

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: ENVIRONMENTAL SERVICES

AGENDA DATE: **Introduction:** March 3, 2020
Public Hearing: March 17, 2020

CONTACT PERSON: ELLEN A. SMYTH, P.E., DIRECTOR, ESD
212-6060

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212-6053

DISTRICT (S) AFFECTED: All

STRATEGIC GOAL: Goal 8: Nurture and Promote a Healthy, Sustainable Community

SUBGOAL: Goal 8.5: Improve air quality throughout El Paso

SUBJECT:

AN ORDINANCE AMENDING TITLE 9 (HEALTH AND SAFETY), CHAPTER 9.36 (AIR POLLUTION) OF THE EL PASO CITY CODE TO RENAME THE CHAPTER AS AIR QUALITY, AND TO AMEND THE CHAPTER IN ITS ENTIRETY TO COMPLY WITH APPLICABLE STATE AIR QUALITY REGULATIONS; THE PENALTY BEING AS PROVIDED IN SECTION 9.36.100 (VIOLATIONS) OF THE EL PASO CITY CODE.

BACKGROUND / DISCUSSION:

Chapter 9.36 was originally adopted in 1989, when the City was a partner in the El Paso City-County Health and Environmental District, which was eventually disbanded in 2007. During the period the District was active, it was responsible for enforcing air pollution rules published by the Texas Air Control Board, Texas Natural Resources Conservation Commission and finally, the Texas Commission on Environmental Quality (TCEQ). Since 2008, the Environmental Services Air Quality Program has maintained a contractual relationship with TCEQ to enforce state air quality rules in the city and in local jurisdictions, per interlocal agreements. Making the administrative revisions in this ordinance will streamline the ordinance, clearly identify the City's role in regulating air quality, and adopt by reference TCEQ air quality rules. The amendment in its entirety has no adverse effect on El Paso residents, and will have no impact on the department's budget.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

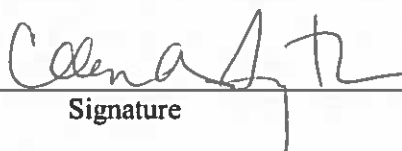
DEPARTMENT HEAD:

Ellen Smyth, P.E.

Name

Signature

Date



2-24-2020

ORDINANCE NO. _____

AN ORDINANCE AMENDING TITLE 9 (HEALTH AND SAFETY), CHAPTER 9.36 (AIR POLLUTION) OF THE EL PASO CITY CODE TO RENAME THE CHAPTER AS AIR QUALITY, AND TO AMEND THE CHAPTER IN ITS ENTIRETY TO COMPLY WITH APPLICABLE STATE AIR QUALITY RULES AND REGULATIONS; THE PENALTY BEING AS PROVIDED IN SECTION 9.36.100 (VIOLATIONS) OF THE EL PASO CITY CODE.

WHEREAS, the Texas Clean Air Act, as amended, authorizes a municipality to abate a nuisance and enact and enforce an ordinance for the control and abatement of air pollution provided said ordinance is consistent with the Texas Clean Air Act or the rules or orders of the Texas Commission on Environmental Quality; and

WHEREAS, the City Council has deemed it appropriate to adopt the proposed amendments to ensure that the City's air pollution provisions are consistent with applicable State air quality rules and regulations.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

Section 1. That Title 9 (Health and Safety), Chapter 9.36. (Air Pollution) be retitled and amended to read as follows:

Chapter 9.36 Air Quality

Section 2. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.010 (Definitions) be amended to read as follows:

9.36.010 Definitions.

The following definitions apply to this chapter 9.36 of the El Paso City Code:

- A. "Air contaminant" means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.
- B. "Air pollution" means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property, or interfere with the normal use or enjoyment of animal life, vegetation, or property.
- C. "Department" means the Department of Environmental Services.
- D. "Director" means the Director of the Department of Environmental Services.

