for the 2015 eight-hour ozone standard. Although the 1979 one-hour ozone NAAQS has been revoked, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement.

Scope of the rulemaking:

This rulemaking adoption will amend the language in 30 TAC §116.150(e) to clarify the NO_x exemption for the El Paso nonattainment area applies only for the 1979 one-hour ozone standard, in accordance with EPA's approval of the NO_x waiver.

A.) Summary of what the rulemaking will do:

The rulemaking will clarify that the NO_x exemption for the El Paso ozone nonattainment area applies to only the 1979 one-hour ozone standard.

B.) Scope required by federal regulations or state statutes:

Although the rulemaking amendment is not explicitly required by federal regulations or state statutes, this project is necessary to clarify waiver applicability to the NO_x standards under §116.150(e) to ensure that NNSR would apply if required for the 2015 eight-hour ozone standard in accordance with a commitment made by the executive director in the November 28, 2022, response to EPA.

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

None.

Statutory authority:

The rulemaking amendment will be adopted under Texas Water Code (TWC):

- §5.102, General Powers;
- §5.103, Rules; and
- §5.105, General Policy

TCEQ adopts the amendments under Texas Health and Safety Code (THSC):

- §382.002, Policy and Purpose;
- §382.011, General Powers and Duties;
- §382.012, State Air Control Plan;
- §382.017, Rules;
- §382.051, Permitting Authority of the Commission;
- §382.0512, Modification of Existing Facility;
- §382.0515, Application for Permit; and
- §382.0518, Preconstruction Permit

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Effect on the:

A.) Regulated community:

The regulated community operating in the El Paso ozone nonattainment area will benefit from clarifications made in the rules as the rules will contain up-to-date references of the NNSR requirements for NO_x.

B.) Public:

The public is not anticipated to be negatively affected by this rulemaking. The public may benefit from the clarification of NNSR requirements for NO_x in El Paso ozone nonattainment area.

C.) Agency programs:

Agency programs are not anticipated to be affected by the rulemaking. As part of the current permit review process, the Air Permits Division conducts reviews of sources subject to NNSR that meet federal definitions and requirements.

Stakeholder meetings:

No stakeholder meetings took place for this rulemaking. The rulemaking adoption underwent the required 30-day public comment period and a public hearing was held.

Public Involvement Plan

In addition to the statutory public notice requirements, TCEQ developed a public involvement plan to encourage public participation. A plain language summary was also provided.

Alternative Language Requirements

The agenda item announcement for proposal and adoption at the commissioners' Agenda Meeting will be provided in English and Spanish. A plain language summary and the Executive Summary was provided in Spanish on the agency Rule Proposals website, and newspaper notices for the public hearing were published in English and Spanish. The public did have opportunity to request additional communication accommodations, including live translation services, for the public hearing.

Public comment:

The commission offered a public hearing on February 27, 2024. The comment period closed on February 27, 2024. No public comments were received.

Significant changes from proposal:

None.

Potential controversial concerns and legislative interest:

Staff does not expect the adopted rulemaking to be controversial since these requirements already apply to affected sources within the El Paso ozone nonattainment area. There is no known legislative interest at this time.

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

No.

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

The commission could decide not to amend the language in §116.150(e). However, if the rulemaking is not completed to clarify NNSR NO_x applicability requirements and the El Paso area

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were to be designated nonattainment in the future, rulemaking would be required to ensure EPA approval of future SIPs.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** January 26, 2024

Anticipated *Texas Register* adoption publication date: June 28, 2024

Anticipated effective date: July 4, 2024

Six-month *Texas Register* filing deadline: July 26, 2024

Agency contacts:

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Terry Salem, Staff Attorney, Environmental Law Division, (512) 239-0469

Abigail Adkins, Staff Attorney, Environmental Law Division, (512) 239-2496

Gwen Ricco, Texas Register Rule/Agenda Coordinator, General Law Division, (512) 239-2678

Attachments:

NO_x Exemption Clarification & Commitment Letter

cc: Chief Clerk, 2 copies
Executive Director's Office
Jim Rizk
Jessie Powell
Krista Kyle
Office of General Counsel
Suzanne Alexander
Terry Salem
Abigail Adkins
Gwen Ricco

The Texas Commission on Environmental Quality (TCEQ) adopts the amendment to 30 Texas Administrative Code (TAC) §116.150. As adopted, this amended rule is submitted to the U.S. Environmental Protection Agency (EPA) as a state implementation plan (SIP) revision.

Amended §116.150 is adopted without changes to the proposed text as published in the January 26, 2024, issue of the *Texas Register* (49 TexReg 381) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Federal Clean Air Act (FCAA), §§172(c)(5), 173, 182(a)(2)(C), 182(f) requires areas designated nonattainment for the ozone national ambient air quality standard (NAAQS) to include nonattainment new source review (NNSR) permitting requirements that require preconstruction permits for the construction and operation of new or modified major stationary sources (with respect to ozone) located in the nonattainment area. Emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_x) are precursor pollutants that in the presence of sunlight combine to form ozone. FCAA, §182(f) requires states to apply the same requirements to major stationary sources of NO_x as are applied for VOC; but further specifies that if the EPA administrator determines that “net air quality benefits are greater in the absence of reductions of oxides of nitrogen” the requirement for nonattainment plans to address NO_x emission reductions does not apply (a NO_x waiver).

A NO_x waiver was conditionally approved for the El Paso 1979 one-hour ozone nonattainment area, effective November 21, 1994 (59 *FedReg* 60714), conditioned on EPA approving the FCAA, §179B, demonstration that the El Paso one-hour ozone nonattainment area would attain the ozone NAAQS, but for international emissions from Mexico. Under Section 179B of the Act, EPA

approved the 1979 one-hour ozone standard attainment demonstration SIP for El Paso County on June 10, 2004 (69 *FedReg* 32450). The NO_x waiver was codified in 30 TAC §116.150(e), which specifies NNSR requirements applicable in El Paso County.

