

## **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.*

Title 129 Proposed Changes: Webinar, Outreach Events, Informal Public Comments  
April 8, 2021; April 25, 2021; May 13, 2021; May 25, 2021; June 10, 2021  
NDEE Question-and-Answer received during Informal Outreach

*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

Title 129 Proposed Changes: Webinar, Outreach Events, Informal Public Comments  
April 8, 2021; April 25, 2021; May 13, 2021; May 25, 2021; June 10, 2021  
NDEE Question-and-Answer received during Informal Outreach

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.

NDEE also proposed 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 all the 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?
  - 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.

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 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 share the information concerning low emitter letters concerning asphalt plants?
  - The explanation regarding the Low Emitter Rule is found in the third inquiry (above). Individuals who submitted questions from the April 8, 2021 webinar received 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?
  - No. All current operating permits have a five-year lifespan, and were public noticed as such. If the proposed changes to Title 129 are approved, issuing a Class II permit with a term of longer than five years will occur during the renewal process for that permit. Class I permits cannot have a term longer than five years, per federal 40 CFR Part 70 requirements.
- 6) Were 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 has proposed language that includes defining crematoria as incinerators.
- 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?
  - A clean version (no mark ups) of the proposed final version of Title 129 is 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. 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 and the resources required to keep the weblinks updated.

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 Environmental Quality Council later this year. 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.

Once scheduled before the EQC, a formal public comment period will be held, and the EQC also accepts testimony at the hearing.

13) During the outreach, NDEE staff said they had proposed removing some language for the regulations and were told they could not because EPA determined the removal would be backsliding. Is the Nebraska SIP more stringent than the federal regulations?

- Every state's air program regulations must be at least as stringent as their federal counterparts. However, each state can enact additional regulation to address issues affecting their citizenry. State construction permitting programs are often unique – permitting thresholds, assessed fees, etc. – can vary.

Nebraska regulations do have requirements that differ from federal standards. An example, in Chapter 25 the averaging period is three (3) hours whereas the federal regulations have a 30-day averaging period. EPA's position is that someone could be subject to the 30-day average and the NDEE 3-hour average; thus the Department cannot remove the 3-hour averaging or it

would be considered backsliding from the currently approved SIP. As part of the regulatory review process, the Department examined where state regulations did differ and examined if those requirements could be rolled back or altered.

14) Will older permits subject to state standards, when revised, will only be subject to the federal regulation?

- Operating permits that have been renewed are subject to state and federal regulations that exist at the time of permit issuance. If a state-based regulation is referenced in the draft operating permit renewal, which is not a requirement of a previous construction permit, the Department will examine if circumstances allow removal of those requirements from the draft permit. If the requirements originated in a construction permit, the source will need to come in for a construction permit modification first.

15) Moving forward, would a new source be subject to old standards and new federal standards?

- Going forward, new sources would only be held to the new standards.

16) How will the proposed Title 129 changes affect low emitters?

- 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. Please see Question 3, above.

17) With regards to Class II permits, the proposed language will allow the Department to issue permits longer than five (5) years at the discretion of the Director. What criteria will be put into Title 129 about this? It was suggested during the outreach meeting that the criteria the Director will use in making that determination should be placed into Title 129.

- As the commentor has pointed out, the draft language for Title 129 initially did not list the specific criteria that the Director would review in her/his determination that a Class II permit would be eligible for a timespan greater than five (5) years. Based on feedback, NDEE is proposing to add the following italicized draft language to the draft language in Chapter 6, Sections 003.02A through 003.02A3 to try to address or minimize those concerns as much as possible.

*003 Permit Content. The standard permit content for Class I and Class II operating permits is as follows:*

*003.01 Each Class I and Class II operating permit will specify emission limitations and standards in accordance with the requirements found at 40 CFR § 70.6(a). The source will propose permit terms and conditions to satisfy these requirements in its application.*

*003.02 Permit duration. Class I and Class II operating permits will be issued for a term pursuant to the standards found at 40 CFR § 70.6(a)(2).*

*003.02A Notwithstanding 003.02, the Director may issue a Class II operating permit to natural minor sources for the life of the source. The Director may issue a Class II operating permit to synthetic minor sources for a fixed term not to exceed 10 years, except synthetic minor sources belonging to the categories listed below may be issued a permit for the life of the source. The Director may issue a Class II permit for a shorter duration.*

*003.02A1 Municipal power plants*

*003.02A2 General operating permits for incinerators, should that be the only operating permit required for the source*

*003.02A3 Mobile power generation*

18) Within the proposed language, NDEE specifies when the Director is involved or her/his approval is needed and where the Department can do things. Why? Is the Department open to comments about where the responsibilities lie?

