

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: January 10, 2024

DATE OF REQUEST: December 20, 2023

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 for publication of, and hearing on, 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 (SIP).

This proposed rulemaking 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 the EPA's approval of the NO_x waiver. (Suzanne Alexander, Abigail Adkins, Terry Salem, Rule Project No. 2023-121-116-AI)

Richard C. Chism

Director

Samuel Short

Division Deputy Director

Gwen Ricco

Agenda Coordinator

Copy to CCC Secretary? NO ☐ YES ☒

COMISIÓN DE CALIDAD AMBIENTAL DE TEXAS

SOLICITUD DE PUNTO DE LA AGENDA

Para Reglamentación Propuesta

FECHA SOLICITADA: 10 de enero de 2024

FECHA DE LA SOLICITUD: 20 diciembre de 2023

PERSONA DE CONTACTO SOBRE CAMBIOS A ESTA SOLICITUD (EN CASO DE SER NECESARIO): Gwen Ricco, Coordinadora de Reglamentaciones/Agenda, (512) 239-2678

TEXTO: Expediente Núm. 2023-1000-RUL Consideración para una audiencia y para la publicación de una enmienda a la Sección 116.150(e) del Título 30 del TAC Capítulo 116, Control de Contaminación Aérea Mediante Permisos para Construcciones Nuevas o Modificaciones, y revisiones correspondientes al plan de implementación estatal (SIP, por sus siglas en inglés).

Esta reglamentación propuesta modificaría el texto de la sección 116.150(e) del Título 30 del TAC a fin de aclarar que la exención de NO_x para el área de no cumplimiento de El Paso aplica solamente al estándar de una hora para el ozono de 1979, de conformidad con la aprobación por parte de la EPA de la exención de NO_x. (Suzanne Alexander, Abigail Adkins, Terry Salem, Proyecto de Reglamentación Núm. 2023-121-116-AI)

Richard C. Chism

Director

Samuel Short

Director Adjunto de la División

Gwen Ricco

Coordinadora de la Agenda

¿Copia para Secretario de CCC? NO ☐ SÍ ☒

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** December 20, 2023

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 Proposed Rulemaking
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 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 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 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 the Texas Commission on Environmental Quality (TCEQ) revise the NNSR rule to include the requirements for NO_x.

Re: Docket No. 2023-1000-RUL

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 proposed rulemaking would 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 would do:

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

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

TCEQ proposes 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

Re: Docket No. 2023-1000-RUL

Effect on the:

A.) Regulated community:

The regulated community operating in the El Paso ozone nonattainment area would benefit from clarifications made in the rules as the rules would 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 are planned for this rulemaking. The proposed rule changes would undergo the required 30-day public comment period and a public hearing will be held.

Public Involvement Plan

In addition to the statutory public notice requirements, TCEQ will develop a public involvement plan to encourage public participation. A plain language summary will also be 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 will be provided in Spanish on the agency Rule Proposals website, and newspaper notices for the public hearing will be published in English and Spanish. The public will have an opportunity to request additional communication accommodations, including live translation services, for the public hearing.

Potential controversial concerns and legislative interest:

Staff does not expect the requirements proposed in this 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.

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

Key points in the proposal rulemaking schedule:

Anticipated proposal date: January 10, 2024

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

Anticipated public hearing date: February 27, 2024

Anticipated public comment period: January 26, 2024 – February 27, 2024

Commissioners
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December 20, 2023

Re: Docket No. 2023-1000-RUL

Anticipated adoption date: July 26, 2024

Agency contacts:

Suzanne Alexander, Rule Project Manager, Air Permits Division, (512) 239-2134
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
Keisha Townsend
Krista Kyle
Office of General Counsel
Suzanne Alexander
Terry Salem
Abigail Adkins
Gwen Ricco

Comisión de Calidad Ambiental de Texas

Memorándum interno

To: Los Comisionados **Fecha:** 20 de diciembre de 2023

Mediante: Laurie Gharis, Oficial Mayor
Kelly Keel, Directora Ejecutiva Interina

De: Richard C. Chism
Director de la Oficina del Aire

Núm. de expediente: 2023-1252-RUL

Ausnto: Aprobación de la Comisión para Reglamentación Propuesta
Capítulo 116, Control de Contaminación Aérea Mediante Permisos para
Construcciones Nuevas o Modificaciones
Aclaración de los Requisitos de NO_x de la Revisión de Nuevas Fuentes de No
Cumplimiento para el Área de No Cumplimiento de Ozono de El Paso
Proyecto Reglamentario Núm. 2023-121-116-AI

Antecedentes y razón(es) para la reglamentación:

Las secciones 172(c)(5), 173, 182(a)(2)(c) y 182(f) de la Ley Federal de Aire Limpio requieren que las áreas designadas de no cumplimiento del estándar de calidad del aire ambiental incluyan requisitos de Revisión de Nuevas Fuentes de No Cumplimiento (FCAA, NAAQS y NNSR, por sus respectivas siglas en inglés) que requieran permisos de preconstrucción para la construcción y operación de fuentes estacionarias principales nuevas o modificadas (con respecto al ozono) ubicadas en el área de no cumplimiento. Las emisiones de compuestos orgánicos volátiles y óxidos de nitrógeno (VOC y NO_x, por sus respectivas siglas en inglés) son contaminantes precursores que, en presencia de la luz solar, se combinan para formar ozono. La sección 182(f) de la FCAA requiere que los estados apliquen los mismos requisitos a las fuentes estacionarias principales de NO_x como se aplican para VOC, pero especifica además que si el administrador de la Agencia de Protección Ambiental de Estados Unidos (EPA, por sus siglas en inglés) determina que “los beneficios netos de la calidad del aire son mejores en ausencia de reducciones de óxidos de nitrógeno,” el requisito para los planes de no cumplimiento para abordar las reducciones de emisiones de NO_x no aplica (una exención de NO_x).

Se aprobó de manera condicional una exención de NO_x para la zona de no cumplimiento del estándar de una hora para el ozono de 1979 de El Paso, la cual entró en vigor el 21 de noviembre de 1994 (59 *FedReg* 60714), bajo la condición de que la EPA aprobara la sección 179B de la FCAA, demostrando que la zona de no cumplimiento de una hora de El Paso cumpliría con el NAAQS para el ozono pero para emisiones internacionales provenientes de México. Bajo la sección 179B de la Ley, la EPA aprobó el plan de implementación estatal (SIP, por sus siglas en inglés) demostrativo del cumplimiento del estándar de una hora para el ozono de 1979 para el Condado de El Paso el 10 de junio de 2004 (69 *FedReg* 32450). La exención de NO_x se codificó en la sección 116.150(e) del Título 30 del Código Administrativo de Texas (30 TAC, por sus siglas en inglés) el cual especifica los requisitos de NNSR aplicables en el Condado de El Paso.

El área del Condado de El Paso fue originalmente designada en cumplimiento del NAAQS de 2015 para el ozono vigente a partir del 3 de agosto de 2018, publicado el 4 de junio de 2018 (83 *FedReg* 25776). El 30 de noviembre de 2021, a través de 86 *FedReg* 67864 (vigente a partir del 30 de diciembre de 2021), la EPA volvió a designar el área de El Paso como de no cumplimiento mediante un cambio de límites que combina el Condado de El Paso con el Condado de Doña Ana de Nuevo México y aplicó una fecha retroactiva de cumplimiento del 3 de agosto de 2021 al área del Condado de El Paso. Como respuesta a la designación de no cumplimiento, la Comisión comenzó la planificación de un SIP para cumplir con las obligaciones de la FCAA aplicables a la zona de no cumplimiento para el ozono de 2015 del Condado de El Paso.

Como respuesta a la solicitud de comentarios sobre la revisión al Inventario de Emisiones (EI, por sus siglas en inglés) del SIP propuesto para el Condado de El Paso sobre el NAAQS de ocho horas para el ozono de 2015, la EPA señaló que el requisito de NNSR que está actualmente aprobado para el área de no cumplimiento de ozono de El Paso no incluye requisitos de NNSR para óxidos de nitrógeno (NO_x) con base en una exención de NO_x que fue aprobada para dicha área bajo el estándar de una hora para el ozono de 1979, el cual ha sido revocado. La EPA también recomendó que la Comisión de Calidad Ambiental de Texas (TCEQ, por sus siglas en inglés) revise la norma NNSR para que incluya los requisitos para NO_x.

Como respuesta, el 28 de noviembre de 2022 la TCEQ se comprometió a iniciar reglamentación para una propuesta para modificar la sección 116.150(e) del Título 30 del 30 TAC a fin de aclarar que la exención de NO_x para fuentes localizadas en el área de no cumplimiento de ozono de El Paso aplica exclusivamente al estándar de una hora para el ozono de 1979, y por lo tanto no aplica a los requisitos de NNSR para el estándar de ocho horas para el ozono de 2015.