The El Paso County area was originally designated as attainment for the 2015 eight-hour ozone NAAQS effective August 3, 2018, published June 4, 2018, 83 *FedReg* 25776. On November 30, 2021, 86 *FedReg* 67864, effective December 30, 2021, the El Paso County area was redesignated by EPA to nonattainment through a boundary change combining El Paso County with Dona Ana County, New Mexico and applying a retroactive attainment date of August 3, 2021, to the El Paso County area. In response to the nonattainment designation, TCEQ began SIP planning efforts to meet the FCAA obligations applicable for the El Paso County 2015 eight-hour ozone nonattainment area.

In response to the request for comment on the proposed El Paso County Emissions Inventory (EI) SIP Revision for the 2015 eight-hour ozone NAAQS, EPA noted that the NNSR requirement that is currently approved for the El Paso ozone nonattainment area did not include NNSR requirements for NO_x based on a NO_x waiver that was approved for the area under the revoked 1979 one-hour ozone standard. EPA also recommended that TCEQ revise the NNSR rule to include the requirements for NO_x.

In response, on November 28, 2022, TCEQ committed to initiate rulemaking for a proposal to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. While in the process of SIP planning to comply with the nonattainment designation, TCEQ challenged

the redesignation and the application of a retroactive attainment date. The D.C. Circuit Court of Appeals reversed EPA's redesignation in its opinion issued on June 30, 2023, in *Board of County Comm'n of Weld County v. EPA*, 72 F.4th 284 (D.C. Cir. 2023). The 2015 eight-hour ozone nonattainment designation is no longer effective in the El Paso County area; thus, NNSR is no longer required for the 2015 eight-hour ozone standard. Although the 1979 one-hour ozone NAAQS has been revoked, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement.

Section by Section Discussion

This rulemaking adoption will amend the language in 30 TAC §116.150(e) to clarify that the currently effective NO_x exemption for the El Paso nonattainment area applies only for the 1979 one-hour ozone standard, in accordance with EPA's approval of the NO_x waiver.

Final Regulatory Impact Determination

TCEQ reviewed the rulemaking adoption considering the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking adoption does not meet the definition of a "Major environmental rule" as defined in that statute and, in addition, if it did meet the definition, will not be subject to the requirement to prepare a regulatory impact analysis. 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. Additionally, the rulemaking adoption does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a "Major

environmental rule,” which are listed in Tex. Gov’t Code Ann., §2001.0225(a). Tex. Gov’t Code Ann., § 2001.0225 applies only to a “Major environmental rule,” the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed 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) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rulemaking adoption’s purpose is to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. As discussed elsewhere in this preamble, the currently effective rule provision that allows major sources of NO_x to avoid NNSR permitting is not specific regarding its applicability for a particular ozone NAAQS. This rule adoption will appropriately clarify the applicability of the NO_x waiver to the 1979 one-hour ozone NAAQS only. Although the 1979 one-hour ozone NAAQS has been revoked by EPA, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement. New Source Review (NSR) preconstruction permitting programs are mandated by 42 United States Code (USC), §7410, FCAA, §110. States are required to either accept delegation of the federal NSR program or create, submit, and implement a program as part of their EPA-approved SIP, required by the FCAA, §110 to attain and maintain the NAAQS. All NSR permits must also be included in operating permits by 42 USC, §7661a, FCAA, §502, as specified elsewhere in this preamble. Texas has an EPA-approved NSR

preconstruction program, so the adopted revisions to 30 TAC Chapter 116 will be submitted to EPA as revisions to the Texas SIP, as discussed elsewhere in this preamble.

The rulemaking adoption implements requirements of the FCAA, 42 USC §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA. The FCAA does specifically require NSR preconstruction permitting programs for both major and minor stationary sources. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS; and for required programs, states must create and implement programs that meet both the statutory and regulatory requirements for those programs. In developing the required or necessary programs, states, affected industry, and the public collaborate on the best methods for meeting the requirements of the FCAA and attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC §7410.

If a state does not comply with its obligations under 42 USC, §7410, FCAA, §110 to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) or mandatory sanctions under 42 USC, §7509, FCAA, §179 as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410, FCAA, §110(c). Under 42 USC, §7661a, FCAA, §502, states are also

required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation, or requirement under the FCAA, including enforceable emission limitations and other control measures, means, or techniques, which are required under 42 USC, §7410, FCAA, §110. Similar to requirements in 42 USC, §7410, FCAA, §110, regarding the requirement to adopt and implement plans to attain and maintain the national ambient air quality standards, states are not free to ignore requirements in 42 USC, §7661a, FCAA, §502 and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Lastly, states are also subject to the imposition of sanctions under 42 USC, §7661a(d) and (i), FCAA, §502(d) and (i) for failure to submit an operating permits program, the disapproval of any operating permits program, or failure to adequately administer and enforce the approved operating permits program.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as "Major environmental rules" that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, TCEQ provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." TCEQ also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a "Major

environmental rule” that exceeds a federal law.

Because of the ongoing need to meet federal requirements, TCEQ routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by TCEQ to meet a federal requirement was considered to be a “Major environmental rule” that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. Requiring a full RIA for all federally required rules is inconsistent with the conclusions reached by TCEQ in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, then the intent of SB 633 is presumed to only require the full RIA for rules that are extraordinary in nature. While the rule adoption may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and creates no additional impacts since the adopted rules do not impose burdens greater than required to comply with the FCAA requirement for states to create and implement NSR preconstruction permitting programs, as discussed elsewhere in this preamble.