- E. "Premises" means any public or private property including any building and structure present at the property, other than property designed for and used exclusively as a private residence, housing not more than three families;
- F. "Private residence" means a premises that is not used in whole or in part for any commercial operation.
- G. "TCEQ" means the Texas Commission on Environmental Quality.

Section 3. That Title 9 (Health and Safety), Chapter 9.36. (Air Quality), Section 9.36.020 (Duties of director) be amended to read as follows:

9.36.020 Applicability.

This chapter shall apply only to air pollution and odors that are observed and documented from outdoors and are not completely contained within a fully enclosed building or structure.

Section 4. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.030 (Rules and Regulations) be amended to read as follows:

9.36.030 Air Quality Standards.

The City hereby adopts by reference the following state air pollution control laws, rules and regulations and as they may be amended from time to time, including the tables, graphs, figures, appendices, and other matter promulgated as part of the state commission's rules or orders, all of which are incorporated by reference as though written fully word for word in this chapter.

- A. 30 Tex. Admin. Code §101, General Air Quality Rules;
- B. 30 Tex. Admin. Code §106, Permits by Rule;
- C. 30 Tex. Admin. Code §111, Control of Air Pollution from Visible Emissions and Particulate Matter;
- D. 30 Tex. Admin. Code §112, Control of Air Pollution from Sulfur Compounds;
- E. 30 Tex. Admin. Code §113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants;
- F. 30 Tex. Admin. Code §114, Control of Air Pollution from Motor Vehicles;
- G. 30 Tex. Admin. Code §115, Control of Air Pollution for Volatile Organic Compounds;

- H. 30 Tex. Admin. Code §116, Control of Air Pollution by Permits for New Construction or Modification;
- I. 30 Tex. Admin. Code §117, Control of Air Pollution from Nitrogen Compounds;
- J. 30 Tex. Admin. Code §118, Control of Air Pollution Episodes.

Section 5. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.040 (Director's authority to require submission of data-Confidentiality) be amended to be entitled (Role of the Department) and to read as follows:

9.36.040 Role of the Department.

The role of the Department shall be as follows:

- A. Investigate complaints of violations of this chapter, the Texas Clean Air Act, pursuant to Chapter 382 of the Texas Health and Safety Code, as amended, and other applicable state and federal air pollution laws, rules and regulations, make inspections of sources of air pollution and ambient air conditions, and to maintain a record of the investigations, complaints, inspections and observations;
- B. Encourage voluntary cooperation by persons and by affected groups in the preservation and regulation of the purity of the outdoor atmosphere;
- C. Collect and disseminate information to the general public on air pollution;
- D. Work with planning and zoning agencies for the purpose of coordinating activities under the provisions of this chapter with planning and zoning activities, and foster the best possible management of the air resources of the City;
- E. Cooperate and work with the federal, state and local government agencies concerned with air pollution problems.

Section 6. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.050 (Reserved) be entitled (Sources of Authority) and amended to read as follows:

9.36.050 Sources of Authority.

The Department, by and through its Director and designees, shall implement and enforce this chapter as determined necessary pursuant to the following:

- A. Applicable state statute(s), rules and regulations;
- B. An executed contract between the City and the TCEQ;
- C. A memorandum of understanding with a government entity related to activities under this chapter; or
- D. An executed interlocal agreement between the City and a local government entity.

Section 7. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.060 (Additional ambient air and emissions standards) be entitled (Outdoor Burning) and amended to read as follows:

9.36.060 Outdoor Burning.

A. General Prohibition Against Outdoor Burning.

No person may cause, suffer, allow, or permit any outdoor burning within City limits, except as provided by this subchapter or applicable state law.