Durante el proceso de planificación del SIP para cumplir con la designación de no cumplimiento, la Comisión impugnó la redesignación y la aplicación de una fecha de cumplimiento retroactiva. El Tribunal de Circuito de Apelaciones de D.C. revirtió la redesignación de la EPA en su opinión emitida el 30 de junio de 2023 en *Board of County Comm'n of Weld County v. EPA*, 72 F.4th 284 (D.C. Cir. 2023). La designación de no cumplimiento del estándar de ocho horas para el ozono de 2015 ya no es válida en el área del Condado de El Paso, por lo tanto, ya no se requiere el NNSR para el estándar de ocho horas para el ozono de 2015. Aunque el NAAQS de una hora para el ozono de 1979 ha sido revocado, los estados deben seguir implementando requisitos aplicables a menos que la EPA apruebe su remoción. La clarificación de la aplicabilidad de la exención de NO_x garantizará la implementación apropiada y efectiva del requisito.

Alcance de la reglamentación:

Esta reglamentación propuesta modificaría el texto de la sección 116.150(e) del Título 30 del TAC para aclarar que la exención de NO_x para el área de no cumplimiento de ozono de El Paso aplica solamente para el estándar de una hora para el ozono de 1979, de conformidad con la aprobación de la exención de NO_x por parte de la EPA.

A.) Resumen de lo que haría la reglamentación:

La reglamentación aclararía que la exención de NO_x para el área de no cumplimiento de ozono de El Paso aplica solamente para el estándar de ozono de una hora de 1979 y no aplica al estándar de ocho horas para el ozono al determinar la aplicabilidad de la NNSR.

B.) Alcance requerido por normas federales o estatutos estatales:

Aunque las normas federales o los estatutos estatales no requieren explícitamente la enmienda propuesta, este proyecto es necesario para aclarar la aplicabilidad de la exención a los estándares de NO_x bajo la sección 116.150(e) para garantizar que la NNSR aplica como lo requiere el estándar de ocho horas para el ozono, de conformidad con un compromiso hecho por la directora ejecutiva en la respuesta del 28 de noviembre de 2022 a la EPA.

C.) Recomendaciones para personal adicionales no requeridas por norma federal o estatuto estatal:

Ninguna.

Autoridad reglamentaria:

La enmienda propuesta sería adoptada bajo el Código de Aguas de Texas (TWC, por sus siglas en inglés):

- §5.102, Facultades Generales;
- §5.103, Normas; y

- §5.105, Política General

La TCEQ propone las enmiendas bajo el Código de Salud y Seguridad de Texas (THSC, por sus siglas en inglés):

- §382.002, Política y Propósito;
- §382.011, Facultades y Obligaciones Generales;
- §382.012, Plan Estatal para Control del Aire;
- §382.017, Normas;
- §382.051, Autoridad de la Comisión para la Concesión de Permisos;
- §382.0512, Modificación de Instalación Existente;
- §382.0515, Solicitud para Permiso; y
- §382.0518, Permiso de Preconstrucción

Efecto en:

A.) La comunidad regulada:

La comunidad regulada que opera en el área de no cumplimiento de El Paso se vería beneficiada por las aclaraciones hechas en las normas ya que contendrían referencias actualizadas de los requisitos de NO_x de la NNSR.

B.) El público:

No se espera que el público se vea afectado de forma negativa por esta reglamentación. El público podría beneficiarse de la aclaración de los requisitos de NO_x de la NNSR en el área de no cumplimiento de ozono de El Paso.

C.) Los programas de la agencia:

No se espera que los programas de la agencia se vean afectados por la reglamentación. Como parte del proceso actual de revisión de permisos, la División de Permisos del Aire lleva a cabo revisiones de fuentes sujetas a la NNSR que cumplen con definiciones y requisitos federales.

Reuniones de partes interesadas:

No se tienen planeadas reuniones de partes interesadas para esta reglamentación. Los cambios propuestos a las normas pasarían por el periodo obligatorio de 30 días de comentarios públicos y se llevará a cabo una audiencia pública.

Plan de participación pública

Además de los requisitos de avisos legales públicos, la TCEQ desarrollará un plan para fomentar la participación pública. Asimismo, se ofrecerá un resumen en lenguaje sencillo.

Requisitos de idioma alternativos

El anuncio del punto sobre propuesta y adopción en la Reunión de Agenda de los Comisionados se ofrecerá en inglés y en español. Tanto el resumen en lenguaje sencillo como el Resumen Ejecutivo se ofrecerán en español en la página web de Propuestas de Normas de la agencia, y los anuncios en periódicos sobre la audiencia pública se harán en inglés y en español. El público tendrá la oportunidad de solicitar arreglos especiales de comunicación adicionales (entre ellos servicios de interpretación en vivo) para la audiencia pública.

Posibles preocupaciones controversiales e interés legislativo:

El personal no espera que los requisitos propuestos en esta reglamentación sean controversiales puesto que dichos requisitos ya aplican a las fuentes afectadas dentro del área de no cumplimiento de ozono de El Paso. Hasta este momento, se desconoce cualquier interés legislativo.

¿Afectará esta reglamentación cualquier normativa actual o requerirá el Desarrollo de nuevas normativas?