For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. TCEQ has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that “when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency’s interpretation.” (*Central Power & Light Co.*

v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978.) TCEQ's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as subject to this standard.

As discussed in this analysis and elsewhere in this preamble, TCEQ has substantially complied with the requirements of Texas Government Code, §2001.0225. The adopted rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The adopted rules were determined to be necessary to fulfill the state's obligation to create and implement an NSR preconstruction permitting program, and all NSR permits are required to be included in federal operating permits under 42 USC, §7661a, FCAA, §502, and will not exceed any standard set by state or federal law. These adopted rules are not an express requirement of state law. The adopted rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the adopted rules, if adopted by TCEQ and approved by EPA, will become federal law as part of the approved SIP required by 42 USC §7410, FCAA, §110. The adopted rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code (THSC),

Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017. Therefore, this rulemaking adoption action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission offered a public hearing on February 27, 2024. The comment period closed on February 27, 2024. No oral or written comments on the proposed rule were received.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

TCEQ completed a takings impact analysis for the rulemaking adoption action under the Texas Government Code, Chapter 2007. The primary purpose of this rulemaking adoption action, as

discussed elsewhere in this preamble, is to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. As discussed elsewhere in this preamble, the currently effective rule provision that allows major sources of NO_x to avoid NNSR permitting is not specific regarding its applicability for a particular ozone NAAQS. This adopted rule will appropriately clarify the applicability of the NO_x waiver to the 1979 one-hour ozone NAAQS only. Although the 1979 one-hour ozone NAAQS has been revoked by EPA, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement. NSR preconstruction permitting programs are mandated by 42 USC, §7410, FCAA, §110. States are required to either accept delegation of the federal NSR program or create, submit, and implement a program as part of their EPA-approved SIP, required by the FCAA, §110 to attain and maintain the NAAQS. The adopted rule changes will continue to fulfill this requirement. Also, since NSR preconstruction permitting is an applicable requirement of the FCAA, all NSR permits are required to be included in operating permits by 42 USC, §7661a, FCAA, §502. Texas has an EPA-approved NSR preconstruction program, so the adopted revisions to 30 TAC Chapter 116 will be submitted to EPA as revisions to the Texas SIP, as discussed elsewhere in this preamble.

Therefore, Chapter 2007 does not apply to this rulemaking adoption because it is an action reasonably taken to fulfill an obligation mandated by federal law, as provided by Texas Government Code, §2007.003(b)(4).

As discussed elsewhere in this preamble, the rulemaking adoption implements requirements of

the FCAA, §42 USC §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state, as well as requires certain specific programs, such as NSR preconstruction permitting. While 42 USC §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA. The FCAA does specifically require NSR preconstruction permitting programs for both major and minor stationary sources. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS, and for required programs, states must create and implement programs that meet both the statutory and regulatory requirements for those programs. In developing the required or necessary programs, states, affected industry, and the public collaborate on the best methods for meeting the requirements of the FCAA and attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC §7410.

If a state does not comply with its obligations under 42 USC, §7410, FCAA, §110 to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) or mandatory sanctions under 42 USC, §7509, FCAA, §179 as well as the imposition of a FIP under 42 USC, §7410, FCAA, §110(c). Under 42 USC, §7661a, FCAA, §502, states are required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation, or requirement under the FCAA, including enforceable

emission limitations and other control measures, means, or techniques, which are required under 42 USC, §7410, FCAA, §110. Similar to requirements in 42 USC, §7410, FCAA, §110, regarding the requirement to adopt and implement plans to attain and maintain the NAAQS, states are not free to ignore requirements in 42 USC, §7661a, FCAA, §502 and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Lastly, states are also subject to the imposition of sanctions under 42 USC, §7661a(d) and (i), FCAA, §502(d) and (i) for failure to submit an operating permits program, the disapproval of any operating permits program, or failure to adequately administer and enforce the approved operating permits program.

The adopted rules will not create any additional burden on private real property beyond what is required under federal law, as the adopted rules, if adopted by TCEQ and approved by EPA, will become federal law as part of the approved SIP required by 42 USC §7410, FCAA, §110. The adopted rules will not affect private real property in a manner that will require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking adoption also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking adoption will not cause a taking under Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this rulemaking adoption.

Consistency with the Coastal Management Program

TCEQ reviewed the rulemaking adoption and found the adoption 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 (CMP) and, therefore, must be consistent with all

applicable CMP goals and policies.

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 will not affect any coastal natural resource areas because the rules only affect counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission offered a public hearing on February 27, 2024. The comment period closed on February 27, 2024. No oral or written comments on the proposed rule were received.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement under the 30 TAC Chapter 122, Federal Operating Permits Program. Although the rulemaking adoption will amend the language in 30 TAC §116.150(e), the amended language will clarify the waiver applicability to the NO_x standards for the El Paso nonattainment area for the 1979 one-hour ozone standard; therefore, it is not anticipated to have an adverse effect on sites subject to NNSR requirements.

Public Comment

The commission offered a public hearing on February 27, 2024. The comment period closed on February 27, 2024. No oral or written comments on the proposed rule were received.

SUBCHAPTER B, NEW SOURCE REVIEW PERMITS

DIVISION 5: NONATTAINMENT REVIEW PERMITS

§116.150

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides authority to perform any acts necessary and convenient to exercising its jurisdiction; TWC §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its power and duties; TWC, §5.105, concerning General Policy, which requires the commission to adopt all general policy by rule; TWC, §7.002, concerning Enforcement Authority, which authorizes the commission to enforce the provisions of the Water Code and the Health and Safety Code within the commission's jurisdiction; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act.

