

Proposed Changes to Title 129 – Nebraska Air Quality Regulations

The process to begin the evaluation of, and proposed language changes to, Title 129 – Nebraska Air Quality Regulations (Title 129) came about because of Governor Rickett’s Executive Order No. 17-04. The text of Executive Order 17-04 is provided below for your convenience.

WHEREAS, the effective, efficient operation of state government requires the least restrictive regulatory environment; and WHEREAS, the Nebraska Administrative Code has more than 7,500,000 words and more than 100,000 restrictive words; and

WHEREAS, Nebraska's existing regulatory framework hinders economic growth and creates undue barriers to upward mobility for hardworking Nebraskans; and

WHEREAS, removing burdensome regulations will help Grow Nebraska.

NOW, THEREFORE, I, Pete Ricketts, Governor of the State of Nebraska, do hereby issue the following Executive Order:

- 1. This order applies to all Cabinet agencies and boards and commissions with rulemaking authority located within Cabinet agencies. All non-Cabinet agencies, boards, and commissions are strongly urged to participate in this order.*
- 2. All state agencies shall immediately suspend all rulemaking.*
 - a. This suspension shall remain in effect until December 31, 2017.*
 - b. Any proposed regulation that affects public health, safety, welfare, or is time sensitive or subject to statutory deadlines shall be promulgated pursuant to the Nebraska Administrative Procedure Act.*
- 3. Every state agency shall conduct a review of all existing and pending agency regulations.*
 - a. Each state agency director shall designate an individual responsible for oversight of the review.*
 - b. Every state agency shall submit a report to the Office of the Governor by November 15, 2017 for each existing or proposed regulation. The report shall answer the following questions:*
 - i. Is the regulation essential to the health, safety, or welfare of Nebraskans?*
 - ii. Do the costs of the regulation outweigh the benefits? Provide specific data and reasoning.*
 - iii. Does a process exist to measure the effectiveness of the regulation? If so, explain.*
 - iv. Has a less restrictive alternative been considered?*
 - v. Was the regulation solely promulgated_ due to a state statutory requirement? If so, provide citations.*

vi. Was the regulation promulgated as the result of a federal mandate? If so, include copies of the applicable federal statutes and regulations.

c. Any regulation deemed to be more restrictive than required under state or federal law or creates an undue burden on Nebraskans, shall be revised or repealed pursuant to the Nebraska Administrative Procedure Act. This Executive Order shall take effect immediately. IN WITNESS THEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nebraska to be affixed on this 6th day of July, 2017.

In order to fulfill the Governor's order, the Nebraska Department of Environment and Energy (NDEE) began an extensive review of Title 129. Department staff removed language by referencing the Code of Federal Regulations (CFR) where possible, reduced the number of chapter and the word count of the Title, and removed restrictive words such as *should*, *must*, *prohibited*, *required*, and *may not*, when able to do so. NDEE staff also referenced state statutes or other Titles where possible rather than replicating the language where possible. Most importantly, NDEE staff went through and looked where state-imposed requirements could be lessened and still meet the approval requirements of Nebraska's State Implementation Plan (SIP) by the United States Environmental Protection Agency (EPA). Federal requirements, which NDEE cannot change or have its requirements less stringent than its federal counterparts, were adopted by reference. Some chapter language that NDEE was seeking to have removed was considered 'backsliding' or lessening requirements already in the Nebraska SIP and thus would not be able to removed and still receive the necessary approval by the EPA.

The revisions to Title 129 that NDEE is proposing is summarized in the Abstract under the Proposed Rules and Regulations tab on the NDEE website. That abstract language is provided below for your convenience.

- Revisions to Title 129 – Nebraska Air Quality Regulations have been proposed to implement Executive Order No. 17-04 on Regulatory Reform, streamline and clarify existing provisions, and adopt changes to state and federal law. Regulatory streamlining and language modernization revisions have been proposed for all chapters.
- Proposed revisions to Chapter 1 include incorporation of Chapters 2 and 37, and the addition of definitions of "common control" and "support facility" to support the updated definition of "major source".
- Chapters 3, 4, 21, 38, and 43 were consolidated and renumbered as Chapter 2, titled "Nebraska Air Quality Standards"; revisions include incorporation by reference of National Ambient Air Quality Standards (NAAQS) and actions the Department will take during an air emergency episode.
- Chapters 5, 7, 8, 10-13, 29, and 31 were consolidated, revised, and renumbered as Chapter 6, titled "Operating Permits"; with substantial proposed changes that include allowing the Director to issue Class II permits for a term that exceeds five (5) years.
- Chapter 6 was revised and renumbered as Chapter 11.
- Chapters 9 was revised and renumbered as Chapter 7.
- Chapter 14 was revised and renumbered as Chapter 10.
- Chapter 15 was revised and renumbered as Chapter 9.
- Chapters 16 and 17 were consolidated, revised, and renumbered as Chapter 3, "Construction Permits"; with substantial changes including the addition of sections outlining allowable

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construction activities prior to obtaining a permit and sections explaining the contents of a completed application.