- While there may be changes between where the term “Department” and “Director” is used regarding who had responsibility to conduct certain actions because of CFR incorporation, it was the intent that the drafted language regarding who is assigned what tasks would not change from the current version to the proposed version. In addition, the Nebraska Environmental Protection Act delegates certain powers and duties to the Director and to the Department. We were mindful of those delegations when drafting the proposed regulations. The Department is open to comments regarding this issue, and would ask that commenters provide them the regulatory sections that are of concern.

19) June 18, 2021 is when public comments regarding the NDEE white papers are due. Is the Department considering incorporating some of the language from these documents into the Title? If not, some language from these documents should be put into the proposed regulation.

- The white papers are intended to be guidance to the regulated community to explain how the Department has come to the conclusions it has on particular issues. No specific language was provided by the regulated community or public during the informal comment period that was requested to be included. If there are suggestions for what specifically should be included, the Department would be willing to discuss such proposals for a future Title 129 revision.

20) With the proposed changes to Title 129 scheduled to go before the Environmental Quality Council in the autumn, would comments from the public be included in the EQC meeting? If the changes are

substantial enough, would the Department delay presenting the proposed language until a later time?

- NDEE’s goal is to present the Title 129 language at a Fall EQC meeting. Members of the regulated community and public requested additional time to review the changes and/or incorporate additional language into the Title. The Director extended the informal comment period deadline from June 18<sup>th</sup> to July 9<sup>th</sup>. The NDEE intends to share the feedback received during the informal comment period to the EQC at the hearing. In addition, the regulated community and public will have an opportunity to submit formal comments when the public notice period for the EQC meeting begins.

21) Can changes be made to the existing Title V permit holders cannot operate under a new construction permit until it is incorporated into a new Title V permit?

- It is NDEE’s understanding that the manner these issues are handled are consistent with the federal requirements. However, if members of the public or regulated community can provide examples and language that show a different determination, the Department would welcome that information as written comments.

22) What would Class II operating time frames beyond five years look like? Would existing Class II permits be extended?

- It is the intent of the Department to review individual Class II permits as they come up for renewal, not retroactively. As that time, the Department will follow the proposed language presented in Question 17, above, to make any determination.

23) A question was sent via email to the Department regarding the current language in Title 129, Chapter 30, Section 002.07A; and the definition is of “dangerous materials.” The commenter wanted to point out the vagueness of the section.

- The Department agrees with the commenter that the term is not adequately defined within Title 129. When examining the section referenced, it was determined that it could be removed in its entirety as other sections of the chapter adequately covered situations the Department could think of that Section 002.07A would have encompassed.

24) What are the next steps in the process? When will the changes be implemented? How is it passed down to the delegated authorities other than the NDEE?

- The next steps in the Title 129 regulatory review process are to:
  - 1) Finalize draft regulations;
  - 2) Place the regulations on the EQC schedule and formally public notice the draft;

Title 129 Proposed Changes: Webinar, Outreach Events, Informal Public Comments  
April 8, 2021; April 25, 2021; May 13, 2021; May 25, 2021; June 10, 2021  
NDEE Question-and-Answer received during Informal Outreach

- 3) Present the proposed regulations before the EQC;
- 4) Send the proposed language to the Attorney General's office for review, and then on to the Governor for his signature;
- 5) Send the signed regulations to the Secretary of State's office - the changes will go in affect five (5) days later.

Delegated Authorities are being consulted and the State Implementation Plan (SIP) will include delegated authorities. Specific Authorities are being included in discussions and their own procedures are being revised. There is no hard-set date for when the changes could go in effect.

25) Will sources with existing permits have to submit a new application for their existing permit the day the new regulations go into effect?

- No, sources with existing permits will not need to submit an application to update their permits on the date the proposed language goes into effect.