The amendments are also adopted under THSC, §382.002, concerning 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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.015, concerning the Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the

commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; THSC, §382.022, concerning Investigations, which authorizes the executive director authority to make or require investigations; THSC, §382.051, concerning Permitting Authority of the Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act; THSC, §382.0512 concerning Modification of Existing Facility; authorizing the commission to consider certain effects on modifications of permits; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with the Texas Clean Air Act; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling, monitoring, and certification requirements as permit conditions; THSC, §382.0515, Application for Permit, which authorizes the commission to require certain information in a permit application; and THSC, §382.0518, Preconstruction Permit, allowing the commission to require a permit prior to construction of a facility.

The adopted amendments implement TWC, §§5.102, 5.103, 5.105, and 7.002; and THSC, §§382.002, 382.011, 382.012, 382.015, 382.016, 382.017, 382.022, 382.051, 382.0512, 382.0513, 382.0514, 382.0515, and 382.0518.

§116.150. New Major Source or Major Modification in Ozone Nonattainment Areas.

(a) This section applies to all new source review authorizations for new construction or modification of facilities or emissions units that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 *et seq.* as of the date of issuance of the permit, unless the following apply on the date of issuance of the permit:

(1) the United States Environmental Protection Agency (EPA) has made a finding of attainment;

(2) the EPA has approved the removal of nonattainment New Source Review (NSR) requirements from the area;

(3) the EPA has determined that Prevention of Significant Deterioration requirements apply in the area; or

(4) the EPA determines that nonattainment NSR is no longer required for purposes of anti-backsliding.

(b) The owner or operator of a proposed new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing stationary source of VOC or NO_x emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO_x, shall meet the requirements of subsection (d)(1) - (4) of this section, except as provided in subsection (e) of this section. Table I, located in the definition of major modification in §116.12 of this title, specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source and significant level for those classifications.

(c) Except as noted in subsection (e) of this section regarding NO_x, the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x unless at least one of the following conditions are met:

(1) the proposed project emissions increases are less than five tons per year (tpy) of the individual nonattainment pollutant in areas classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

(2) the proposed project emissions increases are less than 40 tpy of the individual nonattainment pollutant in areas classified under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502) and for those under FCAA, Title I, Part D, Subpart 2 (42 USC, §7511) classified as Marginal or Moderate; or

(3) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.

(d) In applying the de minimis threshold test, if the net emissions increases are greater than the significant levels stated in Table I located in the definition of major modification in §116.12 of this title, the following requirements apply.

(1) The proposed facility or emissions unit shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility or emissions unit is a new major source or major modification

except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new facility or emissions unit and to each existing facility or emissions unit at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state must be in compliance or on a schedule for compliance with all applicable state and federal emission limitations and standards.

(3) At the time the new or modified facility or emissions unit or facilities or emissions units commence operation, the emissions increases from the new or modified facility or emissions unit or facilities or emissions units must be offset. The proposed facility or emissions unit shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I located in the definition of major modification in §116.12 of this title. Internal offsets that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of less than 100 tpy of an applicable nonattainment pollutant are not required to undergo NNSR under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of greater than or equal to 100 tpy of an applicable nonattainment pollutant can substitute federal BACT (as identified in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements) for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

(4) In accordance with the FCAA, the permit application must contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis must demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(e) For sources located in the El Paso ozone nonattainment area under the 1979 one-hour ozone National Ambient Air Quality Standard as defined in 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO_x emissions.

subsequent year of employment, not to exceed eight consecutive years, as a full-time classroom teacher in any public school.

§23.292. Eligible Lender and Eligible Education Loan.

(a) The Coordinating Board shall retain the right to determine the eligibility of lenders and holders of education loans to which payments may be made. An eligible lender or holder shall, in general, make or hold education loans made to individuals for purposes of undergraduate, medical and graduate medical education and shall not be any private individual. An eligible lender or holder may be, but is not limited to, a bank, savings and loan association, credit union, institution of higher education, student loans secondary market, governmental agency, or private foundation.

(b) To be eligible for repayment, an education loan must:

- (1) be evidenced by a promissory note for loans to pay for the cost of attendance for undergraduate or graduate education;
- (2) not be in default at the time of the teacher's application;
- (3) not have an existing obligation to provide service for loan forgiveness through another program;
- (4) not be subject to repayment through another student loan repayment or loan forgiveness program;
- (5) if the loan was consolidated with other loans, the teacher must provide documentation of the portion of the consolidated debt that was originated to pay for the cost of attendance for the teacher's undergraduate or graduate education; and
- (6) not be an education loan made to oneself from one's own insurance policy or pension plan or from the insurance policy or pension plan of a spouse or other relative.

§23.293. Disbursement of Repayment Assistance and Award Amount.

(a) The annual repayment(s) shall be in one disbursement made payable to the servicer(s) or holder(s) of the loan upon the teacher's completion of each year of qualifying employment.

(b) The Commissioner or his or her designee shall determine the maximum annual repayment amount in each state fiscal year, taking into consideration the amount of available funding and the number of eligible applicants.

(c) A teacher who transfers to a Texas public school that is not a Title I school after completing four consecutive years of employment at a Title I school may qualify for no more than 75% of the annual award amount established for the fiscal year. This award limitation is applicable only to a teacher who applies for the Program prior to September 1, 2023.

(d) A teacher who applies for the Program on or after September 1, 2023, may continue to receive the same amount of loan repayment assistance provided during the first four years of teaching service in subsequent years, not to exceed eight years in the Program.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 11, 2024.

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General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: February 25, 2024

For further information, please call: (512) 427-6365

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 5. NONATTAINMENT REVIEW PERMITS

30 TAC §116.150

The Texas Commission on Environmental Quality (TCEQ) proposes an amendment to 30 Texas Administrative Code (TAC) §116.150. If adopted, this amended rule would be submitted to the U.S. Environmental Protection Agency (EPA) as a state implementation plan (SIP) revision.