B. Exceptions.

The following exception to Disposal Fires applies to any current prohibition against outdoor burning at the City's Rio Bosque Park:

1. Notwithstanding any current prohibitions against outdoor burning within the limits of the City, there shall be an exception for a disposal fire that consists of the on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth at Rio Bosque Park located at 10719 Socorro Road, El Paso, Texas by the City or any other person authorized by the City and when the material is generated only from that property even while said outdoor burn is in a designated nonattainment area or that contains any part of the city that extends into a designated nonattainment area, if the plant growth being disposed was generated as a result of right-of-way maintenance, land clearing operations, and maintenance along water canals when no practical alternative to burning exists. Such burning is subject to the following requirements:
 - a. Prior to prescribed or controlled burning, the applicant for an open burning permit shall submit to the fire official an application for an open burning permit, a minimum of ten (10) days in advance of the proposed burn, and that application shall include the date(s) burning will occur, specific location, the time burning will commence, and the estimated time burning will terminate.
 - b. The fire official shall in turn submit the application to the Department. Upon review of the application, the Director shall approve said application if the following criteria are not met or shall deny said application if the following criteria are met, and within five (5) working days of receipt of the application shall notify the fire official of the Director's approval or denial of the application: During periods when the outdoor burn ban is in effect for El Paso County, as established by the Texas Interagency Coordination Center;
 - i. If the request proposes anything other than the on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth when the material is generated only from that property and when there is no other practical alternative means of disposal; or

- ii. If there is a structure with sensitive receptors on adjacent property less than 300 feet from the area of the open burning, unless the disposal fire requestor provides written approval from the property owner where said structure is located.
- c. After receipt of a denial from the Director, the fire official shall notify the applicant of said denial. After receipt of an approval from the Director, the fire official shall issue the open burning permit for the prescribed or controlled burn subject to the following criteria being met:
 - i. Current and adopted fire code requirements;
 - ii. An on-site pre-burn inspection conducted by the El Paso Fire Department-Fire Prevention Division when required by the fire official;
 - iii. Receipt of fees for the open burning permit; and
 - iv. Receipt of fees for fire watch/standby personnel when such personnel are required by the fire official in the amount identified in the adopted budget resolution for the current fiscal year, or other appropriately adopted resolution by City Council.
- d. Pursuant to this subsection, a "practical alternative" is defined as an economically, technologically, ecologically, and logistically viable option, such as recycling, composting, mechanical chipping or mulching, logging, landfills or air curtain incineration (trench burning).
- e. Burning must be outside the corporate limits of the city except as described in this subchapter which permits burning consistent with the Texas Clean Air Act, subchapter E, Authority of Local Governments, as amended.
- f. Burning shall commence and be conducted only when wind direction and other meteorological conditions are such that smoke and other pollutants will not cause adverse effects to any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s), unless the city obtains prior written approval from the property owner where said receptor is located.
- g. If at any time the burning causes or may tend to cause smoke to blow onto or across a road or highway, it is the responsibility of the person initiating the burn to post flag-persons on affected roads.
- h. Burning must be conducted downwind of or at least 300 feet (ninety meters) from any structure containing sensitive receptors located on adjacent properties unless the city obtains prior written approval from the property owner where said structure is located.
- i. Burning shall be conducted in compliance with the following meteorological and timing considerations:

- i. The initiation of burning shall commence no earlier than one hour after sunrise. Burning shall be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.
 - ii. Burning shall not be commenced when surface wind speed is predicated to be less than six miles per hour (mph) (five knots) or greater than 23 mph (20 knots) during the burn period.
 - iii. Burning shall not be conducted during periods of actual or predicated persistent low-level atmospheric temperature inversions.
 - j. Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.
- 2. The fire official is authorized to order the extinguishment by the permit holder or the fire department of open burning, which creates or adds to a hazardous or objectionable situation.
 - 3. Prescribed or controlled burning without an approved open burning permit shall not be allowed and the applicable local amendment to the International Fire Code (Chapter 9.52.030.15 of the El Paso City Code) relating to payment for a permit shall be enforced.