No.

¿Cuáles serán las consecuencias si esta reglamentación no procede? ¿Existen alternativas a la reglamentación?

La Comisión podría decidir no enmendar el texto de la sección 116.150(e). Sin embargo, si la reglamentación no se completa para aclarar los requisitos de NO_x de la NNSR, la EPA podría denegar la aprobación de la revisión al EI del SIP del Condado del Paso, lo cual podría iniciar un plazo de sanciones y de Plan de Implementación Federal (FIP, por sus siglas en inglés) así como a una llamada del SIP para que el estado presente la revisión requerida.

Puntos clave en el programa de propuesta reglamentaria:

Fecha anticipada de propuesta: 10 de enero de 2024

Fecha anticipada de publicación en el *Texas Register*: 26 de enero de 2024

Fecha anticipada para la audiencia pública: 27 de febrero de 2024

Periodo anticipado de comentarios públicos: 26 de enero a 27 de febrero de 2024

Fecha anticipada de adopción: 26 de julio de 2024

Contactos de la agencia:

Suzanne Alexander, Gerente de Proyectos de Reglamentación de la División de Permisos del Aire, (512) 239-2134

Terry Salem, Abogado de la División de Leyes Ambientales, (512) 239-0469

Abigail Adkins, Abogada de la División de Leyes Ambientales, (512) 239-2496

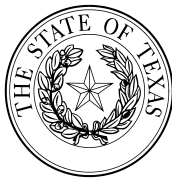
Gwen Ricco, Coordinadora de Reglamentaciones/Agenda del Texas Register de la División de Leyes Generales, (512) 239-2678

Archivos adjuntos:

Carta de Compromiso y Aclaración de la Exención de NO_x

cc: Oficial Mayor, 2 copias
 Oficina de la Directora Ejecutiva
 Jim Rizk
 Keisha Townsend
 Krista Kyle
 Oficina del Asesor Jurídico General
 Suzanne Alexander
 Terry Salem
 Abigail Adkins
 Gwen Ricco

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 28, 2022

Earthea Nance, PhD, PE
Regional Administrator
U.S. Environmental Protection Agency - Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270

Subject: Nonattainment New Source Review Requirements in El Paso County

Dear Dr. Nance:

This letter is in regard to your agency's correspondence dated July 21, 2022, concerning the proposed El Paso County Emissions Inventory State Implementation Plan (SIP) Revision for the 2015 Eight-Hour Ozone National Ambient Air Quality Standard (NAAQS). In that correspondence, the U.S. Environmental Protection Agency (EPA) Region 6 noted that the nonattainment new source review requirement (NSR) that is currently approved for El Paso County does not include nonattainment NSR 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 Region 6 also recommended that the TCEQ revise the nonattainment NSR rule to include the requirements for NO_x.

Currently, Title 30 Texas Administrative Code (30 TAC) §116.150(e) states that "for sources located in the El Paso ozone nonattainment area as defined in Title 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO_x emissions." It is clear from the regulatory history of 30 TAC §116.150(e) that the intent of the commission was to implement a NO_x exemption exclusively for the El Paso nonattainment area under the 1979 one-hour ozone standard in accordance with the EPA's approval of the NO_x waiver for the area.

This letter confirms that the TCEQ interprets the language of 30 TAC §116.150(e) to apply only to the 1979 one-hour ozone NAAQS. As such, it does not apply to nonattainment NSR requirements for the 2015 eight-hour ozone standard in El Paso County. Further, I commit to initiate a rulemaking project to request commission approval to propose a clarification of the language in §116.150(e). When proposed and adopted, I expect this action to remedy the concerns raised by EPA Region 6.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker".

Toby Baker
Executive Director

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 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 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 the TCEQ revise the NNSR rule to include the requirements for NO_x.

In response, on November 28, 2022, the 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 Girtten, 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. Girtten 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, nor 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 program; 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 U.S.C. §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 U.S.C. §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 U.S.C. §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 to 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 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 U.S.C. §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.

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 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. 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 U.S.C. §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 U.S.C. §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 U.S.C. §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 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 U.S.C. §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, 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 E, room 201S, 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.

Members of the public 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_YTkzNmNkYTgtZmViYS00ZDRjLWl4ZWUtMzNlMDA2OTA2YTk4%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%22IsBroadcastMeeting%22%3atrue%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/propose_adopt.html. For further information, please contact Suzanne Alexander, Operational Support Section, Air Permits Division, 512-239-2134.

SUBCHAPTER B, NEW SOURCE REVIEW PERMITS

DIVISION 5: NONATTAINMENT REVIEW PERMITS

§116.150

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 the a member, employee, or agent of the commission to enter public or private property 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.