Background and Summary of the Factual Basis for the Proposed Rules

Federal Clean Air Act (FCAA), §§172(c)(5), 173, 182(a)(2)(C), 182(f) requires areas designated nonattainment for the ozone national ambient air quality standard (NAAQS) to include nonattainment new source review (NNSR) permitting requirements that require preconstruction permits for the construction and operation of new or modified major stationary sources (with respect to ozone) located in the nonattainment area. Emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_x) are precursor pollutants that, in the presence of sunlight, combine to form ozone. FCAA, §182(f) requires states to apply the same requirements to major stationary sources of NO_x as are applied for VOC; but further specifies that if the EPA administrator determines that "net air quality benefits are greater in the absence of reductions of oxides of nitrogen" the requirement for nonattainment plans to address NO_x emission reductions does not apply (a NO_x waiver).

A NO_x waiver was conditionally approved for the El Paso 1979 one-hour ozone nonattainment area, effective November 21, 1994 (59 *FedReg* 60714), conditioned on EPA approving the FCAA, §179B, demonstration that the El Paso one-hour ozone nonattainment area would attain the ozone NAAQS, but for international emissions from Mexico. Under Section 179B of the Act, EPA approved the 1979 one-hour ozone standard attainment demonstration SIP for El Paso County on June 10, 2004 (69 *FedReg* 32450). The NO_x waiver was codified in 30 TAC §116.150(e), which specifies NNSR requirements applicable in El Paso County.

The El Paso County area was originally designated as attainment for the 2015 ozone NAAQS effective August 3, 2018, published June 4, 2018, 83 *FedReg* 25776. On November 30, 2021,

86 *FedReg* 67864, effective December 30, 2021, the El Paso County area was redesignated by EPA to nonattainment through a boundary change combining El Paso County with Dona Ana County, New Mexico and applying a retroactive attainment date of August 3, 2021 to the El Paso County area. In response to the nonattainment designation, TCEQ began SIP planning efforts to meet the FCAA obligations applicable for the El Paso County 2015 eight-hour ozone nonattainment area.

In response to the request for comment on the proposed El Paso County Emissions Inventory (EI) SIP Revision for the 2015 Eight-Hour Ozone NAAQS, EPA noted that the NNSR requirement that is currently approved for the El Paso ozone nonattainment area did not include NNSR requirements for nitrogen oxides (NO_x) based on a NO_x waiver that was approved for the area under the revoked 1979 one-hour ozone standard. EPA also recommended that TCEQ revise the NNSR rule to include the requirements for NO_x.

In response, on November 28, 2022, TCEQ committed to initiate rulemaking for a proposal to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. While in the process of SIP planning to comply with the nonattainment designation, TCEQ challenged the redesignation and the application of a retroactive attainment date. The D.C. Circuit Court of Appeals reversed EPA's redesignation in its opinion issued on June 30, 2023, in *Board of County Comm'n of Weld County v. EPA*, 72 F.4th 284 (D.C. Cir. 2023). The 2015 eight-hour ozone nonattainment designation is no longer effective in the El Paso County area; thus, NNSR is no longer required for the 2015 eight-hour ozone standard. Although the 1979 one-hour ozone NAAQS has been revoked, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement.

Section by Section Discussion

This proposed rulemaking will amend the language in 30 TAC §116.150(e) to clarify that the currently effective NO_x exemption for the El Paso nonattainment area applies only for the 1979 one-hour ozone standard, in accordance with EPA's approval of the NO_x waiver.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be improved clarity regarding the applicability of a state and federal regulation. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

TCEQ reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy

in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

TCEQ reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

TCEQ 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 the proposed rules are in effect.

Government Growth Impact Statement

TCEQ prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, or require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal or limit an existing regulation, nor does the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

TCEQ reviewed the proposed rulemaking considering the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute and, in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. 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. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Tex. Gov't Code Ann., §2001.0225(a). Tex. Gov't Code Ann., § 2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed 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 pro-

gram; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rulemaking's purpose is to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. As discussed elsewhere in this preamble, the currently effective rule provision that allows major sources of NO_x to avoid NNSR permitting is not specific regarding its applicability for a particular ozone NAAQS. This proposed rule will appropriately clarify the applicability of the NO_x waiver to the 1979 one-hour ozone NAAQS only. Although the 1979 one-hour ozone NAAQS has been revoked by EPA, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement. New Source Review (NSR) preconstruction permitting programs are mandated by 42 United States Code (USC), 7410, FCAA, §110. States are required to either accept delegation of the federal NSR program or create, submit, and implement a program as part of their EPA-approved SIP, required by the FCAA, §110 to attain and maintain the NAAQS. All NSR permits must also be included in operating permits by 42 USC, §7661a, FCAA, §502, as specified elsewhere in this preamble. Texas has an EPA-approved NSR preconstruction program, so the proposed revisions to 30 TAC Chapter 116 will be submitted to EPA as revisions to the Texas SIP, as discussed elsewhere in this preamble.

The proposed rulemaking implements requirements of the FCAA, 42 USC §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA. The FCAA does specifically require NSR preconstruction permitting programs for both major and minor stationary sources. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS; and for required programs, states must create and implement programs that meet both the statutory and regulatory requirements for those programs. In developing the required or necessary programs, states, affected industry, and the public collaborate on the best methods for meeting the requirements of the FCAA and attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC §7410.