Section 8. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.070 (Prohibition) be entitled (Solid Fuel Heating Devices) and amended to read as follows:

9.36.070 Solid Fuel Heating Devices.

A. The City hereby adopts by reference 30 Tex. Admin. Code §111.111(c), in its current form and as may be amended, which is incorporated by reference as though written fully word for word in this chapter.

B. Notice of no-burn periods shall be sufficient if published in a newspaper of general circulation within the City, or if presented orally at least three times during a six hour period by at least two radio or television stations operating within the City, or if presented to the general public in the form of a message posted on the City's website or a recorded telephone message, the telephone number for which is published on the City's website or newspaper of general circulation within the city.

Section 9. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.080 (Procedures to comply with those commonly accepted) be entitled (Odors) and amended to read as follows:

9.36.080 Odors.

A. Declared Nuisance.

1. The discharge of one or more air contaminants from any source whatsoever in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property is declared to be a nuisance. The following shall be considered nuisances for the purpose of this chapter, but such enumeration shall not be deemed to be exclusive:
 - a. An offensive smell, smoke or odor generated by the burning of any hair, leather, rags or substances.
 - b. A foul or offensive odor generated by the accumulation of animal feces and putrid materials.
2. The Police Department, any employee of the Department or the City's Department of Animal Services, an employee in the code enforcement division, or a commissioned peace officer is authorized to abate such nuisances under the term and conditions hereinafter provided.

B. Abatement.

In addition to the penalties set forth in Section 9.36.090(D) of this chapter, upon complaint or upon its own initiative, the Police Department, any employee of the Department or the City's Department of Animal Services, an employee in the code enforcement division, or a commissioned peace officer may remove, abate or destroy the nuisance at the expense of the City. Alternatively, the Director may request that the City Attorney file suit to obtain such orders or processes as are necessary to abate the nuisance.

C. Enforcement of this section.

In addition to abatement, the Police Department, employees of the Department or the City's Department of Animal Services, employees in the code enforcement division and commissioned peace officers are authorized to enforce the provisions of this section and shall have the power to issue warnings and citations to any persons violating the provisions of this section. These city officials designated above are authorized to conduct inspections of any property upon complaint or its own initiative, and to investigate instances of non-compliance with this section to enforce these provisions. If the occupants in possession of any property refuses to allow the city officials permission to enter the property, at any

reasonable time, those officials shall have recourse to every remedy provided by law to secure entry including obtaining the proper judicial warrants.

Section 10. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.090 (Inspection and enforcement) be amended to read as follows:

9.36.090 Inspections and Enforcement.

A. Whenever the Director or authorized representative has reasonable cause to believe that there exists upon any premises any condition or code violation of this chapter that makes the level of air contaminants unsafe, dangerous or hazardous, the Director or authorized representative may enter such premises at all reasonable times to inspect the same or to perform any duty imposed upon the Director by this chapter.

1. If the premises subject to inspection is occupied, the Director or authorized representative shall first present proper credentials and request entry.
2. If the premises subject to inspection is unoccupied, the Director or authorized representative shall first make a reasonable effort to locate the owner or other persons having charge or control of the premises and request entry.
3. If entry subject to this section is refused, the Director or authorized representative shall have recourse to every remedy provided by law to secure entry.

B. Whenever the Director or authorized representative has first obtained a proper inspection warrant or availed himself of any other remedy provided by law to secure entry, no owner or occupant or any other persons having charge, care or control of any premises shall fail or neglect, after proper request is made as herein provided, to promptly permit entry therein for the purpose of inspection and examination pursuant to this chapter.

Section 11. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.100 (Disposal fire exception) be entitled (Violations) and amended to read as follows:

9.36.100 Violations.

A. Reporting to the TCEQ.

The Director, or authorized representative, may develop and refer any violation of this chapter to the TCEQ for review and enforcement.