- Chapter 18 was revised and renumbered as Chapter 12, with the standards alphabetized by subpart.
- Chapter 19 was revised and renumbered as Chapter 4.
- Chapters 20, 30, and 32-36 were consolidated, revised, and renumbered as Chapter 15, titled “Compliance”.
- Chapter 22 was revised and renumbered as Chapter 14; with substantial changes including the allowance of incinerators for the disposal of contraband materials from law enforcement operations.
- Chapters 23, 27, and 28 were consolidated, revised, and renumbered as Chapter 13, titled “Hazardous Air Pollutants”, with standards alphabetized by subpart
- Chapters 24 and 25 were consolidated, revised, and renumbered as Chapter 16, titled “Sulfur Compound and Nitrogen Oxides Emission Standards”.
- Chapter 26 was revised and renumbered as Chapter 5.
- Chapter 42 was revised and renumbered as Chapter 8.
- Appendix II was renumbered as Appendix I. Chapters proposed for removal/repeal include:
- Chapter 39 (this chapter was repealed in April 2020; the testing described in the chapter is no longer conducted);
- Chapter 40 (this chapter was repealed in April 2020; it addressed an area of the state previously designated nonattainment with the federal Lead air quality standard; this area has since achieved compliance with the standard and provisions of the chapter no longer apply);
- Chapter 41 (but for one section incorporated into revised Chapter 1, this chapter restates requirements found in statute and other regulations or general legal principles);
- Appendix I (an Emergency Action Plan has been drafted by NDEE, as some Appendix I contents do not properly reflect the current communication procedures of the Department);
- Appendix III (its contents are contained in Appendix II).

As part of the information public outreach effort, NDEE held a webinar on the proposed Title 129 changes on April 8, 2021. Registrations for the event totaled 128. Questions 1 through 8, on subsequent pages, were asked by attendees of the webinar.

The first in-person and/or online Question-and-Answer outreach event occurred in April 27, 2021. Two individuals attended in person and 22 people signed up to attend via Webex. Questions 9, 10, 11, and 12 were received during the event.

Fourteen attendees attending the outreach event on May 13, 2021, and no questions were presented or emailed in afterwards.

Questions Received

- 1) Are Common Control and Support Facility not in any CFR federal definition, or are they just in memorandums and guidance documents?
 - “Common Control” and “Support Facility” are not defined in the Code of Federal Regulations (CFR). The proposed definitions in Title 129 were developed based upon the Federal Register, the *Standard Industrial Classification (SIC) Manual, 1987*, as well as Environmental Protection Agency (EPA) policy and guidance documents. In adding these definitions, the NDEE is seeking to provide sources with regulatory certainty, efficient process of permit applications, and to avoid the potential for inconsistent determinations between the NDEE and the EPA.

In making its determination whether pollutant-emitting activities are considered to be a part of the same industrial grouping, the EPA has referred to a 1999 letter from the EPA to William Baumann, Chief of the Combustion and Forest Productions Section within the Wisconsin Department of Natural Resources (1999 letter). The 1999 letter provided guidance on when a support facility is considered to be a part of an industrial grouping even though the support facility has a different two digit SIC code. NDEE interpreted Title 129 to allow for the application of the support facility concept, congruent with EPA policy, until the District Court of Lancaster County, Nebraska, held in *Pacific Aurora, LLC v. The State of Nebraska, ex rel.* (January 15, 2020) that a plain language reading of Title 129 does not allow NDEE to consider buildings, structure, facilities, or installations to be a part of the same industrial grouping if they have two different SIC codes.

As a result of the Pacific Aurora decision, it was decided that NDEE would reference support facilities in the definitions of “building, structure, or facility” and “major source” as well as define “support facility” in Title 129. In crafting the definition of “support facility”, NDEE relied on the 1987 SIC Manual, the 1999 letter, and the two Federal Register documents referenced in that letter at 45 FR 52695 and 62 FR 30289.

NDEE also decided that because “common control” was an undefined term used throughout Title 129, adding a definition would provide regulatory certainty to the public. EPA interpretations of what constitutes two (or more) pollutant-emitting activities to be considered “under the control of the same person (or persons under common control)” are explored in a number of guidance documents, most notably in an April 30, 2018 letter from William Wehrum, EPA Assistant Administrator (referred to as the *Meadowbrook Letter*) and a September 7, 2019 letter from Carl Daly, EPA Region 7 Acting Director of the Air and Radiation Division. NDEE considered these documents when crafting the definition for “common control.”

- 2) Regarding the addition of the definitions of "common control" and "support facility", has the NDEE evaluated the universe of sources in Nebraska which may be affected and/or the resulting sources required to obtain permitting? Also, will there be an allowed grace period for sources newly required to apply for permitting based on the new definitions?

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- The definition of “common control” is not anticipated to impose any new requirements on existing sources. NDEE does not anticipate the reference to support facilities in the definitions of “building, structure, or facility” and “major source” and addition of a definition for “support facility” in Title 129 to affect many sources because up until the Pacific Aurora decision, NDEE had interpreted its regulations to allow for support facilities with a different two digit SIC code to be considered a part of an industrial grouping. As of now, no grace period has been established, but NDEE plans to work with sources, as they are identified, to bring them into compliance voluntarily.