If a state does not comply with its obligations under 42 USC, §7410, FCAA, §110 to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) or mandatory sanctions under 42 USC, §7509, FCAA, §179 as well as the imposition of a federal implementation plan (FIP) under 42 USC, §7410, FCAA, §110(c). Under 42 USC, §7661a, FCAA, §502, states are also required to have federal operating permit programs that provide authority to issue permits and assure compliance with

each applicable standard, regulation, or requirement under the FCAA, including enforceable emission limitations and other control measures, means, or techniques, which are required under 42 USC, §7410, FCAA, §110. Similar to requirements in 42 USC, §7410, FCAA, §110, regarding the requirement to adopt and implement plans to attain and maintain the national ambient air quality standards, states are not free to ignore requirements in 42 USC, §7661a, FCAA, §502 and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Lastly, states are also subject to the imposition of sanctions under 42 USC, §7661a(d) and (i), FCAA, §502(d) and (i) for failure to submit an operating permits program, the disapproval of any operating permits program, or failure to adequately administer and enforce the approved operating permits program.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th legislative session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, TCEQ provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." TCEQ also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, TCEQ routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by TCEQ to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. Requiring a full RIA for all federally required rules is inconsistent with the conclusions reached by TCEQ in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, then the intent of SB 633 is presumed to only require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and creates no additional impacts since the proposed rules do not impose burdens greater than required to comply with the FCAA requirement for states to create and implement NSR preconstruction permitting programs, as discussed elsewhere in this preamble.

For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. TCEQ has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is

in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).) TCEQ's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as subject to this standard.

As discussed in this analysis and elsewhere in this preamble, TCEQ has substantially complied with the requirements of Texas Government Code, §2001.0225. The proposed rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble. The proposed rules were determined to be necessary to fulfill the state's obligation to create and implement an NSR preconstruction permitting program, and all NSR permits are required to be included in federal operating permits under 42 USC, §7661a, FCAA, §502, and will not exceed any standard set by state or federal law. These proposed rules are not an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the proposed rules, if adopted by TCEQ and approved by EPA, will become federal law as part of the approved SIP required by 42 USC §7410, FCAA, §110. The proposed rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

TCEQ invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. 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

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

TCEQ completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, Chapter 2007. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to amend 30 TAC §116.150(e) to clarify that the NO_x waiver for sources located in the El Paso ozone nonattainment area applies exclusively to the 1979 one-hour ozone standard and, therefore, does not apply to NNSR requirements for the 2015 eight-hour ozone standard. As discussed elsewhere in this preamble, the currently effective rule provision that allows major sources of NO_x to avoid NNSR permitting is not specific regarding its applicability for a particular ozone NAAQS. This proposed rule would appropriately clarify the applicability of the NO_x waiver to the 1979 one-hour ozone NAAQS only. Although the 1979 one-hour ozone NAAQS has been revoked by EPA, states must continue to implement applicable requirements unless their removal is approved by EPA. Clarification of the applicability of the NO_x waiver will assure appropriate and effective implementation of the requirement. NSR preconstruction permitting programs are mandated by 42 USC, 7410, FCAA, §110. States are required to either accept delegation of the federal NSR program or create, submit, and implement a program as part of their EPA-approved SIP, required by the FCAA, §110 to attain and maintain the NAAQS. The proposed rule changes will continue to fulfill this requirement. Also, since NSR preconstruction permitting is an applicable requirement of the FCAA, all NSR permits are required to be included in operating permits by 42 USC, §7661a, FCAA, §502. Texas has an EPA-approved NSR preconstruction program, so the proposed revisions to 30 TAC Chapter 116 will be submitted to EPA as revisions to the Texas SIP, as discussed elsewhere in this preamble.

Therefore, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law, as provided by Texas Government Code, §2007.003(b)(4).

As discussed elsewhere in this preamble, the proposed rulemaking implements requirements of the FCAA, 42 USC §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state, as well as requires certain specific programs, such as NSR preconstruction permitting. While 42 USC §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA. The FCAA does specifically require NSR preconstruction permitting programs for both major and minor stationary sources. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS, and for required programs, states must create and implement programs that meet both the statutory and regulatory requirements for those programs. In developing the required or necessary programs, states, affected industry, and the public

collaborate on the best methods for meeting the requirements of the FCAA and attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC §7410.

If a state does not comply with its obligations under 42 USC, §7410, FCAA, §110 to submit SIPs, states are subject to discretionary sanctions under 42 USC, §7410(m) or mandatory sanctions under 42 USC, §7509, FCAA, §179 as well as the imposition of a FIP under 42 USC, §7410, FCAA, §110(c). Under 42 USC, §7661a, FCAA, §502, states are required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation, or requirement under the FCAA, including enforceable emission limitations and other control measures, means, or techniques, which are required under 42 USC, §7410, FCAA, §110. Similar to requirements in 42 USC, §7410, FCAA, §110, regarding the requirement to adopt and implement plans to attain and maintain the NAAQS, states are not free to ignore requirements in 42 USC, §7661a, FCAA, §502 and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Lastly, states are also subject to the imposition of sanctions under 42 USC, §7661a(d) and (i), FCAA, §502(d) and (i) for failure to submit an operating permits program, the disapproval of any operating permits program, or failure to adequately administer and enforce the approved operating permits program.

The proposed rules will not create any additional burden on private real property beyond what is required under federal law, as the proposed rules, if adopted by TCEQ and approved by EPA, will become federal law as part of the approved SIP required by 42 USC §7410, FCAA, §110. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

TCEQ 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.

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

Chapter 116 is an applicable requirement under the 30 TAC Chapter 122, Federal Operating Permits Program. Although the proposed rulemaking would amend the language in 30 TAC §116.150(e), the amended language will clarify the waiver applicability to the NO_x standards for the El Paso nonattainment area for the 1979 one-hour ozone standard; therefore, it is not

anticipated to have an adverse effect on sites subject to NNSR requirements.