B. Civil Penalty.

Subject to Section 7.3511 of the Texas Water Code, as amended, and following the adoption of a City resolution, the City may by its own attorney institute a civil suit for injunctive relief or civil penalty, against persons violating the provisions of Chapter 16, 26, or 28 of the Texas Water Code, or Chapters 361 366, 371, 372, or 382 of the Texas Health and Safety Code, as amended. Any civil penalty sought by the City's own attorney pursuant

to Chapter 7 of the Texas Water Code shall be consistent with the maximum penalties of each violation as set forth in §7.102 of the Texas Water Code, as amended. Each day of a continuing violation shall constitute a separate violation.

1. Any civil penalty recovered in a suit brought according to this Section shall be divided with the State in accordance with §7.107 of the Texas Water Code, as amended.
2. In the event the State prevails in a suit under this Section, it may recover reasonable attorney's fees, court costs, and reasonable investigative costs incurred in relation to the proceeding.

C. Criminal Enforcement.

1. A peace officer may refer an alleged criminal violation by a person holding a permit issued by the TCEQ, of the Texas Health and Safety Code, or any other statute, rule, order, permit or other decision of the Texas Natural Resource Conservation Commission to a prosecuting attorney subject to §7.203 of the Texas Water Code, as amended.
2. In accordance with §7.203 of the Texas Water, as amended, the City's prosecuting attorney may bring an action for criminal prosecution of a misdemeanor punishable by a fine not to exceed two thousand dollars.
3. Each day's violation shall constitute a separate offense.
4. Nothing in this section prohibits a peace officer from issuing a citation or making an arrest.
5. Any fine, penalty, or settlement recovered through a prosecution subject to this Section and brought in the name and by the authority of the State of Texas, shall be apportioned 70 percent to the State of Texas and 30 percent to the City.

D. Other enforcement action.

Except as otherwise provided by Texas law, any person violating any provision of Section 9.36.080 of this Code, shall be deemed guilty of a misdemeanor and upon conviction, shall be punished by a fine not to exceed five hundred dollars. Each day that a provision of this chapter is violated shall constitute a separate offense.

Section 12. That Title 9 (Health and Safety), Chapter 9.36 (Air Quality), Section 9.36.110 be added and read as follows:

9.36.110 Severability.

The sections, paragraphs, sentences, clauses, and phrases of this Code are severable, and if any phrase, clause, sentence, or paragraph or section of this Code shall be deemed

preempted or declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Code.

Section 13. That Title 9 (Health and Safety), Chapter 9.36 (Air Pollution), Section 9.36.120 be added and read as follows:

9.36.120 Conflicting Code Previsions Repealed.

Any provision(s) in the El Paso City Code specifically in conflict with any provision in this chapter is deemed inoperative and repealed.

Section 14. That Title 9 (Health and Safety), Chapter 9.36 (Air Pollution), Section 9.36.130 be added to read as follows:

9.36.130 Savings of Pending Violations.

Nothing in this chapter shall be construed to affect any suit or proceeding pending in any court, or any rights acquired, or liability incurred, or any cause or causes of actions acquired or existing, under any act or prior ordinance; nor shall any legal right or remedy of any character be lost, impaired, or affected by this chapter.

Section 15. This ordinance shall take effect upon adoption.

Section 16. Except as expressly herein amended, Title 9 (Health and Safety), of the El Paso City Code shall remain in full force and effect.

ADOPTED this _____ day of _____, 2020.

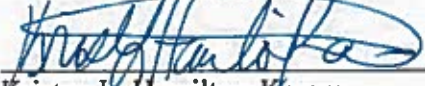
CITY OF EL PASO

Dee Margo
Mayor

ATTEST:

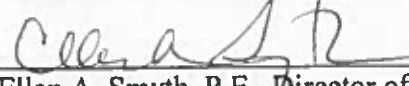
Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Kristen L. Hamilton-Karam
Assistant City Attorney

APPROVED AS TO CONTENT:



Ellen A. Smyth, P.E., Director of
Department of Environmental Services