3) For small asphalt plants, will our business need to apply for new permits even though we already have a low emitter permit?

- No, if you already have Low Emitter Status, you will not need to apply for an operating permit based solely on the proposed Title 129 changes. There are no requirement changes in the Department’s current Low Emitter Rule with the proposed language.

The Low Emitter Rule helps facilities determine whether they need an operating permit or not. If a source has Low Emitter status, then an operating permit is not necessary if nothing has changed that may increase their actual emissions in excess of Class II permitting thresholds. If you are planning on an expansion, you will need to check how much your emissions will increase. If you are not changing anything at your facility, then there is nothing you will need to do – your letter will remain valid.

The Low Emitter Rule will not affect the determination of whether a source that is expanding or has an increase in emissions will need an air construction permit. The current Chapter 17, which will be part of the proposed Chapter 3, covers when a construction permit is necessary. The NDEE has a general construction permit for asphalt plants that meet specific criteria. Please remember that the need for an air construction permit is based on a source’s potential-to-emit (PTE) and not actual emissions.

4) Could you send me the information concerning low emitter letters concerning asphalt plants also?

- The explanation regarding the Low Emitter Rule is found in the third inquiry (above). Individuals who submitted questions from the April 8, 2021 webinar will receive a response email regarding their queries.

5) With the proposed changes, is there a possibility of extending current operating permit for more than five years?

- All current operating permits have a five-year lifespan, and were public noticed as such. If the proposed changes to Title 129 are approved, the Director will have the discretion of issuing a Class II permit with a term of longer than five years and will occur during the renewal process for that permit. Class I permits will not be able to have a term longer than five years, per federal 40 CFR Part 70 requirements. The Department is in the process of working through what criteria must be met in order to be met for Class II sources to qualify. Factors that are under

consideration are the type of industrial source, the compliance history of the source, the frequency of changes or modifications that have occurred at the site, etc. The issuance of the Class II permit term will be up to the Director; and will not be automatic or retroactively applied.

- 6) Was there any language clarifications in the new chapter 14 defining crematoria as incinerators? There was some unclear language in the definitions with whether human remains are considered "solid waste" for the purpose of permitting?
 - The Department is currently examining the question posed above. Due to potential air emissions and the fact that many of these businesses may be located near residential neighborhoods, an applicability determination was completed in 2010 by NDEE which determined that crematoriums are considered incinerators and need to be permitted. The current language in Title 129 is being reviewed to determine what further clarifications may be necessary. Currently the language the Department is considering proposing is "Incinerator" means any furnace used in the process of burning solid waste or a furnace used for cremation.
- 7) What is the reasoning for consolidating multiple chapters into a single chapter when there are minimal changes made? It would be less confusing if you keep the chapters that you are not making significant changes too.
 - As part of the regulatory review executive order, the Department consolidated chapters where the Department was able to do so. In addition, chapters less than one page in length were to be merged with other chapters, which initiated some of the mergers. All proposed mergers in the proposed Title 129 updates reflect these recommendations and requirements.
- 8) Can you make a clean version available showing what the final version of Title 129 is intended to look like without all of the changes shown.
 - A clean version (no mark ups) of the proposed final version of Title 129 is now posted to the NDEE website in the Department webpage listing [proposed rules and regulations](#).
- 9) Why were some definitions deleted from Title 129?
 - Definitions were deleted if the definition is found in state statute, federal statute or federal regulation. Also, with the incorporation by reference of federal regulations elsewhere throughout Title 129, the need for some definitions was eliminated. In addition, previously there were some definitions found in Chapter 1 that only applied to Prevention of Significant Deterioration (PSD) requirements; and those cases those definitions are proposed to move to the new chapter that will cover PSD requirements.
- 10) Can there be links to the CFR in Title 129 to make it more user friendly?
 - NDEE is exploring the possibility of incorporating weblinks within the text of Title 129, should it be approved by the EQC and go into effect. Part of the considerations in considering doing so would be whether the linked-to pages change frequently enough, and whether the

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Department's Information Technology staff would have available time and resources to be able to do this.

11) How will the public know where language and passages went to in the new Title 129?

- The NDEE has developed a cross-walk tool to help the public and EQC members examine where previous sections of Title 129 were moved to in the new proposed language, or if they were removed because the language was incorporated by reference from the CFR. A copy of the crosswalk can be found on the NDEE [Proposed Rules and Regulations](#) webpage.

12) What is the proposed timeline for the changes?

- NDEE has been directed to try and bring the proposed Title 129 regulations before the Autumn 2021 Environmental Quality Council meeting. Should the changes be approved by the EQC, a final review from the Attorney General's Office will need to be conducted before it sent over to the Governor for his approval and then posted on the Nebraska Secretary of State's website.

NDEE is conducting its outreach efforts now so that any informal comments the Department receives can be evaluated and addressed prior to preparing all materials for the EQC. NDEE will be examining informal comments or questions it receives prior to June 18, 2021 in order to meet the deadlines necessary for an Autumn EQC meeting.