Announcement of Hearing

TCEQ will hold a hybrid virtual and in-person public hearing on this proposal in Austin on February 27, 2024, at 10:00 a.m. in Building F, Room 2210, at TCEQ'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 at 9:30 a.m.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Friday, February 23, 2024. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Monday, February 26, 2024, to those who register for the hearing.

Persons who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YT-kzNmNkYtGtZmViYS00ZDRjLWl4ZWUtMzNMDA2OTA2YTk4%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22Is-BroadcastMeeting%22%3atru%7d

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 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at: <https://tceq.commentinput.com/comment/search>. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-121-116-AI. The comment period closes at midnight Tuesday, February 27, 2024. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from TCEQ's website at https://www.tceq.texas.gov/rules/proposal_adopt.html. For further information, please contact Suzanne Alexander, Operational Support Section, Air Permits Division, (512) 239-2134.

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides authority to perform any acts necessary and convenient to exercising its jurisdiction; TWC §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its power and duties; TWC, §5.105, concerning General Policy, which requires the commission to adopt all general policy by rule; TWC, §7.002,

concerning Enforcement Authority, which authorizes the commission to enforce the provisions of the Water Code and the Health and Safety Code within the commission's jurisdiction; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act.

The amendments are also proposed under THSC, §382.002, concerning 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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.015, concerning the Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; THSC, §382.022, concerning Investigations, which authorizes the executive director authority to make or require investigations; THSC, §382.051, concerning Permitting Authority of the Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act; THSC, §382.0512 concerning Modification of Existing Facility; authorizing the commission to consider certain effects on modifications of permits; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with the Texas Clean Air Act; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling, monitoring, and certification requirements as permit conditions; THSC, §382.0515, Application for Permit, which authorizes the commission to require certain information in a permit application; and THSC, §382.0518, Preconstruction Permit, allowing the commission to require a permit prior to construction of a facility.

The proposed amendments implement TWC, §5.102, §5.103, §5.105, and §7.002; and THSC, §§382.002, 382.011, 382.012, 382.015, 382.016, 382.017, 382.022, 382.051, 382.0512, 382.0513, 382.0514, 382.0515, and 382.0518.

§116.150. New Major Source or Major Modification in Ozone Nonattainment Areas.

(a) This section applies to all new source review authorizations for new construction or modification of facilities or emissions units that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §7407 et seq. as of the date of issuance of the permit, unless the following apply on the date of issuance of the permit:

- (1) the United States Environmental Protection Agency (EPA) has made a finding of attainment;
- (2) the EPA has approved the removal of nonattainment New Source Review (NSR) requirements from the area;
- (3) the EPA has determined that Prevention of Significant Deterioration requirements apply in the area; or

(4) the EPA determines that nonattainment NSR is no longer required for purposes of anti-backsliding.

(b) The owner or operator of a proposed new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing stationary source of VOC or NO_x emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO_x, shall meet the requirements of subsection (d)(1) - (4) of this section, except as provided in subsection (e) of this section. Table I, located in the definition of major modification in §116.12 of this title, specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source and significant level for those classifications.

(c) Except as noted in subsection (e) of this section regarding NO_x, the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x unless at least one of the following conditions are met:

(1) the proposed project emissions increases are less than five tons per year (tpy) of the individual nonattainment pollutant in areas classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

(2) the proposed project emissions increases are less than 40 tpy of the individual nonattainment pollutant in areas classified under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502) and for those under FCAA, Title I, Part D, Subpart 2 (42 USC, §7511) classified as Marginal or Moderate; or

(3) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.

(d) In applying the de minimis threshold test, if the net emissions increases are greater than the significant levels stated in Table I located in the definition of major modification in §116.12 of this title, the following requirements apply.

(1) The proposed facility or emissions unit shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility or emissions unit is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new facility or emissions unit and to each existing facility or emissions unit at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state must be in compliance or on a schedule for compliance with all applicable state and federal emission limitations and standards.

(3) At the time the new or modified facility or emissions unit or facilities or emissions units commence operation, the emissions increases from the new or modified facility or emissions unit or facilities or emissions units must be offset. The proposed facility or emissions unit shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I

located in the definition of major modification in §116.12 of this title. Internal offsets that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of less than 100 tpy of an applicable nonattainment pollutant are not required to undergo nonattainment new source review under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of greater than or equal to 100 tpy of an applicable nonattainment pollutant can substitute federal BACT (as identified in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements) for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

(4) In accordance with the FCAA, the permit application must contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis must demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(e) For sources located in the El Paso ozone nonattainment area under the 1979 one-hour ozone National Ambient Air Quality Standard as defined in 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO_x emissions.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 12, 2024.

TRD-202400118

Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: February 25, 2024

For further information, please call: (512) 239-2678



CHAPTER 311. WATERSHED PROTECTION SUBCHAPTER H. REGULATION OF QUARRIES IN THE JOHN GRAVES SCENIC RIVERWAY

30 TAC §§311.71 - 311.75, 311.77, 311.79 - 311.82

The Texas Commission on Environmental Quality (TCEQ) proposes to amend §§311.71 - 311.75, 311.77, and 311.79 - 311.82.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB) 1688, 88th Texas Regular Legislative Session, amended Texas Water Code (TWC), Chapter 26 by revising Subchapter M (Water Quality Protection Areas); specifically, §§26.551 - 26.562, by expanding the pilot program originally established for quarries in the John Graves Scenic Riverway (Brazos River Basin) to include the "Coke Stevenson Scenic Riverway" (Colorado River Basin). The statute addresses

permitting, financial responsibility, inspections, water quality sampling, enforcement, cost recovery, and interagency cooperation regarding quarry operations. The Coke Stevenson Scenic Riverway is defined as the South Llano River and its contributing watershed in Kimble County, located upstream of the river's confluence with the North Llano River at the City of Junction.

