

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.

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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 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

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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

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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