TCEQ is proposing to amend 30 Texas Administrative Code (TAC) Chapter 311 (Watershed Protection Rules), Subchapter H (Regulation of Quarries in the John Graves Scenic Riverway), which implements TWC, §§26.551 - 26.554 and 26.562. The proposed amendment to Subchapter H expands the permitting and financial assurance requirements for quarries to the new Coke Stevenson Scenic Riverway water quality protection area, continues the requirements in the John Graves Scenic Riverway water quality protection area, and extends the expiration date of the pilot program to September 1, 2027.

Section by Section Discussion

Proposed amended Chapter 311, Subchapter H, would remove reference to "the John Graves Scenic Riverway" from the subchapter title and replace it with "Certain Water Quality Protection Areas"; the amended title would be "Regulation of Quarries in Certain Water Quality Protection Areas." This change is required to provide clarity that the applicability extends to all water quality protection areas identified in the subchapter.

Proposed amended Chapter 311, Subchapter H would remove references to "the John Graves Scenic Riverway" and replace them with reference to "a water quality protection area" throughout the subchapter to encompass both the John Graves Scenic Riverway and Coke Stevenson Scenic Riverway water quality protection areas.

Proposed amended §311.71 (Definitions) would define one new term and revise one term used within the subchapter to be consistent with the definitions found in HB 1688. The new term "Coke Stevenson Scenic Riverway" means the South Llano River and its contributing watershed in Kimble County, located upstream of the river's confluence with the North Llano River at the City of Junction. The revised term "Water quality protection areas" means the Brazos River and its contributing watershed within Palo Pinto and Parker Counties, Texas, downstream from the Morris Shepard Dam on the Possum Kingdom Reservoir in Palo Pinto County, and extending to the county line between Parker and Hood Counties, Texas; and the South Llano River and its contributing watershed in Kimble County, located upstream of the river's confluence with the North Llano River at the City of Junction. The terms "responsible party" and "water body" were revised for clarity and to remove unnecessary language.

Proposed amended §311.72 (Applicability) would identify activities regulated by this subchapter and activities specifically excluded from regulation. Activities regulated by this subchapter include quarrying within a water quality protection area in the John Graves Scenic Riverway and Coke Stevenson Scenic Riverway, as identified in subsection (a). In addition, proposed amended §311.72 specifies September 1, 2027, as the new expiration date for Chapter 311, Subchapter H, consistent with HB 1688.

Proposed amended §311.73 (Prohibitions) would identify areas within the newly defined water quality protection area where quarrying is prohibited, consistent with HB 1688. The proposed amendment to §311.73(a), consistent with existing regulations for the John Graves Scenic Riverway, would prohibit the construction or operation of any new quarry, or the expansion of

Texas Commission on Environmental Quality



ORDER ADOPTING AMENDED RULE AND REVISION TO THE STATE IMPLEMENTATION PLAN

Docket No. 2023-1000-RUL
Rule Project No. 2023-121-116-AI

On June 12, 2024, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered adoption of amended § 116.150(e). The Commission adopts this amendment in 30 Texas Administrative Code Chapter 116; and corresponding revision to the state implementation plan (SIP). This proposed rulemaking would amend the language in 30 Tex. Admin. Code Section 116.150(e) to clarify the NOx exemption for the El Paso nonattainment area applies only to the 1979 one-hour ozone standard, in accordance with the EPA's approval of the NOx waiver. Under Tex. Health & Safety Code Ann. §§ 382.011, 382.012, and 382.023, the Commission has the authority to control the quality of the state's air and to issue orders consistent with the policies and purposes of the Texas Clean Air Act, Chapter 382 of the Tex. Health & Safety Code. The proposed rule was published for comment in the January 26, 2024, issue of the *Texas Register* (49 TexReg 381).

Notice of the public hearing regarding the amended rule was published in English for comment in the January 26, 2024, issue of the *Texas Register* (49 TexReg 381). Notice for the public hearing was also published in English and Spanish in the *El Paso Times* on January 23, 2024. Notices in English and Spanish were also distributed to subscribers through GovDelivery and posted to TCEQ's website.

Pursuant to Tex. Health & Safety Code Ann. § 382.017, Tex. Gov't Code Ann., Chapter 2001, and 40 Code of Federal Regulations § 51.102, and after proper notice, the Commission offered a public hearing to consider the amended rule and revision to the SIP on February 27, 2024, but no attendees registered to make comment on the record, so the hearing was not opened. Proper notice included prominent advertisement in the areas affected at least 30 days prior to the dates of the hearings, as noted herein. A plain language summary of the proposed amendments was provided in both English and Spanish at the public hearing.

The Commission circulated hearing notices of its intended action to the public, including interested persons, the Regional Administrator of the EPA, and all applicable local air pollution control agencies. The public was invited to submit data, views, and recommendations on the proposed amended rule and SIP revision, either orally or in writing, at the hearing or during the comment period. Prior to the scheduled hearing, copies of the proposed amended rule and SIP revision were available for public inspection at the Commission's central office and on the Commission's website.

No comments were received regarding the amended rule and SIP revision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rule and revision to the SIP incorporated by reference to this Order are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rule necessary to comply with *Texas Register* requirements. The adopted rule and the preamble to the adopted rule and the revision to the SIP are incorporated by reference in this Order as if set forth at length verbatim in this Order.

IT IS FURTHER ORDERED BY THE COMMISSION that on behalf of the Commission, the Chairman should transmit a copy of this Order, together with the adopted rule and revision to the SIP, to the Regional Administrator of EPA as a proposed revision to the Texas SIP pursuant to the Federal Clean Air Act, codified at 42 U.S. Code Ann. §§ 7401 - 7671q, as amended.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code Ann., Chapter 2001.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed