

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the *amendments* to §122.10, General Definitions; §122.120, Applicability; §122.130, Initial Application Due Dates; §122.131, Phased Permit Detail; §122.132, Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits; §122.134, Complete Application; §122.136, Application Deficiencies and Supplemental Information; §122.139, Application Review Schedule; §122.140, Representations in Application; §122.142, Permit Content Requirements; §122.143, General Terms and Conditions; §122.145, Reporting Terms and Conditions; §122.146, Compliance Certification Terms and Conditions; §122.210, General Requirements for Revisions; §122.211, Administrative Permit Revisions; §122.212, Applications for Administrative Permit Revisions; §122.213, Procedures for Administrative Permit Revisions; §122.216, Applications for Minor Permit Revisions; §122.217, Procedures for Minor Permit Revisions; §122.221, Procedures for Significant Permit Revisions; §122.231, Permit Reopenings; §122.320, Public Notice; §122.330, Affected State Review; §122.340, Notice and Comment Hearing; §122.350, EPA Review; §122.360, Public Petition; §122.608, Procedures for Incorporating Periodic Monitoring Requirements; §122.706, Applications for Compliance Assurance Monitoring; and §122.708, Procedures for Incorporating Compliance Assurance Monitoring Requirements. The commission *repeals* §122.215, Minor Permit Revisions; and §122.219, Significant Permit Revisions. The commission also adopts *new* §122.215, Minor Permit Revisions; §122.218, Minor Permit Revision Procedures for Permit Revisions Involving the Use of Economic Incentives, Marketable Permits, and Emissions Trading; §122.219, Significant Permit Revisions; and §122.222, Operational Flexibility and Off-Permit Changes. Sections 122.215 - 122.218 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas state implementation plan (SIP).

Sections 122.10, 122.120, 122.132, 122.136, 122.140, 122.142, 122.143, 122.145, 122.146, 122.210, 122.211, 122.213, 122.215 - 122.219, 122.222, 122.231, 122.350, and 122.608 are adopted *with changes* to the proposed text as published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 890). Sections 122.130, 122.131, 122.134, 122.139, 122.212, 122.221, 122.320, 122.330, 122.340, 122.360, 122.706, and 122.708 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full federal operating permit (FOP) program approval must be submitted to the EPA no later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all interim approvals of operating permit programs (65 Federal Register (FR) 32035). The State of Texas FOP program is an interim-approved program subject to the EPA's notice. The commission adopts this rulemaking to resolve inconsistencies which exist between Chapter 122, Federal Operating Permits, and Title 40 Code of Federal Regulations (CFR) Part 70 (Part 70), State Operating Permit Programs, so that the EPA may grant full program approval to the commission's operating permit program. The commission plans to submit program revisions to the EPA on or before June 1, 2001.

The 1990 Federal Clean Air Act Amendments (FCAA), Title V, Permits, directed the EPA to establish the minimum requirements for a state operating permit program. On July 21, 1992, the EPA promulgated Part 70 to comply with this directive. States were required to submit operating permit programs meeting the requirements of Part 70 to the EPA. On August 23, 1993, the commission adopted Chapter 122 to implement the FOP program and submitted its proposed operating permit

program (which included Chapter 122) to the EPA on September 17, 1993, and in two supplemental submittals on October 28, 1993, and November 12, 1993. On June 7, 1995, the EPA published notice of its proposal to grant source category-limited interim approval to the State of Texas (60 FR 30037). On June 25, 1996, the EPA promulgated interim approval of the State operating permit program for a period of two years, beginning on July 25, 1996 (61 FR 32693). Interim program approval provided the commission with the authority to implement the operating permit program in Texas for two years without the imposition of an EPA-promulgated, administered, and enforced program under 40 CFR Part 71 (Part 71), Federal Operating Permit Programs. To obtain full program approval, the commission must submit a program to the EPA that corrects inconsistencies between the interim program and Part 70.

Title V does not allow for extensions of interim programs; however, the EPA has extended interim programs three times. These extensions were intended to allow states to simultaneously develop a full program submittal that would correct any interim inconsistencies and meet the requirements of a revised Part 70. On August 29, 1997, the EPA automatically extended all interim approvals of operating permit programs until October 1, 1998 (62 FR 45732). On July 27, 1998, the EPA published a direct final rule that extended interim approval expiration dates until June 1, 2000. On February 14, 2000, the EPA published another direct final interim program extension which would have allowed all interim programs to expire on June 1, 2002 (65 FR 7290). However, on March 29, 2000, the EPA published a withdrawal of the February 14, 2000 extension based on an adverse comment that the extension was contrary to the express provisions of the FCAA (65 FR 16523). Subsequently, on May 22, 2000, the EPA published notice that all states with interim approval would have until June 1, 2001 to submit a

program for full program approval and that the EPA would take action on those submittals by December 1, 2001 (65 FR 32035). If the EPA is unable to approve a state's program by December 1, 2001, Part 71 is automatically effective in that state, and Part 71 sources that have not received a FOP would have up to one-year to submit permit applications under Part 71.

The EPA has proposed revisions to Part 70, some of which have not been promulgated. However, some provisions of Chapter 122 were amended in October 1997 to take advantage of flexibility offered by proposed revisions to Part 70. The October 1997 revisions to Chapter 122 were submitted to the EPA for approval in June 1998. The EPA has not yet acted on the June 1998 submittal and the commission understands that the EPA will not act separately on that submittal from this adoption.

In the June 25, 1996 notice, the EPA indicated that in an action on a state's submittal for full approval, it will use the criteria in the final Part 70 regulation (61 FR 32693). The existing July 21, 1992 regulation, as amended, is the final Part 70 regulation at this time. The commission adopts this rulemaking to make Chapter 122 consistent with this version of Part 70 and to address the inconsistencies identified in the June 25, 1996 notice.

RESOLUTION OF INCONSISTENCIES BETWEEN CHAPTER 122 AND PART 70

In the June 7, 1995 notice, the EPA identified various inconsistencies between Chapter 122 and Part 70 (60 FR 30037). The EPA's June 25, 1996 notice states that the inconsistencies specifically identified in the June 7, 1995 notice must be remedied before the EPA grants full approval to Texas' operating permit program (61 FR 32698). Also, the EPA provided the commission a draft document which

summarizes the inconsistencies identified in the 1995 and 1996 notices. That document is available from the commission upon request.

On January 26, 2001, the commission's proposal to address deficiencies in the FOP program identified by the EPA was published in the *Texas Register*. The proposal listed the specific deficiencies and the commission's proposed solution. That list of deficiencies will not be republished but can be found in the January 26, 2001 issue of the *Texas Register* (26 TexReg 890). The commission incorporates this list and the discussion of the deficiencies by reference. A copy of the proposal will be included in the FOP program submittal package that will be sent to the EPA. Changes in the proposed rule language made for this adoption will be identified in the SECTION BY SECTION DISCUSSION.

SECTION BY SECTION DISCUSSION

Subchapter A - Definitions

The commission adopts amendments to §122.10. The reference to the title of Chapter 101 is corrected. The commission amends §122.10(1), the definition of air pollutant, to respond to the inconsistency with Part 70 identified by the EPA in the June 7, 1995 notice. The commission amends §122.10(1)(F) to specify that any pollutant subject to a requirement established under FCAA, §112(r) is an air pollutant under Chapter 122. The existing regulation does not identify these pollutants as "air pollutants." The commission also amends §122.10(1)(F)(i) and (ii). Section 122.10(1)(F)(i) specifies that the definition of air pollutant includes any pollutant subject to requirements under FCAA, §112(j) and also specifies the date pollutants under FCAA, §112(j) shall be considered to be regulated if the EPA fails to promulgate a standard by the date established pursuant to FCAA, §112(e). Section 122.10(1)(F)(ii)

specifies that the term air pollutant also includes any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to the FCAA, §112(g)(2) requirement. The amendments are consistent with the definition of regulated air pollutant in 40 CFR §70.2.

The commission amends §122.10(2), the definition of applicable requirement, to include Chapter 101, Subchapter H, Emissions Banking and Trading. Because Subchapter H provides an alternative means of compliance with applicable requirements, the commission believes Subchapter H is also an applicable requirement. The commission also deleted the Chapter 119 reference in the definition of applicable requirement, since the regulation has been repealed. The definition of applicable requirement includes all of the requirements under 30 TAC Chapter 106, Subchapter A, General Requirements or 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification and any term or condition of any preconstruction permit, in response to the inconsistency with Part 70, identified by the EPA in the June 7, 1995 notice, as previously mentioned. The EPA specified that Chapter 122 was inconsistent with Part 70 because the definition of applicable requirement excluded certain minor new source review (NSR) authorizations as applicable requirements (60 FR 30039). In a draft document which summarizes the inconsistencies between Chapter 122 and Part 70 identified in the 1995 and 1996 notices, the EPA identified an inconsistency in the definition of applicable requirement that it overlooked in its original review of the source category-limited interim program. Since the definition of applicable requirement did not include Chapter 116, the EPA stated that the definition failed to include SIP requirements for prevention of significant deterioration (PSD) and nonattainment permitting. The revised definition addresses the issue. In response to comment and for consistency

with 40 CFR §70.2, the definition now includes requirements that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective dates. The commission also deletes §122.10(2)(K), since no concept of federal only enforceability exists in Part 70. The commission is also correcting capitalization errors and is making other formatting corrections in the definition.

The commission, in response to a comment, adds language to §122.10(7), the definition of deviation, to clarify that deviations and compliance certifications are not limited to information obtained through required monitoring. Similar language is added to §122.146(4).

In response to comments on concurrent public notice and EPA review periods, the commission amends §122.10(9), the definition of draft permit, to specify that the draft permit may be the same document as the proposed permit. The new definition allows the executive director to implement more efficient permitting procedures for initial issuances, significant revisions, reopenings, or renewals that do not receive public comments. However, the EPA review period would occur after the public notice period when comments are received. This will give the EPA the opportunity to consider any public comments received and any other changes to the permit. Further, the commission is adopting changes from the proposed language in §122.350(b)(1) to specify that public notice and EPA review may run concurrently and, if appropriate, the executive director may extend the EPA review period.

The commission adopts §122.10(11), the definition of “FCAA, §502(b)(10) changes.” This definition clarifies the types of changes to a permit that qualify as operational flexibility and do not require a permit revision.

The commission amends §122.10(23), renumbered as §122.10(24), the definition of preconstruction authorization. The amended definition includes any authorization to construct or modify an existing facility or facilities under Chapter 106, Permits by Rule and Chapter 116. This amendment addresses the Part 70 inconsistency identified by the EPA in the June 7, 1995 notice concerning the identification of minor NSR as an applicable requirement. The commission also deletes the language relating to the delegation of FCAA, §112(g) and (j) to the commission as part of the definition of preconstruction authorization. This deletion addresses the issue that the EPA has raised on the validity of the federal only enforceability designation. In Chapter 122, applicable requirements were designated as federally enforceable only when they were promulgated, but not yet adopted by and delegated to the commission. The commission deleted the federally enforceable only designation, making this clarification to the definition of preconstruction authorization necessary.

The commission amends the definition of site in §122.10(29), renumbered as §122.10(30), to clarify that if research and development facilities have the same two-digit standard industrial classification (SIC) code as a collocated manufacturing facility, they will be included with the collocated facility for operating permit applicability and permitting purposes.

In addition to these changes, the defined terms in Chapter 122, Subchapter A are renumbered.

Subchapter B - Permit Requirements

The commission adopts amended §122.120 to clarify which sites are required to obtain a permit. New §122.120(b) clarifies the applicability of a site to Chapter 122 by further identifying what types of sites are not subject to Chapter 122. In response to comments, the commission amends §122.120(b) to refer to the criteria for sites that are not subject to Chapter 122, as opposed to the owner or operator for those sites. This will eliminate confusion for owners and operators of both sites that are subject to the program and sites that are not. Section 122.120(b)(1) clarifies that a permit is not required for non-major sites that the EPA has exempted from the obligation to obtain a permit. Section 122.120(b)(2) states that non-major sites that are eligible for an EPA deferral are not required to obtain a permit. Also, the commission amends the newly designated §122.120(a) by adding the phrase “except as identified in subsection (b)” to further clarify that the sites in §122.120(a) are subject to Chapter 122 and those sites identified in §122.120(b) are not. The commission also amends newly designated §122.120(a)(4) to require that sites that are non-major which are no longer eligible for an EPA deferral are required to obtain a permit.

The commission adopts amended §122.130 to delete a reference to the interim and full operating permit programs. The interim program refers to the permitting of those sources for which the commission was granted source category-limited interim approval on June 25, 1996. All other sources permitted under Chapter 122 are considered as permitted under the full operating permit program. Since the commission is seeking full program approval from the EPA, the references to the interim and full operating permit programs are unnecessary. The amendments to this section include the entire deletion of subsection (a), including the types of sources required to obtain a permit during the interim program

and the dates by which to apply. The commission deletes §122.130(b)(2), which designated the primary SIC groups that should have applied for a permit by July of 1998. The commission also deletes §122.130(b) and §122.139(1) and amends §122.130(b)(1) and (3), and (c); §122.132(c); §122.134(c); and §122.139(2); to delete references to the interim and full operating permit programs and application due dates, and the references to the deleted §122.130(a) and (b)(2). Section 122.130(c) specifies the requirements for sites that become subject to the program after the effective date of the interim or full program. Because the commission is deleting the references to the interim or full program, it is also amending this subsection by using the date February 1, 1998, which is the due date for abbreviated applications for sources subject to the full program. Because of the deletions, §122.130 and §122.139 have been renumbered.

The commission adopts amended §122.131 to add a new subsection (g) to clarify that a site may not qualify for the phased permit detail process if the commission receives its application after July 22, 2000. The commission will, however, honor applications previously submitted in accordance with the phased permit detail process. The commission will discontinue the option because the process is overly resource intensive.

The commission adopts amended §122.132(e)(4)(B) to specify that the determination of compliance status will be based on, at a minimum, but not limited to, compliance methods specified in the applicable requirements. The commission adopts amended §122.132(e)(4)(C)(iii) to specify that compliance schedules shall be supplemental to and not sanction noncompliance with applicable requirements.

The commission adopts new §122.132(e)(10), (e)(11), and (g). New §122.132(e)(10) requires that fugitive emissions be included in permit applications and permits in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. In response to negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, new §122.132(e)(11) requires any application for which the executive director has not authorized initiation of public notice by the effective date of this rule to include preconstruction authorizations that are applicable to emission units at the site. New subsection (g) clarifies that applicants are not required to submit information for facilities that are identified as de minimis under §116.119, De Minimis Facilities or Sources, unless these facilities are subject to an applicable requirement. The facilities or sources addressed by §116.119 are not required to obtain an NSR authorization before construction. Since they are not required to obtain a preconstruction authorization, the commission will not require these facilities or sources to be identified in an operating permit application. The concept of de minimis facilities or sources is also consistent with 40 CFR §70.5(c), which allows state programs to develop a list of insignificant activities which do not need to be included in permit applications. In addition, the commission deletes references to sources or facilities from §122.132(g) and §122.146(5)(E). The rule now indicates that information on facilities that are identified as de minimis under §116.119 is not required to be included in applications or the annual compliance certification provided the facility has no other applicable requirement. This amendment is necessary because some sources or facilities identified as de minimis under §116.119 may have applicable requirements other than Chapter 116 and, therefore, will need to include those sources in applications and the annual compliance certification.

The commission adopts amended §122.136. The adopted language requires an applicant to submit any necessary information to address applicable requirements or state-only requirements after a complete application is filed until the point that the draft permit is released. This is consistent with 40 CFR §70.5(b). The previous requirement stated that, if a site becomes subject to additional applicable requirements or state-only requirements after an application is submitted, an applicant must submit information to address those requirements within 60 days after becoming subject to the new requirements. This amendment will require applicants to keep permit applications up to date with new requirements, but does not require them to update the application once public notice is published. If a site becomes subject to new requirements after notice has been published, the executive director will make a determination to request additional information for the existing permitting action or require the permit holder to revise the permit after it is issued. However, the site will still need to be in compliance with the new requirements. In response to comments, the commission amends §122.136(c) to clarify that additional information will not be required to be submitted to the executive director before the commencement of the technical review period to address requirements that become applicable to the site after an application is filed. This is consistent with 40 CFR §70.5(b) and will reduce the amount of application material that will need to be continually updated before the release of the draft permit. The commission amends the title of §122.136 to “Application Deficiencies and Supplemental Information” to better describe the contents of the section.

The commission adopts amended §122.139. Section §122.139(1) is deleted and existing §122.139(2) is amended to remove reference to the interim and full operating permit programs. The commission also renumbers the section and updates existing §122.139(4), now §122.139(3), to reference paragraphs (1) -

(2), instead of paragraphs (1) - (3). In addition, the commission corrects grammar in existing §122.139(2), now §122.139(1).

The commission adopts amended §122.140. Section 122.140(3) is amended to clarify that information specified in §122.714(a), Compliance Assurance Monitoring, or §122.612, Periodic Monitoring, becomes conditions under which a permit holder shall operate upon the granting of an authorization to operate under a compliance assurance monitoring general operating permit (GOP) or periodic monitoring GOP. The commission also corrects a typographical error in §122.140(3) and adds the appropriate section titles for the rule citations.

The commission adopts amended §122.142. In response to comments, the commission amends §122.142(b)(2)(B)(ii) to require that each permit contain monitoring, recordkeeping, reporting, and testing requirements sufficient to ensure compliance with the permit. This is consistent with 40 CFR §70.6(c)(1). The commission amends §122.142(b)(3) to specify that permits shall contain preconstruction authorizations and that the incorporation of preconstruction authorizations shall be done in accordance with §122.231. The commission adopts this amendment in response to the EPA June 7, 1995 notice which specifically identified that the section on permit content did not properly identify minor NSR as an applicable requirement. The commission also amends §122.142(b)(3) to remove the requirement for applications for an authorization to operate to contain preconstruction authorizations because it was redundant with §122.132(e)(11). In response to comments, the commission adopts a new §122.142(h) to specify that permits must include compliance assurance monitoring, as specified in Subchapter H. This is consistent with 40 CFR §70.6(a)(3)(i)(A).

The commission adopts amended §122.143. In response to comments and for consistency with 40 CFR §70.6(a)(6)(i), the commission amends §122.143(4) to specify that any noncompliance with the terms or conditions codified in the permit or the provisional terms and conditions is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. In response to comments, the commission amends §122.143(8) to require, upon request by the executive director, that the permit holder provide copies of records to be kept by the permit, including any information claimed to be confidential. This is consistent with 40 CFR §70.6(a)(6)(v). The commission deletes §122.143(9). This paragraph described the requirements for removing the federally enforceable only designation once an applicable requirement is adopted by the commission. The commission is eliminating the federally enforceable only designation; therefore, this paragraph is no longer needed. The remaining paragraphs of §122.143 are renumbered accordingly.

The commission adopts amended §122.145. The commission amends §122.145(1)(A) to specify that reports of monitoring data required to be submitted by an applicable requirement, or by the permit, shall be submitted to the executive director. The commission proposed the deletion of §122.145(2)(D). In response to comments, the commission retains §122.145(2)(D), with amendments, and deletes §122.145(3). Section 122.145(2)(D) now specifies that upset reporting does not substitute for deviation reporting. The commission deletes §122.145(3) because it is redundant with upset and maintenance reporting requirements in Chapter 101, General Air Quality Rules.

The commission adopts amended §122.146. In response to comments, the commission amends §122.146(2) to specify that compliance certifications shall be submitted to the executive director and the

EPA administrator. This is consistent with 40 CFR §70.6(c)(5)(iv). The adopted amendment to §122.146(4) requires permit holders to identify any material information that must be included in the certification to comply with FCAA, §113(c)(2), which prohibits knowingly making a false certification or omitting material information. This requirement is consistent with 40 CFR §70.6(c)(5)(iii)(B). Also in §122.146(4), the commission adds language to clarify that compliance certifications are not limited to the information obtained through the required monitoring. The commission corrects the punctuation among the series of subparagraphs in §122.146(5). The amendment to §122.146(5)(A) requires certifications to contain information stating whether the method used for determining the compliance status of each emission unit provides continuous or intermittent data. This requirement is also consistent with 40 CFR §70.6(c)(5)(iii)(B). The commission adopts a new §122.146(5)(E) which clarifies that annual compliance certifications are not required to include any information on facilities identified as de minimis under §116.119, De Minimis Facilities or Sources, provided that the facility has no applicable requirements. As previously mentioned, the commission is proposing to add §122.132(g), which specifies that operating permit applications are not required to include information for de minimis facilities which have no applicable requirements. Since the information is not necessary in the application, the executive director will not require the information to be certified for compliance. The commission adopts a new §122.146(6) which allows the executive director to request additional information if necessary to determine the compliance status of an emission unit. This requirement is consistent with 40 CFR §70.6(c)(5)(iii)(D).

Subchapter C - Initial Permit Issuances, Revisions, Reopenings, and Renewals

The commission adopts amended §122.210. The commission proposed changes to §122.210(a), but in response to comments, the commission is not adopting the proposed changes. The commission agrees with the commenter that the proposed language did not clarify the subsection. The commission deletes §122.210(b) which identified the situations warranting a permit revision. This information is redundant and not as inclusive as that in §§122.211, 122.215, 122.218, and 122.219 which identify the types of changes that qualify as administrative, minor, or significant revisions, respectively. The subsequent subsections are renumbered accordingly.

The commission adopts amended §122.211. The commission adopts a new §122.211(2) that is consistent with 40 CFR §70.7(d)(1)(ii) and specifies that a change in name, address, contact phone number, or other similar change qualifies as an administrative permit revision. The subsequent subsections are renumbered accordingly. The commission also adopts a new §122.211(5), which specifies that changes which incorporate preconstruction authorizations under an EPA-approved program that meets procedural requirements substantially equivalent to those of Subchapters C and D, and compliance and requirements substantially equivalent to §§122.143, 122.145, and 122.146 may qualify as administrative permit revisions. This is consistent with 40 CFR §70.7(d)(1)(v) and would provide additional flexibility offered by Part 70 that could be used in the future to incorporate requirements into operating permits. The commission deletes the language which specified that removing a federally enforceable only designation is an administrative revision. The commission eliminated this designation of federally enforceable only because it may be inconsistent with 40 CFR Part 70.

The commission adopts amended §122.212 to clarify that the application information requirements apply to administrative permit revisions.

The commission adopts amended §122.213. Section 122.213(a) is amended to replace the text referring to changes required as the result of the adoption of a state-only requirement with text describing changes listed in §122.211. This text is more accurate because §122.213 describes procedures for administrative permit revisions, and changes that affect or add state-only requirements are only one type of administrative amendment identified in §122.211. Also, the appropriate section title is added to the rule citation. The commission also deletes §122.213(a)(1) because the requirements listed in the paragraph are now included as applicable requirements under the FOP program. The subsequent paragraphs are renumbered accordingly. The commission amends §122.213(d) by adding the word “administrative” to describe the permit revision type for clarity.

The commission repeals the existing §122.215 and adopts a new §122.215 to make the criteria for minor permit revisions the same as the criteria in 40 CFR §70.7(e)(2)(i)(A)(1) - (5). The commission corrects a typographical error in §122.215(4)(A) by deleting “an” and inserting “any”.

The commission adopts amended §122.216. Because 40 CFR §70.7(e)(2)(v), allows the site to operate a change once a minor permit application is submitted and 40 CFR Part 70 does not allow the permit to be revised after notices have been sent over a 12-month period, the commission deletes §122.216(a). Due to this deletion, the section contains only one subsection which requires no further designation other than the section number. The commission amends §122.216 to specify the minimum information

required in the subsection applies to minor permit revisions. In response to comments and to be consistent with 40 CFR §70.7(e)(2)(ii)(A), the commission adds a new §122.216(6) to require minor permit revision applications to include the emissions resulting from the change.

The commission adopts amended §122.217. The commission deletes §122.217(a)(1)(A) and (b)(1)(A) because these subparagraphs were redundant citations requiring that permit holders comply with Chapter 116 which is now included in the FOP program as an applicable requirement. The remaining subparagraphs in each subsection are renumbered accordingly. In response to comments and to be consistent with 40 CFR §70.7(e)(2)(v), the commission amends §122.217(a)(1)(A) - (C) and §122.217(b)(1)(A) - (C) to specify that the permit holder must comply with applicable requirements, state only requirements, and provisional terms and conditions governing the change at a site. The commission amends §122.217(a)(2) to require that permit holders submit an application to the executive director instead of a notice to address an inconsistency with Part 70 identified by the EPA in the June 7, 1995 notice and to be consistent with 40 CFR §70.7(e)(2)(v). The commission amends §122.217(a)(2) and (3) and (b)(2) and (3) to correctly reference the amended §122.216. The commission deletes an incorrect phrase in §122.217(b). The commission also amends §122.217(b)(2) to remove the requirement to record the information and also to require the information relating to the minor permit revision to be submitted no later than the compliance date of a new requirement or effective date of a repealed requirement, not 45 days after such date. This is consistent with 40 CFR §70.7(e)(2)(v), which requires minor permit revision applications to be submitted before a change is operated. Section §122.217(b)(2) requires a compliance date or an effective date and, for clarification, the commission has added the phrase “whichever is applicable.” Section 122.217(b)(3) specifies that the information

relating to minor permit revisions is to be maintained until the permit is revised. The commission amends this paragraph to reflect that the information is to be maintained until the permit revision is final, for clarity and consistency with 40 CFR §70.7(e)(2)(v). To be consistent with 40 CFR §70.7(e)(2)(iii), the commission adopts a new subsection (e) requiring the executive director to notify the EPA and affected states of minor permit applications. The commission amends §122.217(f)(2) to specify that the executive director may issue a revision provided that a complete application is submitted. Lastly, in order to address Part 70 inconsistencies identified by the EPA in the June 7, 1995 notice, the commission amends §122.217(g) requiring the executive director to take final action on a minor permit revision application no later than 90 days after the receipt of an application or 15 days after the end of the EPA review period, whichever is later. This is consistent with 40 CFR §70.7(e)(2)(iv).

The commission adopts a new §122.218 that is consistent with 40 CFR §70.7(e)(2)(i)(B). This section allows permit holders using economic incentives, marketable permits, and emissions trading to incorporate the changes into operating permits using a minor permit revision. Title 40 CFR §70.7(e)(2)(i)(B) provides that the minor permit revision process may be used for revisions involving these actions, as long as the SIP, or the particular applicable requirement, allows for the use of the minor permit revision process. In order to allow for this option in Chapter 122, §§122.215 - 122.218 will be submitted as a SIP revision. The commission also adds the appropriate title to the rule citation for §122.215.

The commission repeals the existing §122.219 and adopts a new §122.219 specifying that changes to a

permit shall be processed as significant revisions if they do not meet the criteria for administrative or minor revisions. This is consistent with 40 CFR §70.7(e)(4)(i). In response to comments, the commission adds a new §122.219(b) to be consistent with 40 CFR §70.7(e)(4)(i) which specifies that, at a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered a significant permit revision.

The commission adopts amended §122.221 to delete §122.221(b)(1) which specifies that significant revisions may be issued if the change meets the criteria for a significant permit revision. This requirement is unnecessary because the commission has deleted the criteria for significant permit revisions and made significant revisions the default revision type. The subsequent paragraphs are renumbered accordingly. The commission clarifies existing §122.221(b)(2), now §122.221(b)(1), by adding the term “complete.”

The commission adopts a new §122.222 to provide operational flexibility in order to be consistent with 40 CFR §70.4(b)(12) and to specify requirements for off-permit changes in order to be consistent with 40 CFR §70.4(b)(14). In response to comments and to be consistent with §70.4(b)(12)(i), the commission modifies §122.222(a)(4) to state that a change may be operated under operational flexibility if the permit holder has obtained any preconstruction authorization, which cannot be a modification under FCAA, Title I. In response to comments, the commission adds a new subsection (b) that allows the removal of applicable conditions and permit terms from a permit following the removal of a unit from a site provided the applicable requirements and permit terms for the remaining units are not

affected. Also in response to comments, the commission amends existing §122.222(b), now designated as §122.222(c), to specify that written notification of operational flexibility be submitted to the EPA on the same schedule as the executive director and to specify that notice may be provided within two working days of implementation of operational flexibility changes due to an emergency and that the notice shall also include an explanation of the emergency. These amendments are consistent with 40 CFR §70.4(b)(12). In response to comments, the commission adds new §122.222(d) and (e) to incorporate the operational flexibility provisions provided in 40 CFR §70.4(b)(12)(ii) - (iii). Existing subsections (c) - (g) become (f) - (j). Also in response to comments, the commission adds a clarifying statement to paragraph (1) and adds new paragraphs (2) and (3) to the newly designated §122.222(f) to describe procedures for use with emissions trading. The commission adds clarification regarding written notification in existing §122.222(f)(2), now designated as §122.222(f)(4). The commission also adds appropriate section titles to rule citations in this section. In response to negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, the commission adds §122.222(k) to address off-permit changes, consistent with 40 CFR §70(b)(14). The commission also changes the title of the section to Operational Flexibility and Off-Permit Changes.

The commission adopts amended §122.231 for clarification. In response to comments, the commission amends the language in §122.231(a)(1)(B) to be more consistent with 40 CFR §70.7(f)(1)(i). The commission adopts a new §122.231(a)(1)(C) that is consistent with 40 CFR §70.7(f)(1)(i) requiring the executive director to reopen permits to incorporate newly promulgated or adopted applicable requirements when the remaining permit term is less than three years. In response to comments and to be consistent with 40 CFR §70.7(f)(1)(iii), the commission amends §122.231(a)(2) to specify that the

executive director has cause for reopening a permit when the executive director or the EPA administrator determines that the permit contains a material mistake. In response to comments and to be consistent with 40 CFR §70.7(f) and (g), the commission amends §122.231(a)(4) to require a reopening if the executive director or the EPA administrator determines that the permit must be revised or terminated to assure compliance with applicable requirements. To be consistent with 40 CFR §70.7(f)(1)(ii), the commission adds a new §122.231(a)(6) to specify that the executive director has cause to reopen a permit to incorporate additional requirements, including excess emissions requirements, if those requirements become applicable to an affected source under the acid rain program. Upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

The commission also amends §122.231(b)(1) to state that the executive director is required to submit a proposed determination no later than 180 days after receipt of a notification of a reopening initiated by the EPA if the EPA has extended the period for response. This is consistent with 40 CFR §70.7(g)(2). The commission amends §122.231(b)(3) to require the executive director to resolve and take action on a reopening 90 days after receipt of an EPA objection. The previous language required the executive director to take action on a reopening 90 days from the end of the EPA review period or the resolution of any objection. Part 70 does not allow the action on the reopening to be delayed in this manner and the amendment is consistent with 40 CFR §70.7(f)(2).

The commission adopts new subsection (c), with revisions, to address the incorporation of minor NSR. The amendment states that the executive director shall institute proceedings to reopen permits and

authorizations to operate that do not contain the applicable requirements relating to minor NSR, as adopted in §122.10(2)(H). This is consistent with 40 CFR §70.4(d)(3)(ii)(D). The commission adds language stating that applications for which the executive director has authorized initiation of public notice by the effective date of this rule, requirements under Chapter 106, Subchapter A, or Chapter 116 of this title or any term or condition of any preconstruction permit will be incorporated no later than permit renewal. Applications for which the executive director has not authorized initiation of public notice by the effective date of this rule will include NSR at initial issuance. Existing subsections (c) - (f) become (d) - (g). The commission amends newly designated subsection (d) to state that, except as provided in §122.231(c), reopenings shall be made as soon as possible. This is consistent with 40 CFR §70.7(f)(2). The commission also clarifies the 30-day notice language in newly designated subsection (e).

Subchapter D - Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition

The commission adopts amended §122.320 to make the sign posting requirements in Chapter 122 consistent with those of 30 TAC Chapter 39, Public Notice, which specifies public notice requirements for solid waste, water quality and air quality permit applications. As a part of the public notice requirements, new source review permits are required to post signs in accordance with the requirements of Chapter 39. The adoption makes Chapter 122 requirements consistent with Chapter 39 requirements in order to simplify the public notice process if the executive director should, at some point, allow for concurrent NSR permitting and operating permit public notice. The commission amends §122.320(h) to require all lettering be no less than 1 ½ inches in size in block printed capital lettering, which is

consistent with Chapter 39. Also, for consistency with Chapter 39, the commission amends §122.320(h)(1) to clarify that the sign is provided by the applicant and should substantially meet §122(h)(1)(A) - (G). The commission also adopts a new §122.320(h)(G) requiring that the company name applying for the permit be printed on the sign.

For consistency with the definition of affected state in 40 CFR §70.2, the commission amends §122.330(b)(1) to clarify that an affected state is one whose air quality may be affected by the issuance or denial of an operating permit and also that the state must be contiguous to Texas. The commission amends §122.330(b)(2) to clarify that §122.330(b)(1) and (2) are two separate criteria defining an affected state.

The commission adopts a new §122.340(f) requiring an applicant to submit a copy of the notice of hearing of a permit action and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

The commission adopts amended §122.350. The proposed §122.350(b)(1) enabled the public notice period and the EPA review period to run concurrently with, rather than after the end of the public comment period. In response to comments, the commission amends §122.350(b)(1) to give the executive director discretion to extend the EPA review period.

The commission adopts amended §122.360(c) to clarify that the petition for GOPs must be filed no later than 60 days after issuance of the GOP by the executive director to address timing concerns with the GOP issuance process.

Subchapter G - Periodic Monitoring

The commission adopts amended §122.608(e) to correctly reference compliance assurance monitoring (CAM) instead of periodic monitoring. The commission also adds language to identify a rule citation.

Subchapter H - Compliance Assurance Monitoring

The commission adopts amended §122.706(a) and (a)(1)(E) to correct typographical errors.

The commission also adopts amended §122.708(b)(1)(A) and (2)(B) to correct inaccurate identifying references.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking does not meet the definition of a “major environmental rule” as defined in that statute. “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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission does not believe that the adopted rules will have an adverse, material effect on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full FOP program approval must be submitted to the EPA not later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all operating permits program interim approvals (65 FR 32035). The commission's FOP program is an interim-approved program subject to the EPA's notice. The commission adopts these rules to resolve inconsistencies which exist between Chapter 122 and Part 70 so that the EPA may grant full program approval to the commission's operating permit program. The commission must submit program revisions to the EPA no later than June 1, 2001. The revisions that are necessary to obtain full program approval will have an impact on the major sources subject to the program. However, the commission does not believe that this impact will be adverse or material. All of the affected major sources in the state have either already obtained an operating permit or have applications pending. The requirements of this adoption to incorporate preconstruction authorizations into operating permits will begin no later than renewal of the operating permits. Although the new requirement to incorporate minor NSR may be seen as a significant change to the program, the commission believes that most, if not all, of the facilities covered by the preconstruction authorizations are already addressed in operating permits. As discussed in the preamble, sites currently authorized by a rule-based GOP will most likely need to apply for the new executive director-issued GOP or obtain a different federal operating permit due to the extensive revisions to include new and revised applicable requirements and the minor NSR authorizations. The commission believes most of the sites authorized by a GOP will be able to meet the new GOPs. If the commission fails to submit a program that the EPA can approve by December 1, 2001, the EPA must

implement 40 CFR Part 71 in the state and the state could face sanctions including loss of highway funds and increased offsets in nonattainment areas.

The adopted rules do not meet any of the four applicability criteria for requiring a regulatory analysis of “major environmental rule” as defined in the Texas Government Code. Texas Government Code, §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.

During the 75th Legislative Session, Senate (SB) 633 amended the Texas Government Code to require agencies to perform a regulatory impact analysis of certain rules. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) 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, the commission 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.” The commission 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. If each rule proposed for implementation of federally required programs, such as Part 70, was considered to be a major environmental rule that exceeds federal law, then every such rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission 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, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the revisions to Chapter 122 may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and Part 70.

The TNRCC 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) ; *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

These rules are adopted in order to meet the requirements of FCAA, Title V and Part 70. Therefore in addition to not exceeding an express standard set by federal law, these rules do not exceed state requirements, and are not adopted solely under the general powers of the agency because the provisions of the TCAA and TWC provided in the STATUTORY AUTHORITY section of this preamble, provide the commission the authority necessary to implement the FOP program. The rules will achieve their stated purpose by addressing the EPA's comments from the interim program approval notice and by making necessary revisions to be consistent with Part 70. The remaining applicability criteria, pertaining to exceeding a delegation agreement or contract between the state and the federal government does not apply. Thus, the commission is not required to conduct a regulatory analysis as provided in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an assessment of whether the adopted rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that assessment. On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full FOP program approval must be submitted to the EPA not later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all operating permits program interim approvals (65 FR 32035). The commission's FOP program is an interim-approved program subject to the EPA's notice. The commission adopts these rules to resolve inconsistencies which exist between

Chapter 122 and Part 70 so that the EPA may grant full program approval to the commission's operating permit program. The commission must submit program revisions to the EPA no later than June 1, 2001. If the commission fails to submit a program that the EPA can approve by December 1, 2001, the EPA must implement Part 71 in the state and the state could face sanctions including loss of highway funds and offsets in nonattainment areas.

The purpose of this rulemaking is to address the inconsistencies which exist between Chapter 122 and Part 70 so that the EPA may grant full program approval for the state's operating permit program. The rules will achieve their stated purpose by addressing the EPA's comments from the interim program approval notice and by making necessary revisions to be consistent with Part 70. Because the amendments are an action that is reasonably taken to fulfill an obligation mandated by federal law, the amendments meet the exception in Texas Government Code, §2007.003(b)(4). The commission has included elsewhere in this preamble the necessity for the proposed rules. For these reasons the rules do not constitute a takings under Chapter 2007 and do not require additional analysis.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and

policies of the CMP. The commission reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that this rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to the adopted rules is 31 TAC §501.12(1). This goal requires the protection, preservation, restoration, and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the adopted rules is §501.14(q), concerning policies for specific activities and coastal natural resource areas. Title 31 TAC §501.14(q) requires commission rules under the Texas Health and Safety Code (THSC), Chapter 382, governing emissions of air pollutants, to comply with the regulations in 40 CFR adopted pursuant to 42 United States Code (USC) §§7401 *et seq.*, to protect and enhance air quality in the coastal areas so as to protect coastal natural resource areas and promote public health, safety, and welfare. The adopted rules are necessary in order to meet the provisions of Part 70 so that the commission's operating permit program can obtain full program approval. These amendments are consistent with the previously stated goals and policies of the CMP. The permits issued under Chapter 122 do not authorize the increase in air emissions nor do these permits authorize new air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

This adoption deals exclusively with major sources holding FOPs. Owners or operators of these sources should be prepared to amend their permits as discussed previously in this preamble.

HEARING AND COMMENTERS

The commission held a public hearing on the proposal at the TNRCC Complex in Austin, Texas, on February 20, 2001. The commission received comments from 12 organizations and 118 individuals during the public comment period which closed on February 26, 2001. All the commenters supported the commission's effort to obtain final approval of its federal operating permit program but opposed specific parts of the proposal.

Representatives from the Environmental Enforcement Project of the Rockefeller Family Fund (EEP), Neighbors for Neighbors (NFN), Public Citizen (PC), Sustainable Energy and Economic Development Coalition (SEED), Lone Star Chapter of the Sierra Club (Sierra), and the Texas Campaign for the Environment (TCE) made comments at the public hearing.

Baker Botts, L.L.P., on behalf of the Texas Industry Project (TIP); BP; United States Environmental Protection Agency (EPA); ExxonMobil; NFN; Quality of Life El Paso (QLEP); Texas Chemical Council (TCC); Texas Oil & Gas Association (TXOGA); and 118 individuals submitted written comments. PC submitted written comments on behalf of its Texas office, American Lung Association, Texas Impact, Environmental Defense, Sierra, Henry Lowerre & Frederick, Public Interest Research Group, TCE, SEED, San Antonio Coalition for Environmental and Economic Justice, Galveston Houston Association for Smog Prevention, NFN, Mothers for Clean Air, Blue Skies Alliance, Downwinders at Risk, People United for the Environment, and QLEP.

RESPONSE TO COMMENTS

Comment

The EPA commented that it supports the commission's efforts to correct previously identified inconsistencies in the FOP program. However, the EPA commented that further inconsistencies must be addressed in order for Texas to have a fully approvable program. First, the commission's regulations do not define "emergency" consistent with 40 CFR §70.6(g)(1). Chapter 101 contains a definition of upset, but it does not meet the Part 70 definition of emergency. The Chapter 101 definition of upset is broader than the Part 70 definition of emergency, hence allowing more situations to be subject to the exemption from enforcement. Also, the definition of upset differs from the definition of emergency in that upsets are not limited to the exceedence of technology based emission limits. The EPA gave, as an example of non-technology based standard, an exceedence of permit limits due to an extension of operating hours. PC also commented that Chapter 101 exempts excess emissions which do not qualify as emergencies under 40 CFR §70.6(g). BP concurred with the commission's opinion that the notification requirements of Chapter 101 meet the requirements of Part 70.

Response

The commission does not change the rule in response to these comments. The commission believes that its definition of upset and the criteria for exempting upset emissions from compliance is consistent with the definition of emergency under Part 70. The EPA definition of emergency is an event that is sudden, reasonably unforeseeable, and beyond the control of the owner or operator that causes the exceedence of a technology based standard. The commission definition of upset is an unscheduled occurrence or excursion of a process or operation that results in an unauthorized

emission of air contaminants. The commission's definition of upset includes events other than technology based failures which can cause unauthorized emissions. However, the requirements that must be met in order to be considered an upset are consistent with the language and intent of Part 70. Chapter 101 specifies that upset emissions are exempt from compliance with air emission limitations if the owner or operator complies with the requirements of §101.6; the unauthorized emissions were caused by a sudden breakdown of equipment beyond the control of the operator; the unauthorized emissions did not stem from any activity that could have been foreseen and avoided and could not have been avoided by good design, operation, and maintenance practices; the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions; prompt action was taken once the operator knew that applicable emission limitations were being exceeded; the amount and duration of the unauthorized emissions were minimized; all emission monitoring systems were kept in operation, if possible; the owner's or operator's actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence; the unauthorized emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and the unauthorized emissions did not cause or contribute to a condition of air pollution. The commission believes that its requirements under Chapter 101 are at least equivalent to those under the federal rules concerning emergencies. Section 101.11 requires an owner or operator of a source to meet certain criteria in order to receive an exemption for unauthorized emissions. These criteria require that the unauthorized emission must be the result of sudden breakdowns in equipment or process beyond the control of the owner or operator and could not have been avoided by good design, operation, and maintenance. The section also

requires the proper documentation of actions taken in response to the upset. In §101.11, the commission states that upset emissions are exempt from compliance with emission limitations in permits or rules if the owner or operator satisfies the exemption criteria. The exemption requirements were developed from language suggested by the EPA during the revision of the commission's upset/maintenance rules in the Spring and Summer of 2000 and are equivalent to the federal conditions that establish the existence of an emergency. The rules containing these requirements were subsequently approved into the SIP.

To consider the EPA's example of a non-technology based standard, an extension of operating hours might represent an excursion from normal process, but it would have to be a planned or scheduled event. Even if the planning or scheduling interval was short, it would not meet the criteria to be exempt from compliance with the applicable rule, since it was a planned event. The commission's criteria to exempt upset emissions require the owner or operator to demonstrate that the event was a sudden breakdown in equipment or process, was beyond the control of the owner or operator, and could not have been foreseen or avoided by good design, operation and maintenance practices. These criteria clearly exclude operator error from exemption which might also be taken as an example of an event that is non-technology based.

Comment

The EPA commented that Chapter 101 improperly provides for exemptions from permit requirements rather than an affirmative defense as required in 40 CFR §70.6(g)(2) and (3).

Response

The commission does not change the rule in response to this comment. Under 40 CFR §70.6(g)(2), an emergency constitutes an affirmative defense in any action brought for noncompliance with technology based emission standards. The burden of proof to establish the occurrence of an emergency is on the owner or operator of the source; therefore, the responsibility to establish an affirmative defense is that of the owner or operator. The Part 70 definition of emergency includes situations that are unforeseen and unavoidable and assumes proper operation of the source. The commission assumes that, under the federal rules, any proceeding evaluating the existence of an emergency and determining that an emergency existed will result in the deferment of enforcement for any emissions in excess of permitted or otherwise authorized limits.

The commission believes that its requirements under Chapter 101 are equivalent to those under the federal rules concerning emergencies. Section 101.11 requires an owner or operator of a source to meet certain criteria in order to receive an exemption for unauthorized emissions. These criteria require that the unauthorized emission must be the result of sudden breakdowns in equipment or process beyond the control of the owner or operator and could not have been avoided by good design, operation, and maintenance. The section also requires the proper documentation of actions taken in response to the upset. The exemption requirements were developed from language suggested by the EPA during the revision of the commission's upset/maintenance rules in the Spring and Summer of 2000 and are equivalent to Part 70 conditions that establish the existence of an emergency. The revisions to Chapter 101 implementing these requirements were subsequently approved into the SIP and they clearly place

the burden of proof to establish the exemption conditions on the source owner or operator. In §101.11, the commission states that upset emissions are exempt from compliance with emission limitations in permits or rules if the owner or operator satisfies the exemption criteria. The emissions are still considered unauthorized, and the phrase “exempt from compliance” means that the commission will not pursue an enforcement action for that particular occurrence of unauthorized emissions. The commission believes that this is the same result that occurs from the application of the emergency and affirmative defense criteria in Part 70 and that the two procedures place an identical burden of proof on the owner or operator and achieve equivalent results.

Comment

The EPA commented that 40 CFR §70.6(g)(5) provides that an upset in a SIP cannot substitute for the emergency reporting and related affirmative defense provisions in Part 70. Therefore, a separate emergency provision is required in order to correct this inconsistency.

Response

The commission believes that the arguments EPA made in the final Part 70 concerning the de minimis justification for minor permit modification procedures (57 FR 32284) can be used to support the insignificant distinctions between the Chapter 101 upset provisions and the Part 70 emergency provisions. Although the goal of Title V is to issue permits that assure compliance with applicable requirements, the provisions concerning enforcement are general in nature. Title V does not have any provisions for the treatment of emergencies or upsets for major sources. Thus

the emergency provisions in Part 70 are not required to conform to statutory restrictions for emergencies. Since EPA is not constrained by statutory limitations for emergency provisions, the commission believes that EPA can exercise its discretion to approve de minimis exemptions to the emergency provision requirements of Part 70. The differences between the upset provisions of Chapter 101 and the emergency provision in Part 70 are not significant and requiring an emergency provision in addition to the upset provisions in Chapter 101 would “yield a gain of trivial or no value,” *Alabama Power Company v Costle*, 636 F.2d 323, 361 (D.C. Cir. 1979). As developed in the immediately previous response, the commission believes that the reporting and exemption requirements in Chapter 101 are equivalent to, and yield the same results as, the emergency and affirmative defense provisions of Part 70. Reports of unauthorized emissions under Chapter 101 must also be included or referenced in deviation reports under §122.145, Reporting Terms and Conditions. The commission notes that the Chapter 101 upset/maintenance provisions have been approved into the SIP. The result of including a separate emergency provision for upset reporting would be two required reports on the same event and containing the same information. The commission believes this would be a redundant and unnecessary requirement and does not change the rule in response to this comment.

Comment

PC commented that Chapter 101 violates federal requirements by automatically exempting facilities from penalties and injunctive relief; exempting emissions from predictable and scheduled events; exempting violations which are not technology based; and barring the EPA’s and citizens’ ability to enforce applicable requirements. NFN commented that broad, automatic exemptions that the

commission allows, coupled with the barriers to the EPA or citizen enforcement of applicable requirements, violate federal requirements. EEP commented that operating permits should not be drafted to provide special exemptions when upsets occur and that it is not appropriate for a regulatory agency to write forgiveness right into a permit. If something goes wrong and the permit holder fails to comply with the permit limit, that is a violation that should subject the permit holder to enforcement action.

Response

The commission does not change the rule in response to this comment. The commission rules governing the exemption from enforcement of unauthorized emissions from upsets and maintenance do not provide an automatic exemption. The commission has previously stated in this response to comments (and in the rulemaking to the recently revised and the EPA approved provisions in Chapter 101) that the responsibility, under commission rules, of the owner or operator of a source to demonstrate that upsets resulting in unauthorized emissions are sudden and unavoidable events beyond his or her control and could not have been prevented by good design, operation, and maintenance practices. The exemption criteria for emissions resulting from maintenance place a similar burden of proof on the owner or operator to demonstrate that maintenance emissions could not have been prevented through planning and design and are not part of a recurring pattern. The commission's rules only address enforcement under state law and do not preclude action by the federal government nor the introduction of evidence by citizens.

Comment

The EPA requested clarification of whether Chapter 101 is consistent with Part 70. Title 40 CFR

§70.6(g)(3)(i) specifies that the permit holder must be able to identify the cause of the emergency in order to establish an affirmative defense. Section 101.6(a)(2)(A) and (3)(A) only require that the owner identify the cause in its notice if it knows the cause. The EPA also pointed out that §101.11(a) specifies that the exemption only applies to unauthorized emissions caused by a sudden breakdown of equipment or process.

Response

The commission does not change the rule in response to this comment. The commission believes that Chapter 101 is consistent with Part 70. The EPA is correct in stating that §101.6(a)(2)(A) and (3)(A) require reporting the cause of an upset if that cause is known at the time of original notification. Emissions resulting from upsets must be reported to the commission within 24 hours if those emissions are above a certain specified amount. The commission recognizes that the cause of the upset may not be known within that period. Should the cause of an upset be determined to be different than that originally reported or was not known at the time of the original report, then a follow-up report under §101.6(c) must be submitted to the commission within two weeks of the upset.

Comment

The EPA commented that Chapter 101 is inconsistent with 40 CFR §70.6(g)(3)(iv), which contemplates written notification of emergencies. Also, Chapter 101 is inconsistent with Part 70 in that Chapter 101 only provides for prompt reporting of upsets which exceed the reportable quantity. Title 40 CFR §70.6(g) requires the reporting of all emergencies. Contrary to the requirements of 40 CFR §70.6(g),

Chapter 101 would allow upsets which did not exceed the reportable quantity be eligible for an exemption for enforcement even though notification was not submitted to the state.

Response

The commission does not change the rule in response to this comment. The commission does not believe that the language in §70.6(g)(3)(iv) contemplates a particular form of a notice, but rather, it requires certain information to be provided to the permitting authority regarding an emergency. Further, the commission believes that had EPA intended to specifically require a written notice, it would have done so, as it does in the National Pollutant Discharge and Elimination System (NPDES) rules. EPA states in the preamble to the 1992 Part 70 that the emergency provision in §70.6 is “modeled after the NPDES upset provision in 40 CFR §122.41,” (57 FR 32279). Although EPA notes that the NPDES provisions will not be binding precedent for the implementation of Title V, it did state that it would look to the NPDES program for guidance, (57 FR 32260). The provisions of §70.6(a)(3) are patterned after 40 CFR §122.41(n), Upset. Title 40 CFR §122.41(n) requires a permittee to submit notice of an upset as required by §122.41(l)(6)(ii)(B). The rule provides that “any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances.” In the NPDES rules, EPA required specific methods for the reporting of an upset. In Part 70, EPA requires only that a “permittee submitted notice of the emergency” as one of the criteria in order to be eligible for the affirmative defense of emergency.

The commission believes that its requirement for notification of reportable upsets is equivalent to and may, in some cases, be more timely than Part 70 requires. Owners or operators of sources may notify the commission by phone, in writing, by telefax, or through electronic data transfer within 24 hours, which is twice as prompt as the Part 70 requirement to submit notice within two working days. The commission believes that any of these methods provides a verifiable method of notification and is consistent with Part 70. The commission has developed the concept of reportable quantity based on a similar federal concept under the Emergency Planning and Community Right-to-Know Act (EPCRA), regarding when to report releases to any environmental media. Upsets that result in emissions below a reportable quantity do not need to be reported within 24 hours but must be recorded and reported in deviation reports and are subject to the same exemption criteria as any upset. Permit holders are required to make this information available upon request.

Comment

QLEP and 118 individuals commented that deviation reports should be submitted within 48 hours of a violation and that the commission's rules allow a permit holder to wait six months before reporting a violation to the commission. NFN also commented that six months between reports about monitoring activities, such as stack tests and inspections, is not prompt. Also, excess emissions below the reportable quantity become a company's in-house records, which are difficult for the public to obtain, impeding citizen enforcement action or citizen questioning of exemptions for unreported excess emissions. In addition, NFN stated that the commission's reports indicate a 50% decrease in reported excess emissions from upset, maintenance, startup, and shutdown occurrences. EEP also expressed

concern that the proposed rules will allow polluters to avoid reporting of violations for six months and that they see no reason why these violations cannot and should not be reported within 48 hours of occurrence. PC commented that upsets under the reportable quantity are not required to be reported.

Response

The commission does not change the rule in response to these comments. The commission adopted the concept of reportable quantity into the upset/maintenance rules in 1997. While every upset must be recorded, those that exceed a certain reportable quantity must be reported to the commission within 24 hours of occurrence. This concept is patterned after a similar concept used in the EPCRA and has resulted in a decrease in the number of 24-hour reports sent to the commission. The reportable quantity concept allows the commission to concentrate resources on those events most likely to affect the general public. All upsets, regardless of size, are subject to the exemption criteria in §101.11. The records of non-reportable upsets would be retained by the source owner or operators and submitted to the commission every six months in accordance with deviation reporting requirements, and must be made available to the commission upon request. These events would be examined under the exemption requirements of §101.11, and those failing to meet the requirements for exemption will be subject to enforcement.

Comment

PC commented that the commission's rules allow facilities to report upset, startup, shutdown, and maintenance under Chapter 101 rather than satisfy the deviation reporting requirements in Chapter 122.

Also, Chapter 101 does not provide for compliance certifications. Chapter 122, to satisfy Part 70, should be amended to clarify that upset emissions must be reported as deviations.

Response

The commission does not change the rule in response to this comment. Deviations, as defined in Chapter 122, are any indications of noncompliance with the conditions of a permit. The commission considers any unauthorized emissions resulting from upset, start-up, shutdown, and maintenance to be deviations and requires that they be included or referenced in any six-month deviation report submitted to the commission under §122.145. As deviations, these reports of unauthorized emissions are subject to the compliance certification requirements of §122.146, Compliance Certification Terms and Conditions. Any deviations that do not result in unauthorized emissions must also be recorded and submitted as deviations under §122.145.

Comment

The EPA commented that the amnesty provisions set forth in SB 766, Section 12 (§12) poses impediments to the minimum enforcement and implementation authorities that Texas must maintain in order to remain an approved operating permit program under Part 70. The EPA is concerned that the amnesty provision may surrender the commission's ability to assure compliance with applicable requirements of the Clean Air Act at facilities subject to the Part 70 operating permit program, by prohibiting the state from initiating an enforcement action against a permit holder for certain preconstruction violations. The EPA is calling upon Texas to address the concerns with amnesty in the Attorney General's statement, as required by 40 CFR §70.4(b)(3). The opinion should also evaluate

and attest to the adequacy of the state's authority to carry out all aspects of the program, specifically with respect to whether §12 restricts implementation and enforcement of the state program.

Response

Because EPA has requested an Attorney general's statement on the impact of the amnesty provisions from SB 766, the commission does not believe it is appropriate to provide a response to that issue in this adoption. The commission has forwarded EPA's comments to the Attorney general's and anticipates submitting a statement by the end of June, 2001.

Comment

BP suggested that the commission add a definition of affected state in §122.10 which is consistent with the language in §122.330.

Response

The commission does not change the rule in response to this comment. Section 122.330(b) specifies which states may be affected states, and §122.330(b)(1) and (2), as proposed, specifies the criteria for an affected state as defined in 40 CFR §70.2.

Comment

PC supports the inclusion of minor NSR as an applicable requirement and recommended additional amendments to the definition of applicable requirement. The definition should include all requirements

that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective compliance dates, as required by 40 CFR §70.2.

Response

The commission agrees and amends the definition of applicable requirement in response to this comment. A statement concerning the inclusion of requirements with future-effective dates appears in 40 CFR §70.2. It is currently the commission's practice to include, in permits, requirements that have been promulgated or approved by the EPA through rulemaking at the time of permit issuance but which have future effective compliance dates. The commission will continue this practice.

Comment

PC stated that the definition of applicable requirement should include a broad statement that applicable requirements include "any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under Title I of the Federal Clean Air Act (FCAA) that implements the relevant requirements of the FCAA, including any revisions to that plan." PC commented that the definition of applicable requirement does not appear to include all provisions in the applicable SIP. PC observed that Texas' rules may change before or without corresponding changes in the SIP.

Response

The commission does not change the rule in response to this comment. The commission currently includes in the definition of applicable requirement those chapters and portions of chapters provided in the SIP that are relevant to permit content. The definition of applicable requirement includes those requirements that implement relevant requirements of the FCAA.

Comment

TCC supports the proposed minor NSR/Part 70 integration. TCC requested that TNRCC take into consideration stakeholder resource limitations when developing the implementation process. TCC suggested that the process be designed to allow minor NSR authorizations to be effectively and efficiently incorporated into the operating permit while providing the option to phase-out duplicative NSR requirements. TXOGA envisions an approach that allows for elimination of redundant and duplicative standards and provisions contained in NSR permits from overlapping regulatory requirements. TXOGA explained that this approach would result in a simple, more streamlined process. TCC and TXOGA proposed that minor NSR permits be incorporated into FOPs by reference only. TCC proposed that subsequent permit modifications or renewals go through stringency reviews for the purpose of removing duplicative special conditions determined to be redundant. TCC explained that this proposed process would “help filter out” duplicative requirements in minor NSR permits that are also in Title V operating permits. Similarly, ExxonMobil requested that the following sentence be added to §122.142(b)(3): “Such preconstruction authorizations may be incorporated into the Title V permit by reference.”

Response

The commission does not change the rule in response to this comment. The adopted rule requires the executive director to institute proceedings to reopen permits for the incorporation of minor NSR. The commission agrees that this incorporation could be done by simply including minor NSR permit numbers. The executive director is in the process of identifying the most efficient implementation method of eliminating duplicative, redundant, and/or contradicting applicable requirements between minor NSR and FOPs consistent with federal requirements. The commission will continue to work with the stakeholders in the development of procedures for the incorporation of minor NSR.

Comment

BP commented that the incorporation of NSR into the operating permit program should not result in additional permit fees.

Response

The incorporation of minor NSR into the operating permit program will not cause an increase in application fees for NSR permitting.

Comment

The EPA commented that the commission has never submitted Chapter 106, Subchapter A, General Requirements as a SIP revision and that it encourages the commission to do so.

Response

In April 2001, the commission proposed amendments to Chapter 106, Permits by Rule, for proposal and publication that address recordkeeping and what types of maintenance emissions may be authorized under permit by rule. Chapter 106, Subchapter A will be submitted as a SIP revision after the conclusion of that rulemaking.

Comment

PC recommended that the phrase “as found using, at a minimum, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit” be deleted from the definition of deviation. PC explained that permit holders should be required to identify and report a deviation if they have any evidence of a deviation. PC commented that Chapter 101 should clarify that facilities may not use selective reporting to avoid reporting a deviation. Facilities must not be allowed to monitor repeatedly until the results are to their liking and report only the favorable results. Any monitoring or testing performed by the facility that indicates a potential violation must be included in the deviation report. PC argued that permit holders should not be allowed to avoid reporting a deviation of which they are aware simply because the deviation was not identified by the compliance method required by the permit. PC agrees with the definition’s introductory clause that a deviation is any indication of noncompliance. PC explained that the compliance certification rules can then require that certification be based on all reasonably available credible evidence including compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit.

Response

In response to this comment, the commission adds rule language to the definition of “deviation” and to §122.146(4) stating that the determination of a deviation will not be limited to information obtained from required monitoring. This language does not impose additional requirements but is added as a clarification. The minimum compliance method data that must be used to identify deviations is consistent with that identified in 40 CFR §70.6(c)(5) as necessary for FOP compliance certifications. However, the definition of deviation does not relieve a permit holder from considering any additional information to identify a deviation. The commission already requires permit holders to consider additional information to determine whether a deviation has occurred.

Comment

PC commented that the definition of emission unit appears to be more limited than the federal definition. PC noted that the agency’s definition includes “a discrete or identifiable structure, device, item, equipment or enclosure” but that the federal definition also includes an “activity.” PC stated that the commission should amend its rules to use the federal definition of emission unit.

Response

The commission does not change the rule in response to this comment. The regulatory and conventional concept of an emission unit has always been that of a tangible item. This concept is codified in the commission’s definition of emission unit. Under Chapter 122, any tangible item housing an activity that produces air pollutants is an emission unit. Thus, the commission’s definition of emission unit is substantially equivalent to that of the EPA’s.

Comment

PC commented that the commission's rules should delete the definition of final action, since it does not include all actions relating to operating permits which may constitute final action by the commission. The definition is unnecessary, creates confusion, and it should be left to the courts to determine which agency actions constitute final action.

Response

The commission does not change the rule in response to this comment. The term "final action" indicates the end of the executive director's review process and that a permit has been issued or denied. Any subsequent action by either the commission, the EPA, or the public is not included in this term.

Comment

PC commented that the definition of major source is impermissibly limited. Section 122.10(14)(C)(xxvii) limits sources for which fugitives should be counted in determining major source status.

Response

The commission does not change the rule in response to this comment. The commission believes that Chapter 122 permissibly identifies sources for which fugitive emissions must be considered in major source determinations in a manner that is consistent with FCAA, §302(j) and with Part 71. The FCAA, §302(j) specifies that in determining whether a source is major, fugitive emissions are

included when determined by rule by the administrator. Rulemaking for FCAA, §302(j) was last done on August 7, 1980. Part 70 specifies that fugitive emissions should not be considered in determining major source status unless the source belongs to one of the source categories identified in 40 CFR §70.2, major source definition. The definition further enumerates source categories for which fugitive emissions must be included in the major source determination, including stationary source categories regulated by a standard promulgated under FCAA, §111 or §112, but only with respect to those air pollutants that have been regulated for that category. Title 40 CFR Part 71 (Part 71) sets forth the FOP program that would be implemented by the EPA in a state without an approved operating permit program. In the preamble for the Part 71 final rule, the EPA discussed the issue of the missing reference to August 7, 1980, and acknowledged that “it did not follow the procedural steps necessary under §302(j) to expand the scope of sources in this category for which fugitives must be counted in Part 70 major source determinations.” Therefore, the EPA promulgated the final Part 71 is consistent with FCAA, §302(j). The definition of major source in Part 71 specifies that fugitive emissions must be counted for stationary source categories regulated by a standard promulgated as of August 7, 1980, under FCAA, §111 or §112, but only with respect to those air pollutants that have been regulated for that category. The Chapter 122 definition of major source requires fugitive emissions to be considered in determining a major source for any stationary source category regulated under FCAA, §111 or §112 for which the EPA has made an affirmative determination under FCAA, §302(j). Thus, the definition of major source in Chapter 122 is consistent with the definition of major source in Part 71, as well as FCAA, §302(j). Since the aforementioned source categories are the only sources that would be required to count fugitive emissions in the event that

the EPA implements Part 71, it is the commission's opinion that only these sources should be required to count fugitive emissions in determining major source status for Chapter 122 and Part 70 applicability. Although the EPA did not submit comments on this issue during the comment period, it is the commission's understanding that the EPA concurs with this analysis.

Comment

PC commented that §122.10(14)(E) limits the sources for which fugitive emissions must be considered in determining the major source status of facilities in nonattainment areas; Part 70 does not establish such limits.

Response

The commission does not change the rule in response to this comment. The commission believes that §122.10(14)(E) is consistent with Part 70. Title 40 CFR §70.2, Major Source, (2) specifies that fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source unless the source belongs to one of the specified source categories. Since 40 CFR §70.2, Major Source, (2) specifies the inclusion of fugitive emissions for any air pollutant, the specified source categories are also the only source categories required to include fugitive emissions under 40 CFR §70.2, Major Source, (3), which defines major stationary sources in nonattainment areas. Therefore, the commission believes that §122.10(14)(E) is consistent with the definition of major source in 40 CFR §70.2.

Comment

PC commented that §122.10(14)(F) allows facilities to calculate potential to emit without including emissions from temporary sources. PC also commented that §122.204(c), Temporary Sources should be deleted. The commission cannot exempt temporary source calculations from a site's potential to emit.

Response

The commission does not change the rule in response to this comment. The commission did not propose amendments to §122.204; therefore, under Texas administrative law, the section cannot be amended at this adoption. Sections 122.10(14)(F) and 122.204(c) specify that temporary sources located at a site for less than six months would not affect a major source determination. If a temporary source remains at a site for more than six months, the emissions must be included in the potential to emit and any applicable requirements must be included in the operating permit.

Comment

PC commented that the commission's rules do not include a definition of fugitive emissions and suggested incorporating the definition contained in 40 CFR §70.2.

Response

The commission does not change the rule in response to this comment. The commission does not believe that it is necessary to include a definition of fugitive emissions in Chapter 122 since

Chapter 101 defines fugitive emission as any gaseous or particulate contaminant entering the atmosphere which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow. This is consistent with Part 70 which states that fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

Comment

PC questioned why the applicability of Chapter 122 is based on the eligibility of a deferral rather than an actual deferral. PC requested that the phrase “no longer eligible for a deferral” contained in §122.120(a)(4) be replaced with the phrase “no longer deferred.” PC explained that their request would clarify §122.120(a)(4) and make it consistent with Part 70. BP commented that the commission should clarify in §122.120(a)(4) the types of deferrals which relieve the operator from the obligation to obtain a permit. PC questioned the necessity and appropriateness of §122.120(b). PC stated that it is unclear what sites or types of sites will fall under this exemption that are not already subject to §122.120(a). PC added that an exemption for individual sites is not allowed under Part 70.

Response

The rule was not changed in response to this comment. The EPA has granted permitting authorities the discretion to defer Title V operating permitting requirements until December 9, 2004, for area sources of air pollution that are subject to certain regulations (64 FR 69637). Based on the deferral in that rulemaking those area sources are not required to obtain operating permits. Therefore, those sources are eligible for deferral of a Title V permit; however, the EPA

may at some future date determine that those sources are no longer eligible for deferral. The commission's text makes clear that, should that occur, those sources must obtain an operating permit. Section 122.120(b) is intended to help owners and operators correctly apply Chapter 122. The commission cannot anticipate what types of sites would be eligible for deferral.

Comment

PC commented that §122.120(b) is written too broadly. PC explained that owners or operators of sites which may qualify for exemption or deferral from the requirements of Chapter 122 are not themselves exempt from the Chapter 122 requirements. PC continued that those persons may own or operate multiple sites, some of which, are not exempt.

Response

The commission agrees with PC's comment and deletes the phrase "owners and operators of one or more of the" from §122.120(b).

Comment

PC commented that §122.122(e), Potential to Emit allows facilities to keep on site the registration limiting its potential to emit. If a registration is not submitted to the commission, the limits would not be practically enforceable, as is required by the EPA's 1996 document "Effective Limits on Potential to Emit."

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission agrees that a registration limiting a site's potential to emit must be practically enforceable, but that certified registrations kept onsite meet this requirement. The §122.10 potential to emit definition specifies that "any certified registration or preconstruction authorization restricting emissions ...shall be treated as part of its design if the limitation is enforceable by the EPA." The EPA, in 40 CFR §52.21(b)(17), defines federally enforceable as "all limitations and conditions which are enforceable by the administrator, including those...requirements within any applicable SIP." Since the commission submitted §122.122 for incorporation into the SIP, the commission considers limits established under §122.122 to be federally enforceable. Further, §122.122 specifies that certified registration of emissions and records demonstrating compliance with the registration must be kept on-site, or at an accessible location, and shall, upon request, be provided to the commission or any air pollution control agency having jurisdiction. The commission does not believe that a certified registration of emissions must be submitted in order to be practically enforceable, since the owner or operator must make the registration and any supporting documentation available during an inspection.

Comment

PC was supportive of the discontinuation of the phased permit process in §122.131.

Response

The commission agrees that the phased permit process should not be an option for new applications and appreciates the comment.

Comment

PC commented that §122.130 and §122.132(c) are inconsistent with 40 CFR §70.5(c) by allowing applicants to submit abbreviated initial applications and that this procedure does not allow the public to gather the necessary information to participate in operating permit proceedings. Complete applications are not due unless requested by the executive director, hence, applications may not contain emissions information, applicable requirements, or compliance information. Therefore, abbreviated initial applications should be eliminated from the commission's rules. PC also made similar comments on §122.502(a), Authorization to Operate, which was not proposed for amendment and allows the owner or operator to submit an abbreviated application, which is insufficient to comply with the 40 CFR §70.6(d)(2) and FCAA, §7661b. NFN also expressed concern that abbreviated initial applications would impair the commission's access to full information and the public's right to participate in the permit review.

Response

The commission does not change the rule in response to this comment. Section 122.132(c) states that an applicant may submit an abbreviated application and that the executive director shall inform the applicant in writing of the deadline for submitting the remaining information. The executive director requires a full application for every operating permit action. The remaining

information required for a full application is itemized in §122.132(e), including applicable requirements for each emission unit and a compliance plan. The commission uses abbreviated applications primarily to identify major sources and they were the basis for the subsequent schedule developed to require applicants to submit full applications.

When initially implementing the program, the commission required abbreviated applications to be submitted for all permitting actions. This required an abbreviated application for every site to be submitted. The executive director did not, however, intend to begin the technical permit review on all applications at the time each application was submitted. Allowing owners and operators to submit abbreviated applications enabled the executive director to develop the full application submittal schedule without requiring the applicant to continually update and certify the detailed application information prior to the technical review of the permit. Once all information has been submitted, the executive director performs a technical review and develops a draft permit, which will be made available for comment during the public notice period, along with the full permit application. The application process described here also assists interested persons since their review of the applications would not be done on outdated application information. Further, interested persons would not have to track the submittal of outdated application information.

Comment

PC commented that §122.132(e) does not require an application to include all of the information required by 40 CFR §70.5(c), that the rules themselves need to specify the required application content and that it is not sufficient that the applicable form developed by the agency may contain the

information required. Chapter 122 should be amended to require applications to include 1.) identifying information, including company name and address, owner's name and agent, and telephone number and names of plant site manager or contact; 2.) a description of the source's processes and products, including any associated with alternate scenarios identified by the source; 3.) all emissions of pollutants for which the source is major, and all emissions of regulated air pollutants, including a description of all emissions of regulated air pollutants emitted from any emission unit, except where such units are exempted; 4.) identification and description of all points of emissions in sufficient detail to establish the basis for fees and applicability of requirements; 5.) emissions rate in tons per year and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method; 6.) fuels, fuel use, raw materials, production rates and operating schedules to the extent they are necessary to determine or regulate emissions; 7.) identification and description of all pollution control equipment and compliance monitoring devices or activities; 8.) limitations on source operation affecting emissions or any work practice standards, where applicable for all regulated pollutants at the source; 9.) other information required by any applicable requirement, including information related to stack height limitations developed pursuant to FCAA, §123; 10.) calculations on which emissions related information is based; 11.) an explanation of any proposed exemptions from otherwise applicable requirements; and 12.) additional information as necessary to define alternative operating scenarios identified by the source or to define permit terms and conditions. PC also commented that the general permit application should be required to include information regarding emissions. NFN also commented that Chapter 122 should be amended to specify that applications include a detailed explanation of how facilities qualify for exemptions and documentation to support that explanation. The detailed explanation should include a precise listing of how the facility complies with each of the

requirements of the exemption; an answer of “none” to a question is not adequate. The facility should also be required to certify in its annual compliance certification whether or not it continues to meet each requirement for an exemption. Certifications for exempt status would decrease the likelihood of false claims since they carry the consequence of personal liability.

Response

The commission does not change the rule in response to this comment. The commission agrees that Chapter 122 must specify the required application content, however, 40 CFR §70.5(c) states that the permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency and that the forms and attachments shall include the elements identified in Part 70. The commission believes that the rule and the forms developed for the program meet the requirements of 40 CFR §70.5(c). If necessary, §122.136 enables the executive director to request emission calculation information. Specific emissions information is contained in NSR permits and Emissions Inventory reports, as required by §101.10. Because that information is already available, the duplication of that information in operating permit application forms is not necessary. Additionally, the commission does not require fee information in operating permit applications because major sources annually report emission inventories on which fees are assessed.

The commission believes that it requires sufficient information to determine applicability of specific requirements. The commission uses application forms that require applicants to provide the basis for establishing why a facility is not subject to a given requirement. For example, some

regulations do not require facilities below certain sizes to comply with the regulations and, in all cases, the applicant is required to identify the regulatory citation that excludes the facility from the regulation. All application information is required to be certified by the responsible official. The certification establishes that the submitted information is true, accurate and complete. The certification to whether or not a facility meets an exemption is only required when the application is submitted. If the status of an emission unit has changed and the unit is no longer exempt from an applicable requirement, the permit holder must seek the appropriate revision to the FOP, which would include a compliance certification. Once the permit is revised, the permit holder must certify compliance with the applicable requirement annually and this would include certifying that a unit is in compliance with its applicable requirements. When permit holders certify compliance status, they are also certifying that a unit's applicability has not changed, and that they continue to be exempt.

Comment

PC commented that §122.132(e)(4)(C)(iii) be amended for consistency with 40 CFR §70.5(c)(8)(iii)(C). Compliance schedules for out of compliance sources should include an enforceable sequence of actions with milestones and a statement that any compliance schedule is supplemental to, and does not sanction noncompliance with, the applicable requirements.

Response

The commission changes the rule in response to this comment. The commission agrees that §122.132(e)(4)(C)(iii) should be amended to specify that any such schedule of compliance shall be

supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based for consistency with 40 CFR §70.5(c)(8)(iii)(C). The commission does not believe that Chapter 122 requires an amendment to specify that compliance plans include an enforceable sequence of actions with milestones because this information is already required by §122.132(e)(4)(C)(ii) and (iv). Section 122.132(e)(4)(C)(ii) states that a compliance plan for any emission unit not in compliance with applicable requirements shall include a narrative description of how the emission unit will come into compliance with all applicable requirements. Further, §122.132(e)(4)(C)(iv) specifies the compliance plan include a schedule for the submission, at least every six months after issuance of the permit, of certified progress reports. Section 122.142(e)(2), specifies that a permit shall contain a requirement to submit progress reports, which include the dates for achieving the activities, milestones, or compliance required in the compliance schedule and the dates that these were achieved or an explanation of why the dates were not or will not be met and any preventative or corrective measures adopted.

Comment

EEP commented that if a facility is out of compliance with applicable requirements, the permit must include a compliance plan and that compliance certifications are required both at the time that a permit application is submitted and on an annual bases. Sierra noted the importance of compliance certifications and monitoring, recordkeeping and reporting that are added to permits. In the past, many of these requirements were not spelled out in the permits and the information was not easily accessible. Title V is very powerful program for ensuring that these facilities are going to be in compliance with all of these various requirements if all these requirements are going to be in the permit.

Response

The commission does not change the rule in response to this comment. The commission agrees that the operating permits program provides a number of effective enforcement tools. Under the current program, an application is required to contain a compliance plan. Compliance certifications are required for permit applications and on an annual basis for permits. Section 122.142(e) specifies that permits shall contain a compliance schedule for units not in compliance with the applicable requirements at the time of initial permit issuance or renewal. As previously stated, progress reports are required every six months. Section 122.132(e)(4) states that an application shall include a compliance plan and §122.132(e)(9) requires applications to include a certification by the responsible official. Further, §122.146(1) specifies that the permit shall contain a term and condition to specify that the permit holder is required to certify compliance with the terms and conditions of the permit for at least each 12-month period following initial permit issuance. Also, new §122.143(15), formerly §122.143(16), requires any report or annual compliance certification to contain a certification by the responsible official.

Comment

BP commented that the commission should add the following sentence to §122.132(e)(11):

“Applications submitted prior to July 2000 shall be updated to include minor NSR permit at permit renewal.” Similarly, TXOGA suggested that the following phrase be added to §122.132(e)(11):

“except that for applications submitted prior to July, 2000, updates to the applications for this information is not required until permit renewal.” TXOGA explained that an amendment to

§122.132(e)(11) is necessary so that applications already submitted are not immediately out of compliance upon the effective date of this rule.

Response

Based on negotiations with the EPA regarding its comments regarding the timing of minor NSR incorporation, §122.132(e)(11) is revised to state that applications for which the executive director has not authorized initiation of public notice by the effective date of this rule must include preconstruction authorizations.

Comment

PC commented on §122.132(g). Title 40 CFR §70.5(c) requires an application to include a list of insignificant activities and also that the commission needs to specify that the information omitted from the application under de minimis may not include information needed to determine the applicability of or to impose any applicable requirement or to evaluate the fee amount.

Response

The commission changes the rule in response to this comment. The EPA noted in the June 7, 1995 *Federal Register*, with regard to the insignificant activities list, that “the design and approach the state uses to keep activities out of the operating permit application is considered practical and equivalent to Part 70. This design attains the same results as a list of insignificant activities or emissions thresholds for units. The EPA believes the procedures set forth in the Texas permit

regulation to identify insignificant activities achieves the goal and intent of the Part 70 regulations and therefore is consistent and acceptable.” (60 FR 30040).

In response to the comment about de minimis activities, the commission clarifies in §122.132(g) that sources identified as de minimis under Chapter 116 do not have to be included in the application for determining Chapter 116 applicability, but such units would need to be included if they are needed to determine the applicability of any other applicable requirement. A de minimis unit under Chapter 116 is not subject to Chapter 116, but that does not automatically make it a unit that may be listed as an insignificant activity under Part 70. Fees are addressed in §101.27, Emission Fees, and §122.132(g) does not change how emission fees are to be calculated.

Comment

PC commented on §122.134 and stated that an application for a permit should not be considered complete unless the application contains all of the information required by 40 CFR §70.5(c).

Response

The commission does not change the rule in response to this comment. The commission believes that §122.134 is consistent with 40 CFR §70.5(a)(2) which specifies that the program shall provide criteria and procedures for determining when applications are complete and also specifies that applications shall be deemed to be complete within 60 days unless the permitting authority determines that an application is not complete.

Comment

TCC requested that the section header for §122.136 be changed from “Application Deficiencies” to “Application Deficiencies and Supplemental Information.” TCC explained that their suggested header accurately describes the intent of the section. Similarly, TXOGA commented that §122.136 should be retitled “Duty to Supplement or Correct Application,” since much of the section outlines requirements for supplemental information not constituting an application deficiency.

Response

The commission agrees with TCC and TXOGA and changes the title of §122.136 to “Application Deficiencies and Supplemental Information.”

Comment

TCC and TXOGA commented that additional text should be added to §122.136(c) to specify that additional information to address requirements that become subject to a site after application submittal is not required to be submitted before the commission begins the permit technical review, upon request, the applicant will submit the necessary information within 60 days, and that additional time for information submittal is at the discretion of the executive director. BP supported this and added that the revision is needed to avoid continual revisions to the permit application. TXOGA suggested additional language be added to §122.136(c) to specify that information not yet submitted under §122.131, Phased Permit Detail, need not be submitted except in accordance with the schedule associated with the phase-in of that information.

Response

The commission agrees with this comment and amends §122.136(c) to specify that additional information is not required to be submitted before the executive director’s technical permit review period. This is consistent with 40 CFR §70.5(b) which specifies that an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to the release of a draft permit. The amendment will allow the applicant to submit the needed application information in a timely manner without requiring multiple updates of application information until the commencement of the technical review, and will assist the executive director and interested parties since they will not be reviewing application information that is out of date. This amendment will also address TXOGA’s concern in that each portion of a phased permit has an associated technical permit review. Therefore, additional information to address requirements that become applicable will not be required to be submitted before the technical permit review of each phased permit.

Comment

TIP, BP, ExxonMobil, TCC, and TXOGA indicated that §122.140(3) contained a typographical error. The word “respectfully” should be replaced by the word “respectively.”

Response

The commission agrees with this comment and amends §122.140(3) by replacing the word “respectfully” with “respectively.”

Comment

TCC suggested that the phrase “application for an authorization to operate” be removed from §122.142(b)(3) because it is already stated in §122.132(e)(11). BP made the same request and explained that application requirements should not be addressed in a section titled “Permit Content.” TXOGA, ExxonMobil and TIP commented in a similar fashion. TIP requested that §122.142(b)(3) be revised to clarify that the preconstruction authorizations will only be incorporated into Title V permits in accordance with §122.231(c) for those sites that submitted applications prior to the effective date of this rule change. Similarly, TXOGA suggested that the following sentence be added to §122.142(b)(3): “Effective at the renewal of the initial permit, each permit shall contain any preconstruction authorization that is applicable to the emission units at the site.” TXOGA reasoned that their suggested sentence would preclude permits or applications from being out of compliance upon promulgation of this rule.

Response

The commission agrees with the comments and deletes the phrase “or permit application for an authorization to operate” from §122.142(b)(3). In addition, the commission clarifies that preconstruction authorizations are incorporated into operating permits as specified in §122.231(c).

Comment

TIP expressed concern about the level of detail currently required in operating permits and that detailed citation requirements greatly increase the paperwork and processing burden associated with initial permit issuance and permit revisions for both the regulated community and the commission staff with

no corresponding environmental benefit. Further, §122.142(b)(2)(B) goes beyond the intent of Part 70 and the Title V program. By removing the specific, detailed regulatory citations from operating permits, the commission can produce permits that serve as more useful tools for the regulated community, the public, the EPA and the commission, without compromising any person's ability to identify or to enforce the applicable requirements at a site. TIP and TCC requested that the commission address the issue of detailed citation requirements in the preamble and assure the regulated community that another rule opening will take place to propose amendments to §122.142(b)(2)(B) to reduce the level of detail required in operating permits. ExxonMobil also requested that the commission address the issue in the preamble and expressed concern that the rule language in §122.142(b)(2)(B) as currently written could result in more stringent interpretations than is the intent of Part 70. TIP, ExxonMobil, and TCC recommended the deletion of the words "detailed" and "specific" from §122.142(b)(2)(B) and (B)(i). BP supported TCC's suggestion concerning detailed citation requirements and added that permits should be streamlined by removing unnecessary detail. TXOGA supported the above amendment to §122.142(b)(2)(B) and stated that their intent was to submit comments to make the rule as flexible and workable as possible, while maintaining the Part 70 Operating Permits requirements and that the efforts and resources expended by both the commission and the regulated community should be reasonable and meaningful. TXOGA expressed their emphasis on the reduction of paperwork and processing burden associated with the program. Even requirements for minor permit revisions will be unduly burdensome and expensive, with no corresponding environmental benefit. This can be remedied by reducing the reliance on specific, detailed regulatory citations for each and every requirement and by implementing a more descriptive approach which will require less paperwork and less revision process. All parties, including the commission and EPA inspectors, site operators and the public will find such a

tool much more useful in maintaining and understanding current, accurate regulatory requirements for the site. The suggested changes to §122.142(b)(2)(B) are consistent with Part 70 language and will not diminish the ability to identify or enforce all specific requirements for emission units at a site.

Response

The commission does not change the rule in response to this comment but is currently involved in meetings with all stakeholders, including the EPA, to address level of detail issues. Chapter 122 currently provides the flexibility for the commission to structure the level of detail in operating permits in a manner that provides for compliance with Part 70 and also serves as a useful compliance tool for the commission, the regulated community and the public. The commission will continue its work with all stakeholders to arrive at a level of detail that provides enforceability but eliminates unnecessary permit detail and associated permit revisions. Whether the solution is through another rule opening to propose amendments to Chapter 122 or through a procedural process change has yet to be determined.

Comment

PC commented that §122.142(b)(2)(B)(i) should require a permit to include emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. PC referenced 40 CFR §70.6(a)(1).

Response

The commission does not change the rule in response to this comment. Section 122.142(b)(2)(B)(i), although not a word-for-word reiteration of 40 CFR §70.6(a)(1), is consistent with its provisions. Section 122.142(b)(2)(B)(i) requires each permit to contain the specific regulatory citations for each applicable requirement identifying the emission limitations and standards. In this manner, each permit includes emission limitations and standards and operational requirements.

Comment

PC commented that §122.142(b)(2)(B)(ii) should require that each permit include testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit, for consistency with 40 CFR §70.6(c)(1). This requirement is independent of CAM or periodic monitoring requirements. PC also commented that reports of monitoring data should include monitoring required by an applicable requirement as well as monitoring required by the operating permit itself. Therefore, §122.145(1)(A) should be amended to specify that reports of monitoring data required to be submitted by an applicable requirement or by a provision of the permit, shall be submitted to the executive director. In addition, monitoring reports must be required to clearly identify deviations. This is consistent with 40 CFR §70.6(a)(3)(iii)(A).

Response

The commission changes the rule in response to these comments. The commission believes that §122.142(b)(2)(B)(ii), as written, meets the requirements of 40 CFR §70.6(c)(1) which does not require an independent monitoring program but rather refers back to the requirements of 40 CFR

§70.6(a)(3) for periodic monitoring and CAM. Some monitoring is required by the underlying applicable requirements. If the applicable requirement does not contain monitoring, then periodic monitoring is required, and CAM may apply. However, amending these sections clarifies that reports must address monitoring covered by an applicable requirement, and the definition of applicable requirement includes CAM or periodic monitoring as required by the permit.

Comment

TIP requested that §122.142(b)(3) be amended to allow preconstruction authorizations to be incorporated into operating permits by reference.

Response

The commission does not change the rule in response to this comment. Section 122.142(b)(3) was added in response to an inconsistency identified by the EPA to ensure that NSR authorizations will be included in the permit content requirements of Chapter 122. As a part of the implementation process for the inclusion of preconstruction authorizations in operating permits, one option is to incorporate by reference. The commission does not believe it is necessary to specify in the rule how preconstruction authorizations will be included in operating permits.

Comment

PC commented that §122.142(c) is inconsistent with 40 CFR §70.6(a)(3)(i)(B) in that the executive director has discretion to implement periodic monitoring. The citation should be deleted and replaced with text that is consistent with 40 CFR §70.6(a)(3)(i)(B).

Response

The commission does not change the rule in response to this comment. Title 40 CFR §70.6(a)(3)(i)(B) requires that where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of an emission unit's compliance with the permit. In the rulemaking completed in 2000, the commission amended §122.142(c) so that it tracks the language in 40 CFR §70.6(a)(3)(i)(B). However, §122.142(c) does specify that permits contain periodic monitoring as required by the executive director. The executive director makes a determination of what periodic monitoring requirements are needed at initial permit issuance. The executive director has reviewed all applicable requirements to determine which requirements contained no monitoring. The executive director, working with the EPA, developed acceptable procedures and appropriate monitoring requirements to satisfy the Part 70 periodic monitoring provisions. These requirements are included in initially issued permits. The EPA is agreeable to phasing in the remainder of the needed periodic monitoring requirements. The executive director called in full applications based on Standard Industrial Classification (SIC) codes. CAM and periodic monitoring GOPs are being developed and phased in according to this call-in schedule. Therefore, the commission can ensure that adequate and appropriate CAM and periodic monitoring are available when needed for incorporation into permits.

Comment

PC commented that §122.142(e)(1) is not consistent with 40 CFR §70.6(c)(3). Each emission unit not

in compliance with an applicable requirement at permit issuance must include a compliance schedule and it is not sufficient for the permit to include a reference to a compliance schedule. The compliance schedule should be a clearly enforceable condition in the permit.

Response

The commission does not change the rule in response to this comment. Including compliance plans by reference does not affect the enforceability of such compliance plan. All terms and conditions in the permit are enforceable by the commission, including those incorporated by reference.

Comment

PC commented that the phrase “unless otherwise specified in the permit” be deleted from §122.143 and §122.144; §122.145, and §122.146. Part 70 requires the items listed in these sections to be included in permits.

Response

The commission does not change the rule in response to this comment. The phrase gives the executive director the authority to include site specific conditions when needed. For example, more frequent deviation reporting may be included as a part of a compliance plan.

Comment

PC recommended amendments to §122.143(4) to be consistent with 40 CFR §70.6(a)(6)(i), to specify

that any noncompliance with the terms and conditions of the permit or the provisional terms and conditions is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

Response

The commission agrees with this comment and revises the rule to make it consistent with 40 CFR §70.6(a)(6)(i).

Comment

PC commented that §122.143(8) be amended to be consistent with 40 CFR §70.6(a)(6)(v) by adding the language, “ Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.” Information required to be kept pursuant to a permit is public information and should be accessible to the public, upon request, through the commission.

Response

The commission agrees to amend §122.143(8) to be consistent with 40 CFR §70.6(a)(6)(v) regarding submitting records required to be kept by the permit. The commission does not agree that information claimed to be confidential should be sent directly to the EPA administrator because it could adversely affect the commission’s ability to assure compliance with Chapter 122. The commission agrees that public information should be accessible to the public as prescribed

under Texas Government Code, Title 5, Chapter 552, regarding public information and exceptions from required disclosure and THSC, §382.041 regarding confidential information. In addition, on April 14, 2000, the commission and the EPA entered into a memorandum of agreement regarding the transmission of confidential information to the EPA and in which the EPA agrees to adhere to the provisions of §382.041 and federal law regarding claims of confidentiality.

Comment

PC commented that the word “relevant” and the phrase “which are deemed necessary to characterize emission rates” be deleted from §122.144(1)(F) to be consistent with 40 CFR §70.6(a)(3)(iii).

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission may consider this change for future rulemaking. Chapter 122 requires the records to reflect the operating conditions that existed at the time of sampling or measurement.

Comment

PC commented on §122.145(2)(B). The rules require submission of a deviation report once every six months. Part 70 requires prompt deviation reporting. For many deviations, reporting once every six months is prompt.

Response

The commission agrees with this comment and, therefore, makes no change to the rule.

Generally, the commission agrees that for many deviations six-month reporting is prompt; however, many instances may warrant more frequent deviation reports.

Comment

PC commented on §122.145(2)(B) in that a deviation report should be required even if no deviations have occurred, to state that there have been no deviations. Otherwise, it is impossible for the commission or the public to know whether a facility has had no deviations or simply has failed to submit the required deviation report until the annual compliance report is submitted.

Response

The commission does not change the rule in response to this comment. The commission believes that reporting should be kept to the minimum needed to demonstrate compliance with commission rules. In this case, the commission will interpret the absence of a report to indicate no deviations occurred during the reporting period. All permit holders are required to submit an annual compliance certification report in which they certify that, with the exception of the information attached in the deviation table, all emission units were in continual compliance. If there were deviations, they would be noted in the annual compliance certification.

Comment

Sierra noted an additional loophole in the language in the compliance certifications that allow a facility

to avoid having to admit noncompliance. Citizens have big concerns about upsets, which would be one source of excess emissions where the compliance certifications would allow facilities and the responsible official to basically avoid indicating that they are in noncompliance or exceeding some limitation.

Response

The commission does not change the rule in response to this comment. All deviations must be reported, including those resulting from an upset. In addition, permit holders are required to state if compliance was continuous or intermittent.

Comment

The commission proposed the deletion of §122.145(2)(D). ExxonMobil, TCC and TOGA recommended that the commission keep the citation, with amendments, and recommended the deletion of §122.145(3) because it requires a permit holder to submit redundant upset and maintenance reports already specified by Chapter 101. TIP supported this and further clarified that this will better achieve the commission's goal of eliminating redundant provisions from Chapter 122. The current §122.145(2)(D) prevents duplication of reports by allowing permit holders to reference upset or maintenance reports in a deviation report. Section 122.145(3), however, is redundant as it merely restates a permit holder's obligation to report upset or maintenance activities under Chapter 101. BP pointed out that §122.145(2)(D) explains the relationship between deviation reporting and the reporting required in Chapter 101 and that a deviation may or may not be an upset and vice versa. However, if a deviation were an upset, then they would request that any reporting requirements of Chapter 101 be

sufficient to satisfy any deviation reporting requirements under Chapter 122. Therefore, the commission should either address reporting equivalency in the preamble or add a new §122.145(D) specifying if a deviation is reported and that deviation is an upset per Chapter 101, then the deviation report need only reference the unauthorized emissions, upset or maintenance and start-up and shutdown report containing the details related to the deviation.

Response

The commission changes the rule in response to these comments. After reviewing the comments, the commission believes that §122.145(2)(D) should be retained but with amendments. Because all upsets, regardless of the size, are deviations under Part 70, they must be included in the six-month deviation report. The commission amends §122.145(2)(D) to state that reports submitted under the upset and maintenance rules of Chapter 101 do not substitute for reporting deviations under §122.145(2). The commission will continue to allow owners or operators to reference in six-month deviation reports any reports submitted under Chapter 101 during the reporting period.

Guidance on reporting is available through the commission's regional offices and internet site.

The commission agrees that §122.145(3) simply restates existing requirements and deletes that subsection in the adopted rule.

Comment

PC commented that §122.145(3) states that reports of deviations resulting from upset, maintenance, startup, or shutdown are to be submitted in accordance with Chapter 101, which does not require a certification by the responsible official. Chapter 101 also does not require reporting of these emissions

which are below the reportable quantity and should be clarified to specify how these types of emissions below the reportable quantity be reported. There should also be a clear requirement that these type of emissions comply with all Part 70 deviation reporting requirements.

Response

The commission does not change the rule in response to this comment. As previously discussed, the commission is deleting §122.145(3). However, any upset regardless of the amount of emissions resulting from it must be included in a six-month deviation report and is subject to the same certification requirements as any deviation report. An upset reported under §101.6 need only be referenced in the deviation report. Those upsets resulting in emissions that need not be reported under §101.6 must appear in the six-month deviation report with all information as required by Part 70.

Comment

BP commented on §122.146. They suggested that the commission use available information/format of the CAM/PM programs, for example, to simplify the requirement for annual compliance certifications to identify whether the methods used to certify compliance for each emission unit are continuous or intermittent.

Response

The commission does not change the rule in response to this comment. Section 122.146(5)(A) specifies that the annual compliance certification must include or reference the term or condition for which compliance is being certified, the method used for determining compliance, and whether

the method provides continuous or intermittent data. This information is contained in the periodic monitoring or CAM GOP and could be referenced for the annual compliance certification. However, the permit holder is still required to state whether the emission units were in continuous compliance.

Comment

PC commented that the EPA is not receiving compliance certifications pursuant to §122.146(2), as is required by 40 CFR §70.6(c)(5)(iv). These documents were supposed to have been available on-line, but are not, and it is, therefore, impossible for the EPA to perform its required oversight. Operating permits should include a requirements that the permit holder submit compliance certifications to the commission and the EPA, as is required by Part 70.

Response

The commission changes the rule in response to this comment. The commission amends §122.146(2) to specify that the permit holder must submit a copy of the certification to the EPA administrator. The commission is unaware of any situation for which the EPA has not been able to perform its required oversight functions.

Comment

PC commented that the commission's compliance certification rules limit the evidence that a facility must consider when determining compliance, facilities should not be exempt from reporting a violation because it was discovered through some method other than monitoring required by the permit, and that

the information required in §122.146(4) is insufficient to ensure that facilities are reporting all known compliance due to the narrow definition of deviation. PC commented that the compliance status of a facility, as determined by §122.132(e)(4)(B), should not be determined solely by “any compliance method specified in the applicable requirements”. PC explained that this excludes testing, reporting, recordkeeping and monitoring requirements added to the permit to satisfy the periodic monitoring and compliance assurance monitoring requirements in Part 70. PC stated that the compliance status should be based upon all information available as required by EPA regulations. PC expressed that responsible officials with information that a facility is not in compliance with an applicable requirement must state that the facility is out of compliance and asserted that the commission’s regulations should make this requirement clear.

Response

The commission changes the rule in response to this comment. The commission adds clarification to §122.132(e)(4)(B) and §122.146(4) to specify that the determination of compliance status will be based on, at a minimum, but not be limited to, compliance methods specified in the applicable requirements. The commission also revises the definition of deviation.

Comment

PC commented that the compliance certification form is inconsistent with EPA and TNRCC rules.

Response

The commission does not change the rule in response to this comment. The commission acknowledges that the form does not require a list of applicable requirements or a description of the method used for determining compliance for all instances. Instead, the form requires this information for all deviations, and it must certify that the company was in continuous compliance with all terms and conditions in the permit, except for the identified deviations. The form will also be revised to address Part 70 revisions to require certification of intermittent compliance. The commission believes that its form requires all appropriate information.

Comment

TCC commented that the annual compliance certification information required in §122.146(5) for each emission unit could be overly burdensome, especially for larger sites. TCC also stated that the information on the method used for determining the compliance status of each emission unit and whether such method provides continuous or intermittent data will already be contained in a CAM or periodic monitoring GOP and that the commission should clarify that these references can be used to meet §122.146(5).

Response

The commission does not change the rule in response to this comment because §122.146(5) already allows reference to terms and conditions of the permit, which includes CAM or periodic monitoring GOPs. Section 122.146(5) is consistent with 40 CFR §70.6(c)(5)(iii) which specifies prescriptive compliance certification information.

Comment

PC commented that 40 CFR §70.6(c)(5)(iii) requires the compliance certification to include the information listed under §122.146(5). The commission should delete the statement in §122.146(5) that the compliance certification could reference the information, since it is not clear how any referenced information would be subject to the required certification by responsible official.

Response

The commission does not change the rule in response to this comment. Title 40 CFR §70.6(c)(5)(iii) specifies that the compliance certification should include the information required in 40 CFR §70.6(c)(5)(iii)(A) - (D). The identification of applicable information may be done by cross-referencing the permit or previous reports, as appropriate. The Permit Compliance Certification Form allows a permit holder to reference previously submitted deviation reports, thus the referenced information is subject to the required certification by the responsible official.

Comment

PC commented that §122.146(5)(A) is inconsistent with 40 CFR §70.6(c)(5)(3)(B), which specifies that the compliance certification should include a statement indicating whether the compliance methods used for certification provide continuous or intermittent data.

Response

The commission agrees with the comment. The language recommended by PC was added to Chapter 122 in the proposal package published in the January 26, 2001 issue of the *Texas Register*. The commission adopts the language in this rulemaking.

Comment

PC commented on §122.148(b), Permit Shield. All information required by 40 CFR §70.6 should be submitted in an application before the agency makes a determination regarding qualification for a permit shield.

Response

Section 122.148 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. However, the commission believes that §122.148(b) does require sufficient information because it requires compliance with §122.132(e)(2), (3), and (8). These subsections require the submission of information regarding general applicability determinations and specific regulatory citations. Title 40 CFR §70.6(f), which specifies the requirements for permit shields, does not specify that all information required by 40 CFR §70.6 be submitted in an application before the executive director makes a permit shield determination.

Comment

PC commented that §122.148(c) is extremely confusing and should be amended to clearly track the

requirements of 40 CFR §70.6(f) regarding permit shields and 40 CFR §70.6(a)(3)(A) regarding streamlining. Also, the source of the commission's authority to grant a permit shield for state-only requirements is unclear. Such authority should be identified or state-only provisions should be deleted from the rule.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the §122.148 permit shield requirements are consistent with Part 70. Section 70.6(f)(1)(ii) allows permitting authorities to determine that certain requirements are not applicable to a source. Section 122.148(c) refers to this “negative applicability determination” as “potentially applicable requirements.” Section 122.148(c)(2) is consistent with 40 CFR §70.6(f)(1) because it specifies that the permitting authority may include a provision in operating permits stating that compliance with the conditions of the permit shall be deemed in compliance with any applicable requirements, or in the case of Chapter 122, potentially applicable requirements. Additionally, §122.148(c)(1)(B) enables the executive director to perform stringency determinations to eliminate duplicative, redundant and/or contradicting requirements. This is consistent with 40 CFR §70.6(a)(3)(i)(A), which states that the permit may specify a streamlined set of monitoring or testing provisions if more than one requirement applies. Although Part 70 does not require the inclusion of state-only requirements, the commission chose to include such requirements in permits to provide a more complete enforcement tool. The commission has the authority to establish rule requirements to provide for compliance with all rules and regulations.

Comment

PC commented on §122.148(c)(1)(A). Chapter 122 should clarify that a negative applicability shield must include a written determination, or concise summary thereof, explaining the agency's determination that the listed requirements are not applicable to the specified emission unit.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. If a permit shield is requested and approved, the executive director includes a permit shield section in the operating permit that provides a basis for the permit shield determination. The commission believes this meets the 40 CFR §70.6(f)(1)(ii) permit shield requirements.

Comment

PC commented that §122.148(e) should be deleted since permit shield modifications should follow revision or reopening procedures. PC also commented that a statement should be added to §122.148(f) and §122.210(c) to specify that minor permit revisions are not eligible for a permit shield pursuant to 40 CFR §70.7(e)(2)(vi). Also, a statement should be added that administrative revisions are not eligible for a permit shield, except for those cases that are specified in 40 CFR §70.4(d)(4).

Response

The commission revises §122.219 in response to this comment. However, §122.148 was not proposed for amendment by the commission; therefore, under Texas administrative law, the

section cannot be amended to incorporate the suggested comments at this adoption. For consistency with 40 CFR §70.7(e)(2)(vi), the commission specifies in §122.219 that a change to a permit shield must follow significant permit revision procedures. This is consistent with the previous requirements of §122.219(9). In addition, when the executive director determines that a permit shield must be amended to assure compliance with the applicable requirements, the permit will be reopened as required by §122.231. Section 70.4(d)(4) only applies to permit shield revisions for permits issued under an interim program. The operating permits issued under the interim program did not contain a permit shield for minor NSR because it was not an applicable requirement.

Comment

PC commented that a provision should be added to §122.161, Miscellaneous, stating that the commission shall not grant an emergency order excusing violations of operating permits.

Response

Section 122.161 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. Under TWC, §5.501, the commission may issue emergency orders to temporarily suspend or amend a permit condition. This action would only be taken to protect public safety or welfare, and the specific conditions causing the issuance of the order cannot be predicted. The order does not excuse violations of operating permits but would only temporarily suspend the conditions.

Comment

PC commented on §122.165(a). The list of documents that require a signed certification of accuracy and completeness should specifically include deviation reports and upset, maintenance, startup and shutdown reports.

Response

Section 122.165 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. The commission does not agree with this comment because deviation reports are required by the permit and, therefore, are required to be certified in accordance with §122.165(a)(7). A deviation report should include all unauthorized upset, maintenance, start-up, and shutdown emissions or make reference to them.

Comment

PC commented that §122.201(a), Initial Permit Issuance, should be amended to be consistent with 40 CFR §70.7(a)(5) which requires the commission to provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to applicable statutes or regulatory provisions) to the EPA and any other persons who request it. The commission's rules should be amended to require the preparation of such a statement prior to the beginning of the public comment period.

Response

The commission does not change the rule in response to this comment. The executive director does not prepare a specific “statement of basis” for each permit, but rather has implemented this Part 70 provision by developing a permit that states a regulatory citation for each applicable requirement. The commission is unaware of any self-implementing statutory requirements that do not have parallel regulatory provisions. These permit conditions are based on the application and the technical review which includes a site inspection. The commission believes including this detail in the permits meets the requirements of Part 70 for including a statement of basis.

Comment

PC commented on §122.201(a)(1). A permit or a draft permit for public review should not be issued before the executive director has received a complete application containing all of the requirements in 40 CFR §70.5.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the commission would like to clarify that a draft permit is not made available for public notice nor is a permit issued until the executive director has requested, received, and completed a technical review of an application that contains the requirements in §122.132(a) and (e), except for phased permits which comply with the requirements contained in §122.131. As previously stated, the commission believes that §122.132 is consistent with the requirements contained in 40 CFR §70.5(c).

Comment

PC commented that §122.201(a)(2) is inconsistent with 40 CFR §70.7(a)(1)(iv). It should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122. PC commented that §122.217(f)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122, for consistency with 40 CFR §70.7(a)(1)(iv).

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission may consider this comment for future rulemaking. However, §122.201(a)(2) requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires that all applicable requirements be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

PC commented on §122.201(c). Title 40 CFR §70.7(a)(1)(v) requires that the EPA has received a copy of the permit application and any notices before the permit may be issued and it is not sufficient for the commission's rules to provide that the permits are accessible to the EPA. These copies must be submitted to the EPA, even if they are only sent electronically.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The EPA commented on the requirement, appearing throughout the October 1997 rulemaking, that information be submitted to the EPA upon written request. The EPA requested that the rule instead require the information to be made accessible by electronic means. To accommodate this request, the commission currently provides the EPA electronic access to application and permit information.

Comment

PC commented that the phrase, “unless the executive director allows for a shorter period due to an emergency,” be deleted from §122.204(f) because 40 CFR §70.6(e) does not provide for exceptions to the requirement that temporary sources notify the state ten days in advance of a change in location.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission believes that the emergency provision in §122.204(f) will be used infrequently and is a reasonable procedure.

Comment

PC commented that §122.204(h) be added, consistent with 40 CFR §70.6(e), to require that permits for temporary sources include conditions that will assure compliance with all applicable requirements at all authorized locations.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. A change in location does not relieve the temporary source from the obligation to have a permit that assures compliance with all applicable requirements. The commission does not believe that such an addition would be necessary since §122.204(b) requires that an owner or operator of any temporary source apply for a permit consistent with Chapter 122.

Comment

BP and TCC requested that the commission specifically define the changes at a site which alter or change the applicable requirements contained in the permit as stated in §122.210(a).

Response

After reviewing the comment, the commission is not adopting the proposed revisions to §122.210(a). The commission has defined criteria for changes which would be administrative, minor, and significant revisions.

Comment

PC commented that §122.210(b) be amended to specify that permit applications and notices be provided to the EPA to be consistent with 40 CFR §70.7(a)(1)(v) and (d)(3)(ii). The commission should provide a copy to the EPA rather than just make the documents accessible to the EPA.

Response

The commission does not change the rule in response to this comment. In the adoption preamble to the October 1997 Chapter 122 rulemaking, the EPA commented on the requirement appearing throughout the rule that information be submitted to the EPA. In response to this comment, the commission amended the rule to specify that information will be made accessible to the EPA.

Comment

PC commented that §122.211(4) should require that the written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permit holder be submitted to the commission to be consistent with 40 CFR §70.7(d)(iv). PC commented identically on §122.503(a), Application Revisions for Changes at a Site.

Response

The commission does not change the rule in response to this comment. Part 70 does require the submission of a written agreement. However, the commission does not believe it is necessary or appropriate to require an entire agreement to be submitted since such documents may be large and contain extraneous information. The commission can easily access this information, since it will be kept with the permit, and the permit holder must still provide information regarding the transfer as part of the application. Section 122.211(4) and 122.503(a)(3) require that this information be maintained with the permit at the site which makes it available to the commission when needed.

Comment

PC commented that the meaning of §122.211(5) is unclear. BP and TXOGA concurred with §122.211(5) because it allows the incorporation of the requirements from preconstruction authorizations as an administrative permit revision.

Response

The commission does not change the rule in response to this comment. The commission proposed and is adopting §122.211(5), which is consistent with 40 CFR §70.7(d)(1)(v), to provide flexibility in the future to incorporate specified preconstruction review requirements into operating permits. Section 122.211(5) specifically states that the incorporation of preconstruction authorization requirements is an administrative revision provided that the program meets procedural requirements substantially equivalent to those of Chapter 122, Subchapters C and D, and compliance requirements substantially equivalent to those contained in §§122.143, 122.145, and 122.146. The commission may initiate a separate rulemaking to establish an option for enhanced NSR procedures to allow an administrative permit revision to be used to incorporate changes requiring minor NSR authorizations.

Comment

TXOGA requested clarification that new federal or state regulations which have undergone public comment and participation and for which there are also no changes at the site fall within the description of §122.211(7) in that they are similar and, if EPA-approved, are therefore administrative revisions.

Response

The commission does not change the rule in response to this comment. The type of change mentioned by TXOGA does not meet the criteria in §122.211(7) because the change is not similar to the changes in §122.211(1) - (6).

Comment

TCC requested that the commission clarify that changes to an operating permit resulting from the renumbering of citations in a regulation is an administrative permit revision. BP commented that the commission clarify in the preamble that administrative changes in regulatory language (renumbering, rule citations, or the like) are not, in and of themselves, applicable requirements triggering a permit revision.

Response

The commission does not change the rule in response to this comment. However, §122.211(7) affords the EPA the opportunity to approve similar changes. Any EPA-approved type of administrative revision will be posted to the Air Permits web page and included in updated revision guidance.

Comment

PC commented that §122.212 and §122.213(a) and (d) appear to authorize changes at a site that would require an administrative permit revision to be operated before an administrative permit revision application is submitted, which is inconsistent with 40 CFR §70.7(d)(3)(iii).

Response

The commission does not change the rule in response to this comment. Part 70 does require an application for an administrative permit revision to be submitted prior to operating the change. However, the commission believes that the use of provisional terms and conditions coupled with the recordkeeping requirement and the fact that the sources must always be in compliance with the applicable requirements and provisional terms and conditions justifies this insignificant variation from Part 70.

Comment

TCC suggested that the commission delete §122.213(a)(1)(A) - (C) to be consistent with Part 70. Part 70 only specifies that sources may implement the changes as requested in the administrative permit revision immediately after submittal, but makes no reference regarding the applicable requirements contained in §122.213(a)(1)(A) - (C). TIP and ExxonMobil supported this but commented that the entire §122.213(a)(1) be eliminated to make the administrative permit revision procedures consistent with Part 70. Furthermore, read literally, §122.213(a)(1) would not allow a permit holder to proceed with an administrative revision at the site if any emission unit at the site is not in compliance with an applicable requirement, state only requirement or provisional term or condition. This was not the intent of the Title V program and is inconsistent with Part 70. Typographical errors were also identified in the existing §122.213(a)(2) and (3). TXOGA supported TIP comment and added that §122.213(a) was not a Part 70 requirement and is not pertinent to the types of revisions that are administrative in nature.

Response

The commission agrees with these commenters and deletes §122.213(a)(1). The requirements contained in §122.213(a)(1)(A) - (C) are not required by Part 70.

Comment

PC stated that it was supportive of Chapter 122 amendments that were adopted in the October 1997 rulemaking, including the elimination of “off-permit” changes formerly contained in §122.215, the requirement in §122.132(e)(4)(C)(iii) specifying that compliance schedules be at least as stringent as that contained in any judicial consent decree or administrative order, and the elimination of the “interpretation shield” from §122.145(e).

Response

The commission appreciates the comment.

Comment

TIP, ExxonMobil, and TCC requested clarification in the preamble that the deletion of “off-permit” changes does not limit a permit holder’s ability to make changes to sources that qualify for the Off-Permit Application Sources and Activities (OPASA) list. BP supported this and suggested clarification in the preamble that “off-permit” changes are not the same as the OPASA list.

Response

The commission does not change the rule in response to these comments. The commission agrees that “off-permit” changes and sources that qualify for the Off-Permit Application Sources and

Activities (OPASA) list are different. Also, the deletion of “off-permit” in the October 1997 Chapter 122 rulemaking does not limit a permit holder’s ability to make changes to sources that qualify for the OPASA list.

Comment

BP and TCC requested clarification for the type of permit revisions that would be required for major NSR/PSD, minor NSR, permits by rule, and newly promulgated requirements. Further, at a minimum, revisions related to changes which are minor NSR revisions within Chapter 106 and Chapter 116 should be minor operating permit revisions. Changes that trigger Federal NSR and PSD requirements should require significant operating permit revisions. TCC further commented that the incorporation of newly promulgated requirements which: 1.) do not require a change at the site should be administrative operating permit revisions; and 2.) do require a change at the site should be minor revisions. BP commented that the incorporation of new rule requirements, like a new MACT requirement, should be handled as an administrative permit revision. For example, MACT standards pursuant to §112(g) or (j) that have already undergone public notice should be included in the permit as an administrative revision. BP commented that the revision process must be clear, concise, and must not unduly hinder operators from conducting their business. Part 70 language is vague and is subject to interpretation by the commission. BP also commented that minor permit revisions should continue to be the default revision type, since large, complex facilities will likely be required to constantly revise operating permits if significant revisions are the default revision type. TXOGA also commented that a greater number of significant changes will render the program unworkable. BP suggests that incorporation of new rule requirements be typically handled as administrative permit revisions unless the change triggers

PSD/major NSR permitting actions. ExxonMobil commented that the operating permit process should be reasonable and meaningful. Significant revisions should reflect changes associated with PSD and Major NSR; changes associated with minor NSR and standard permits should be minor revisions; and changes qualifying for a permit by rule or a rule renumbering should be administrative revisions.

Response

Based on negotiations with EPA regarding its comments pertaining to the incorporation of minor NSR, actions authorizing new facilities through minor NSR permits and amendments will be considered off-permit changes, as specified in §122.222, when no other applicable requirements in the permit are affected. If rules are revised to include the option for enhanced NSR procedures, the following activities will be considered administrative revisions: 1.) new or modified facilities under permits by rule or standard permits and 2.) facilities authorized to be modified through minor NSR permits or amendments. NSR activities such as address changes are currently administrative permit revisions. Minor NSR permits involving major PSD or nonattainment netting will be considered minor permit revisions. PSD, nonattainment NSR, FCAA §112(g) or (j), and significant changes to monitoring will be considered significant revisions.

In the preamble to the proposed Part 70, EPA stated in Footnote 6 what it believed to be a Title I modification. EPA concluded that a Title I modification would include a modification under §111, §112(g) and (j), PSD and nonattainment permitting (56 FR 21712, 21747). In the July 1, 1996 *Federal Register* promulgating the 40 CFR Part 71 rule (61 FR 34202), the EPA discussed the status of the definition of Title I modification. The EPA stated that it “is not yet prepared to

adopt a final definition for the term, in implementing the Phase I Part 71 program {and} EPA will treat the issue consistently with the approach the Agency has advised states to take under the current Part 70 regulation. Consequently, it will not consider Title I modifications to include changes subject to state minor NSR programs.” (61 FR 34213).

Changes to qualified facilities under §116.116(e) or changes to facilities covered under a flexible permit under Chapter 116, Subchapter G that are not considered an amendment under Chapter 116 and that do not add or remove an operating permit applicable requirement are not envisioned to be a change subject to any revision process under Chapter 122, when the operating permit contains §116.116(e) and/or §116.710(a) as an applicable requirement. Permit holders must ensure that operating permits contain all potential operating scenarios that may be needed for the flexible permit or changes to qualified facilities to avoid unnecessary operating permit revisions. In addition, the operational flexibility provisions contained in §122.222 allow the removal of a unit from the site without requiring a permit revision when the applicable requirements for any other unit remaining in operation at a site are not affected.

Newly promulgated regulations that add new applicable requirements will be incorporated in a permit under the reopening process contained in §122.231 or the renewal process. The commission does not believe that the incorporation of new rule requirements, such as a MACT,

meets the criteria under 40 CFR §70.7(d)(1)(v) because this clause is specifically limited to preconstruction review permits.

Comment

TXOGA requested clarification as to the threshold at which changes at a site are minor. The intent of Part 70 for changes to be significant under FCAA, Title I appears to be the definition of modification under Title I. Therefore, all revisions related to changes which are minor NSR revisions within Chapter 106 or Chapter 116 should be minor revisions and all changes at a site which trigger federal NSR and PSD requirements should be significant. At a minimum, changes are minor which fall under the thresholds of 40 CFR §70.7(e)(3). TXOGA requested that the commission establish an alternative threshold as allowed in §70.7(3) at the level of major versus minor NSR.

Response

The commission does not change the rule in response to this comment. The commission believes that adding a threshold at which changes at a site are minor is inconsistent with Part 70 which requires that any case-by-case determination be a significant revision and thus would not qualify for a revision under 40 CFR §70.7(3). As discussed previously, the commission agrees that changes under Chapters 106 and 116 that do not involve a case-by-case determination can be minor permit revisions.

Comment

The EPA commented that the commission proposes to submit §§122.215 - 122.218 as a revision to the SIP to satisfy 40 CFR §70.7(e)(2)(i)(B), which provides that minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable SIP or in applicable requirements promulgated by the EPA. The EPA pointed out that §§122.215 - 122.218 only address the process for using minor permit modification procedures and do not include the SIP requirements to implement requirements involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches. Those regulations must be part of the SIP before minor permit revision procedures can be used to include these items in operating permits. Approval of §§122.215 - 122.218 alone do not satisfy 40 CFR §70.7(e)(2)(i)(B).

Response

The commission adopted Chapter 101, Subchapter H, Emissions Banking and Trading, and submitted it as a SIP revision. It is the rules contained in Chapter 101, Subchapter H to which §122.218 refers.

Comment

PC commented that §122.215(2) should be amended to specify that a minor permit revision does not involve significant changes to, or relaxation of, existing monitoring, reporting, or recordkeeping requirements in the permit, for consistency with 40 CFR §70.7(e)(4). PC also commented that

§122.219 be amended to specify that every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant, for consistency with 40 CFR §70.7(e)(4).

Response

The commission changes the rule in response to this comment. Consistent with 40 CFR §70.7(e)(4), the commission adopts a new §122.219(b) to specify that, at a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. The commission also clarifies under what conditions it is not a significant revision to remove existing monitoring, reporting, or recordkeeping for a unit removed from the site. In new §122.222(b), the commission clarifies that removing a unit from the site that does not otherwise change another unit's applicable requirements can be removed through operational flexibility. Lastly, the commission wishes to clarify that §122.215(2) is consistent with 40 CFR §70.7(e)(i)(2) and remains unchanged.

Comment

PC commented that a new §122.216(6) should be added to require minor permit revision applications to include the emissions resulting from the change and any new applicable requirements that will apply if a change occurs, for consistency with 40 CFR §70.7(e)(2)(ii)(A).

Response

The commission agrees with the comment and adds new §122.216(6) to require minor permit revision applications to include the emissions resulting from the change. This is consistent with 40 CFR §70.7(e)(2)(ii)(A). The incorporation of minor NSR will include any emissions resulting from a change. In addition, Chapter 122 currently requires that minor permit revision applications include any new applicable requirements that will apply if a change occurs. Section 122.216(3) specifies that an application for a minor permit revision include provisional terms and conditions that codify the new applicable requirements. The concept of provisional terms and conditions is consistent with 40 CFR §70.7(e)(2)(v).

Comment

PC commented that a new §122.216(7) should be added to require minor permit revision applications to include completed forms for the permitting authority to use to notify the EPA administrator and affected states, for consistency with 40 CFR §70.7(e)(2)(ii)(D).

Response

The commission does not change the rule in response to this comment. The commission implements a practical and appropriate process to notify the EPA and affected states of minor permit revision applications. This includes electronically accessible information, recommended by the EPA in its comments on the October 1997 Chapter 122 rulemaking. The commission proposed amendments to §122.217(e) to specify that the executive director notify the EPA and affected states of requested minor permit revision applications, consistent with 40 CFR §70.7(e)(2)(iii). In

addition, §122.330(c) and (d) requires the executive director to notify affected states of minor permit revisions and provides the opportunity for affected states to comment. The commission, therefore, considers it unnecessary for permit holders to complete forms for the executive director to use to notify the EPA and affected states of minor permit revisions.

Comment

TCC commented that §122.217(a)(1)(A) - (C) and (b)(1)(A) - (C) imply that the permit holder is required to be in compliance with every applicable requirement for every emission unit at the site in order to implement the change for a minor permit revision. The citations should be amended to specify that the permit holder complies with applicable requirements, state only requirements and provisional terms and conditions governing the change. TXOGA supported the suggested amendment. TIP and ExxonMobil also supported this and further added that their suggestion would be consistent with 40 CFR §70.7(e)(2)(v). BP suggested using the phrase, “concerning the change.”

Response

The commission agrees with the comment and amends §122.217(a)(1)(A) - (C) and (b)(1)(A) - (C) to specify that the permit holder must comply with applicable requirements, state only requirements, and provisional terms and conditions governing the change. This is consistent with 40 CFR §70.7(e)(2)(v), which specifies that a site may operate a change after submitting a minor permit revision application and must comply with both the applicable requirements governing the change and the proposed permit terms and conditions.

Comment

TXOGA requested verification that §122.217(b) refers to newly promulgated rule requirements which cause a change at the site. Part 70 does not contemplate new rule requirements causing a minor revision where no change was required at the site. New requirements that are simply promulgated but do not require any change at the site meet the criteria for administrative permit revisions.

Response

The commission changes the rule in response to this comment. The commission deletes the language in §122.217(b) that relates to changes to a permit required as the result of the promulgation or adoption of an applicable requirement. This language should have been deleted in the Chapter 122 proposal because it is inconsistent with Part 70 and other amended sections of Chapter 122. Even if no change at the site is required, the incorporation of newly promulgated or adopted applicable requirements could result in an administrative permit revision, a significant permit revision, or a permit reopening depending on the requirements of the new applicable requirement.

Comment

BP commented that §122.217(b)(2) should be revised to retain the 45-day period for information submittal.

Response

The commission believes that incorporating this comment would be inconsistent with Part 70.

Title 40 CFR §70.7(e)(2)(v) allows a source to make a change qualifying for a minor permit revision immediately after an application is filed. Because a site is required to be in compliance by the compliance date of a requirement, any appropriate changes must be in place. Therefore, the application, including provisional permit terms and conditions, must be submitted prior to making the change contemplated by the revision.

Comment

PC commented that §122.217(e) should be amended to state that the executive director shall promptly notify the EPA and affected states of any refusal to accept all recommendations that the affected state submitted during the public or affected state review period, for consistency with 40 CFR §70.8(b)(2).

Response

The commission does not incorporate this comment in the rule because the requirement is already addressed in §122.330(e).

Comment

PC commented that §122.217(f)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122 for consistency with 40 CFR §70.7(a)(1)(iv).

Response

The commission does not change the rule in response to this comment. Section 122.217(f)(3)

requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires all applicable requirements to be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

TCC was supportive of the commission's proposed §122.218, making permit revisions involving the use of economic incentives, marketable permits, and emissions trading minor permit revisions.

TXOGA was also supportive, but also requested clarification that only changes in the requirements of these programs are revisions to the permit and that any individual trade or use of an emission credit within an approved program is not a revision to the permit. PC requested clarification of the types of changes that can qualify for minor permit revision under §122.218, involving economic incentives, marketable permits, or other similar approaches.

Response

The commission does not change the rule in response to this comment. Part 70 specifies that any revisions involving the use of economic incentives, marketable permits, and emissions trading qualify as a minor permit revision. The commission does not believe that Part 70 requires that each trade or use of an emission credit under Chapter 101, Subchapter H result in a minor revision because Chapter 101 specifies how and when each emission credit may be traded or used. Chapter 101, Subchapter H is included in the definition of applicable requirement. If a permit

revision was necessary every time a trade was made, the flexibility provided by such programs would be reduced.

Comment

PC commented that §122.221(b)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements for consistency with 40 CFR §70.7(a)(1)(iv).

Response

Section 122.221(b)(2) requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires all applicable requirements be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

BP supported the incorporation of operational flexibility.

Response

The commission appreciates the comment.

Comment

PC commented that §122.222 appears to allow changes that contravene an express permit term without

a permit revision and that these changes will not be subject to review by the public, affected states, the EPA, or even the executive director. Also, these changes will not be incorporated into the permit until renewal, which may be longer than five years, depending on the pace of renewal application processing. Therefore, the commission should define and limit the types of changes allowed under §122.222. Section 122.222(3) states that the change may not exceed emission limits in the permit, but it does not address the type of emissions. PC questioned whether a new pollutant could be emitted under this section that is not addressed by the permit, whether a permit holder could make changes that would require different control technologies under §122.222, whether any changes in monitoring, recordkeeping, reporting or compliance certification would be allowed under this section, whether changes made under this section would be subject to annual compliance certification or deviation reporting, and whether Chapter 122 would specifically list any change that could occur under §122.222 and the commission should provide an opportunity for the public and the EPA to comment on the list.

Response

The Chapter 122 operational flexibility provisions are consistent with the Part 70 definition of “§502(b)(10) changes” and the provisions of 40 CFR §70.4(b)(12)(i). The commission includes this amendment in response to an EPA comment noting that Chapter 122 must be revised to include the Part 70 provisions for operational flexibility. The rule as adopted defines the criteria for changes that meet the conditions for operational flexibility. Part 70 does not require the changes for operational flexibility to be incorporated into permits at renewal, but only requires the notice to be attached to the permit. An attempt to further define these changes in the rule may unnecessarily limit those changes that would otherwise qualify under the criteria set forth by Part

70, which does not require the state to list or further define operational flexibility in their implementing rule. The commission will develop guidance and seek input from interested parties concerning the implementation of operational flexibility provisions.

Comment

The EPA commented that §122.222(a)(4) may conflict with §122.222(a)(1). Many preconstruction authorizations are also Title I modifications. Therefore, §122.222(a)(4) could be inconsistent with §122.222(a)(1) and with 40 CFR §70.4(b)(12) which exclude Title I modifications. The commission should clarify which types of preconstruction authorizations would not be Title I modifications and §122.222(a)(4) should be revised to clarify that it does not include preconstruction authorizations which are also Title I modifications.

Response

The commission agrees with this comment and changes §122.222(a)(4) to specify that such preconstruction authorization cannot be a Title I modification. The commission also agrees that clarification is needed for the types of preconstruction authorizations that are Title I modifications. In the July 1, 1996 *Federal Register* promulgating the 40 CFR Part 71 rule (61 FR 34202), the EPA discussed the status of the definition of Title I modification. The EPA stated that it “is not yet prepared to adopt a final definition for the term, in implementing the Phase I, Part 71 program {and} EPA will treat the issue consistently with the approach the Agency has advised states to take under the current Part 70 regulation. Consequently, it will not consider Title I modifications to include changes subject to state minor NSR programs.” (61 FR 34213). As

discussed previously, the commission believes that the only actions that are Title I modifications are modifications under §111, §112(g) and (j), PSD and nonattainment permitting.

Comment

The EPA commented that, although a time frame for written notification to the executive director is specified, §122.222 does not set a time frame for written notice to the EPA. Title 40 CFR §70.4(b)(12) specifies that written notification be submitted to the state and the EPA.

Response

The commission agrees with this comment and changes §122.222(c) to specify that written notification must also be submitted to the EPA on the same schedule as to the executive director.

Comment

The EPA commented that §122.222 does not include the provisions in 40 CFR §70.4(b)(12)(iii), a requirement that the state program must include in order to receive full program approval.

Response

The commission agrees with this comment and adds new §122.222(e) to specify the requirements in 40 CFR §70.4(b)(12)(iii). The commission also adds new §122.222(d) to incorporate the operational flexibility requirements in 40 CFR §70.4(b)(12)(ii).

Comment

TIP requests amendments to §122.222(b) that will allow operational flexibility changes with less than seven days advance notice, provided that the commission determines that the shorter advance notice is merited due to an emergency situation. This is consistent with 40 CFR §70.4(b)(12).

Response

In response to this comment, the commission adopts changes to §122.222(c) to specify that notice may be provided to the commission within two working days of the implementation of operational flexibility changes due to an emergency. Such notice shall also include an explanation of the emergency. For clarification the commission amends §122.222(c) to specify that written notice must be submitted to the commission and EPA at least seven days in advance of the proposed change, except for an emergency.

Comment

The EPA commented that §122.231 must be amended to comply with 40 CFR §70.7(f)(2). The commission proposed to amend §122.231 to require the commission to institute proceedings to reopen permits to incorporate minor NSR no later than renewal of the permit. The commission also clarified in the preamble that the time frame will somewhat correspond with the renewal date of a permit. Thus, the commission will not incorporate minor NSR into some permits for up to five years. The EPA finds this unacceptable and states that 40 CFR §70.7(f)(2) requires that all reopenings for new applicable requirements be completed within 18 months after promulgation of applicable requirements. PC agreed with the EPA. Operating permits should be reopened, within 18 months to add minor NSR

requirements, as specified in 40 CFR §70.7(f)(1)(i). Likewise, the proposed amendment to §122.231(d) should not be made.

Response

The commission does not change the rule in response to this comment. The commission acknowledges that minor NSR will have to be incorporated over a period of time and thus will institute proceedings to reopen permits in accordance with 40 CFR §70.4(d)(3)(ii)(D). The majority of the permits issued thus far have been authorizations to operate under GOPs. However, the commission anticipates that the majority of permit holders operating under a GOP (almost 900) will apply for the executive director issued GOPs by October 26, 2001. These GOPs by rules are required to be renewed by October 26, 2001. Because of the extensive changes to the applicable requirements in every GOP, the commission is not renewing the GOPs by rule. Instead, the executive director will issue new GOPs which will include minor NSR. The executive director will institute proceedings to reopen previously approved authorizations to operate. Each owner or operator authorized to operate under a GOP by rule will be required to apply for a new authorization to operate under the executive director issued GOP or submit an application for a site operating permit (SOP).

The EPA raises two issues in its comments concerning the incorporation of minor NSR permits into operating permits. First, the EPA states that 40 CFR §70.7(f)(2) requires all reopenings for new applicable requirements to be completed within 18 months after promulgation of applicable requirements. Since minor NSR will be a new applicable requirement, §122.231 must be revised

to comply with §70.7(f)(2). {The 18-month requirement is actually in 40 CFR §70.7(f)(1)(i)}.

Second, the EPA notes that the June 20, 1996 *Federal Register* notice which revised Part 70 to allow for a streamlined reopening process to incorporate minor NSR permit terms into operating permits did not “contemplate that minor NSR could be excluded until renewal, which could be up to five years after full program approval.” Read together, the EPA’s comment is that minor NSR is a new applicable requirement and, as such, must be incorporated into operating permits under the 18-month deadline in §70.7(f)(1)(i) and not at renewal. This position can be refuted by the actual provisions of Part 70 as it was revised to address the issue of incorporation of minor NSR authorizations.

Minor NSR is not a new applicable requirement subject to 40 CFR §70.7(f)(1)(i). The FCAA, §502(b)(9) provides that permitting authorities “in the case of permits with a term of three or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this Act after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations.” In order to give meaning to the provision in FCAA, §502(b)(9), the assumption must be that Congress anticipated situations where new applicable standards and regulations would be promulgated (Blacks Law Dictionary defines “promulgate” as “to publish; to announce officially; to make public as important or obligatory. The formal act of announcing a statute or rule of court.”) after the operating permit was already issued.

In the preamble to the proposed Part 70 at 56 FR 21745 (May 10, 1991), the EPA stated that it “believes that §502(b)(9) should be read to require that the permitting authority reopen permits for major sources with three or more years remaining in the permit’s life...to incorporate standards and regulations promulgated under the Act which are promulgated after the issuance of such a permit.” In the preamble for the final Part 70 at 57 FR 32256 (July 21, 1992), the EPA stated that “any approvable program, at a minimum, must require that the permitting authority will revise all major source permits with a remaining life of three or more years to incorporate applicable requirements under the Act that are promulgated after the issuance of the permits. Such revisions must be made using the revision procedures that meet the requirements for permit revision and must be made within 18 months after the promulgation of the new requirement. No revision is required if the effective date of the requirement is after the expiration of the permit term.” The EPA implemented §502(b)(9) in 40 CFR §70.7(f)(1)(i) which provides “additional applicable requirements under the Act become applicable to a major Part 70 source with a remaining permit term of three or more years. Such a reopening shall be completed no later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to 40 CFR §70.4(b)(10)(i) or (ii) of this part.”

While the EPA has faithfully implemented the provisions of §502(b)(9) through 40 CFR §70.7(f)(1)(i), it is erroneously applying those provisions to the issue of incorporation of minor NSR. The clear intent of both §502(b)(9) and §70.7(f)(1)(i) is to establish a procedure to

incorporate applicable requirements that are promulgated after the issuance of an operating permit, such as a new NSPS, a MACT, or a new RACT requirement. Section 70.7(f)(1)(i) provides that “such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement.” Although it is true that Chapter 122 is being revised to add minor NSR authorizations to the definition of “applicable requirement,” this does not mean that minor NSR is a new requirement, promulgated after issuance of operating permits, that facilities in Texas must now meet. The EPA has consistently maintained that minor NSR is an applicable requirement. In addition, facilities in Texas have been subject to the minor NSR program since 1971. Minor NSR is not a newly promulgated applicable requirement.

Part 70 does not require reopenings for incorporation of minor NSR authorizations prior to renewal. In the June 20, 1996 *Federal Register* notice (61 FR 31443), the EPA added a new 40 CFR §70.4(d)(3)(ii)(D) to provide a method for the incorporation of minor NSR terms. The EPA states at 61 FR 31444 that it is “adding rule language clarifying that, upon conversion to full approval, permits issued during the interim period would have to be revised or reopened to include any excluded minor NSR terms. Regarding reopening, today’s rule also provides for a streamlined reopening process for excluded minor NSR terms that does not require the full permit issuance process.” The EPA also noted at 61 FR 31446 that “in proposing to allow this type of interim approval, {the EPA} did not contemplate that minor NSR applicable requirements could be excluded until renewal which could be up to five years after full program approval.”

However, in the actual rule text, the EPA did not include a specific deadline for the incorporation of minor NSR terms into operating permits. Nowhere in the June 20, 1996 notice does the EPA refer to the 18-month provision in 40 CFR §70.7(f)(1)(i) as being an element of the streamlined process for the incorporation of minor NSR. Nor does the rule specifically state the minor NSR cannot be incorporated into operating permits at renewal. Section 70.4(d)(3)(ii)(D) provides that a “program receiving interim approval for the reason specified in §70.4(d)(3)(ii)(B) of this section must, upon or before granting of full approval, institute proceedings to reopen Part 70 permits as required by 40 CFR §70.7(f)(1)(iv). Such reopening need not follow full permit issuance procedures nor the notice requirement of §70.7(f)(3), but may instead follow the permit revision procedure in effect under the State’s approved Part 70 program for incorporation of minor NSR permits.”

The EPA could have specified a deadline for reopenings in 40 CFR §70.4(d)(3)(ii)(D) but instead, it required states to “institute proceedings” to reopen operating permits in order to incorporate minor NSR authorizations. Again, the reopening will not incorporate newly promulgated applicable requirements; therefore, the 18-month deadline specified in 40 CFR §70.7(f)(1)(i) does not apply. The commission intends to institute proceedings to reopen permits and authorizations to operate shortly after adoption of the revisions to Chapter 122.

Comment

PC commented that §122.231(a)(1) is inconsistent with 40 CFR §70.7(f)(1)(i) and should be amended to specify that a permit may be reopened if an additional applicable requirement under the FCAA becomes

applicable to a source, for any reason. PC commented that §122.231(a)(1)(A) should be deleted because it is inconsistent with §70.7(f)(1)(i).

Response

The commission does not change the rule in response to this comment. The commission believes §122.231(a)(1) is consistent with 40 CFR §70.7(f)(1)(i) which states that a reopening shall be completed not later than 18 months after “promulgation” of the applicable requirement. Part 70 ties a permit reopening to a rule promulgation and not to “any reason” that an applicable requirement becomes applicable. For example, when the permit holder makes a change at a site that results in a change to applicable requirements in the permit, then the permit revision process under §§122.213 - 122.221 should be used.

Comment

TIP commented that minor NSR authorizations should be incorporated into operating permits for which applications have already been submitted at renewal and not before that time and requested confirmation in the preamble that it will not reopen operating permits until renewal. BP suggested amending §122.231(c) to specify that the executive director will reopen permits at renewal. TCC requested that the commission specify in the preamble or document in the final rule that, for permit applications submitted by July 22, 2000, minor NSR authorizations will not be incorporated until permit renewal. TIP also commented that the process of incorporating minor NSR authorizations may delay permit revisions, if done at that time, and thus impact the permit holder’s ability to operate the change at the site. By incorporating minor NSR at renewal, the commission can assure that the process of integrating

minor NSR and existing operating permits will not affect a site's ability to conduct time-sensitive activities. BP endorsed comments submitted by TCC and TXOGA and generally supported the integration of NSR and Part 70. However, this transition should be streamlined, concise, and understandable, and should not be unduly burdensome on either the commission or the operator in terms of additional resources or time to incorporate. Integration of existing NSR permits into the operating permit program should be handled in a manner that will minimize additional expense and paperwork for our plants. TXOGA requested that the commission clarify the intent to incorporate NSR permit requirements and operating permit requirements into a single document at, and not before, renewal of the operating permit. Any operating permit revision or reopening prior to renewal may have critical time constraints associated with it and should not be delayed due to incorporation of the administrative revisions related to the inclusion of NSR provisions. Permit holders need to have an assured time frame for resource and manpower scheduling purposes. TXOGA supported the concept of incorporating Chapter 106 and Chapter 116 at permit renewal and requested assurance to schedule the workload for the inclusion of information and also to avoid delay of critical permitting actions with strict time constraints. ExxonMobil supported comments submitted by TIP, TXOGA, and TCC and supported the commission's efforts to incorporate Part 70 language into Chapter 122. Specifically, ExxonMobil commented that minor NSR authorizations should be incorporated into operating permits and not before that time. The process of incorporating those authorizations may delay the permit revision and thus impact the permit holder's ability to operate the change at the site. The commission can ensure that the process of integrating minor NSR and existing operating permits will not affect a site's ability to conduct time-sensitive activities if NSR is incorporated at renewal. ExxonMobil requested that the commission confirm in the preamble that it will not reopen operating permits for the

purpose of incorporating minor NSR authorizations until renewal and that the commission consider the resources available when developing the implementation process. The process should be designed with some flexibility to allow minor NSR authorizations to be incorporated into the operating permits by reference. ExxonMobil also supports stringency determinations which streamline and simplify redundant and duplicative standards. TCC commented that §122.231(c) be amended to clarify that the executive director institute proceedings to reopen permits for those holding operating permits as of the effective date of the rule, instead of permits for which applications were submitted to the executive director prior to the effective date of §122.231. BP supported this and further suggested to add that operators who have submitted applications to the executive director prior to the effective date of §122.231, but have not yet received their operating permit, will incorporate Chapter 106, Subchapter A or Chapter 116 preconstruction permits at renewal. TCC also requested that the commission clarify that preconstruction authorizations for applications submitted by July 22, 2000, not be incorporated into the permit until renewal. Also, TCC requested that §122.231 be amended to specify that operating permits for which applications were submitted to the executive director prior to the effective date of the amended Chapter 122 incorporate minor NSR at renewal.

Response

After reviewing these comments, and based on negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, the commission changes §122.231(c). The rule language in §122.231(c) states that for permits already issued, the incorporation of minor NSR will occur no later than permit renewal. Applications for which the executive director has authorized initiation of public notice by the effective date of the rule will incorporate the

requirements for minor NSR no later than permit renewal. Applications for which the executive director has not authorized initiation of public notice by the effective date of the rule will include NSR at initial issuance.

Comment

PC commented that §122.231(a)(1)(B) should be amended to be consistent with 40 CFR §70.7(f)(1)(i) to indicate that the effective date of the requirement is later than the permit expiration date, unless the original permit or any of its terms and conditions have been extended pursuant to the provisions for timely and complete applications for renewal.

Response

The commission agrees with this comment and amends §122.231(a)(1)(B) to be consistent with 40 CFR §70.7(f)(1)(i).

Comment

PC commented that §122.231(a)(1)(D) should be added to state that additional requirements (including excess emission requirements) become applicable to an affected source under the Acid Rain program and that upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit, to be consistent with §70.7(f)(1)(ii).

Response

The commission agrees with this comment and adds new §122.231(a)(6) for consistency with §70.7(f)(1)(ii).

Comment

PC commented that §122.231(a)(4) should be amended for consistency with 40 CFR §70.7(f) and (g) to indicate that the executive director or the EPA determines that the permit must be revised or terminated to assure compliance with applicable requirements. Because the EPA may reopen for the reasons listed in §122.231(a)(4), this list must include a determination by the EPA that the permit must be revised or terminated to assure compliance.

Response

The commission agrees with this comment and adds the suggested language to §122.231(a)(4).

Comment

PC commented that the exception in §122.231(c) to incorporate minor NSR into operating permits is unacceptable. If the state had initially included minor NSR, as it was required, full public participation would have been provided. The commission cannot now illegally avoid this public participation. Also, Part 70 provides no provision to justify the commission's attempt to exempt minor NSR incorporation from normal notice and comment procedures. PC also commented that they oppose any provision that would allow initial incorporation of minor NSR without public participation, which is required by the 42 USC §7661a(b)(6).

Response

The commission does not change the rule in response to this comment. Part 70 was revised on June 20, 1996 (61 FR 31443) to authorize the granting of interim approval to states with programs that did not include minor NSR as an applicable requirement. For every incorporation of NSR that occurs at initial issuance or at renewal, full public participation requirements, including public notice, will be satisfied. However, the adopted rule implements the provisions of 40 CFR §70.4 which allow for a truncated reopening process for the incorporation of minor NSR.

Comment

TIP commented that §122.231(d) should be amended to be consistent with 40 CFR §70.7(f)(2). The commission proposed the language, “ as soon as possible,” whereas §70.7(f)(2) states, “as expeditiously as practicable.”

Response

The commission does not change the rule in response to this comment. The commission believes that the two phrases are equivalent.

Comment

TCC commented that the commission define that a cause for permit reopening does not exist if a material mistake or inaccurate statement made in the permit terms and conditions is discovered by the permit holder and corrected through the submission of the appropriate documentation to revise the permit.

Response

The commission agrees with the comment and adds language clarifying that cause for reopening includes the determination by the executive director or the EPA that the permit contains a material mistake. This is consistent with 40 CFR §70.7(f)(1)(iii). However, the permit holder will be required to revise the permit in accordance with the appropriate permit revision process and will not necessarily be relieved of any possible enforcement action.

Comment

QLEP, NFN, and 118 individuals commented that the proposed Title V rules do not protect citizens' right to know what pollutants facilities in their communities are allowed to emit and the air pollution laws for which compliance must be demonstrated. An individual also commented that the Title V rules should ensure that all applicable facilities are required to comply with every air quality requirement and that enforcement action is taken against all facilities that do not comply. Another individual commented that the Title V rules do not protect citizen's rights to be able to determine what pollutants citizens are exposed to and expressed specific concern about proper guidelines to improve air quality with respect to greenhouse gases. Allowing citizens to take part is an important venue that should not be denied. In addition, EEP submitted a copy of a handbook for citizens on how to participate in the Title V program, and also commented that once Title V is fully implemented and if the program is working properly, it should be relatively easy for federal and state enforcement officials and for members of the public to know what the requirements are that apply to a given facility. The program should therefore serve as an important law enforcement tool. Sierra also commented that the operating permit program is important because for a long time citizens who live in affected communities near large industrial

sources have been interested in trying to understand the permit requirements and the other requirements in the past were not always written into these traditional air permits. This is a very powerful tool because these plants typically are only inspected maybe once a year or once every two years by the commission's staff. Also, for the first time, these requirements will help to ensure compliance on a 24-hour, seven-day basis, which is an effective tool for community people that want to know if a facility is operating in compliance and in compliance with its permits.

Response

The commission does not change the rule in response to this comment. The primary goal of the operating permit program is to provide a mechanism, via a permit, to assure compliance with all applicable rules and regulations. The commission agrees that these permits are an effective compliance and enforcement tool for the public, the applicant, the EPA, and the commission. The commission acknowledges the importance of public participation and the benefits associated with it. The commission assures that Chapter 122 provides public participation as required under 40 CFR Part 70 and, in certain cases, exceeds those requirements. The addition of NSR as an applicable requirement adds information to support a citizens' right to know what pollutants facilities in their communities are allowed to emit. In addition, SOPs already contain a pollutant column in the applicable requirements table that identifies the pollutant regulated by the applicable requirement. In response to this comment, when the GOPs are proposed for renewal in October 2001, the heading for each GOP table will include the pollutant(s) regulated within the table. Part 70 does not define greenhouse gas guidelines to be an applicable requirement. Currently, there are no green house gas applicable requirements for the commission to include in

an operating permit. If and when such is promulgated, an operating permit application will include it.

Comment

QLEP and 118 individuals commented that the rules should be amended to require that notice of operating permit applications be mailed to all persons living within one-half mile of a site applying for an operating permit. PC also commented that notice should be mailed to all persons within a certain distance from the facility.

Response

The commission does not change the rule in response to this comment. Title 40 CFR Part 70 does not require mailed notice to persons within a given distance of the site, and Chapter 122 remains consistent with those requirements. The commission appreciates the commenters' interest and encourages continued public participation in the operating permit program and in individual permit actions. The commission has established a procedure for individuals to receive all notices of permitting actions for an individual site or within a requested county. The commission believes the ability to be added to this mailing list provides sufficient opportunity for citizens to receive a notice for each site to which they are interested.

Comment

PC commented that Chapter 122 should be amended to provide for mailed and published notice more consistent with other air permitting notice provisions. Specifically, notice, or at least a reference to the

full notice, should be published in a prominent location in the non-legal notice section of the newspaper consistent with 30 TAC §116.132(b). PC commented that §122.320(b) should be consistent with the public notice proceedings in §116.132(b). PC also commented that §122.340(e) should require notice of a public hearing to be published in the non-legal notice section of the paper.

Response

The commission agrees that both air permit programs' notice requirements should be as consistent as possible. Regarding mailed notices, both the operating permit and NSR programs mail notice of receipt of applications to affected state representatives and senators. In addition, both air permitting programs require a sign posting and bilingual public notice, responses to comments, an appeals process, a requirement to publish in a newspaper, the ability to be placed on a mailing list, and holding a public meeting when requested. In addition, to provide for easier public access to permit information, the commission provides electronic access to both NSR and operating permit actions and correspondence via the remote document server (RDS) located at:

<http://www.tnrcc.state.tx.us/permitting/airperm/rdsinstr.htm>. As minor NSR is incorporated into operating permits and procedures for integrated permits are developed, the commission will evaluate its air permit newspaper notice requirements to further ensure consistent newspaper notice, appropriate placement of hearing notice in newspapers, as well as eliminate any duplicative air permit notice requirements.

Comment

PC commented that a mailing list should be maintained for persons who wish to receive notice of all operating permit applications. Also, the notice of existing mailing lists, only contained in the *Texas Register*, is so poor that few people know that they can have their names added to a mailing list. TCE commented that citizens should be able to get on a list for a particular facility or group of facilities in their area so that they can be informed in terms of permit problems and enforcement issues, violations, etc. SEED noted that they requested notification on 16 different plants, but was told that can be done for water but not for air. They would like to see that corrected.

Response

The commission does not change the rule in response to this comment. The commission does not rely strictly on any *Texas Register* notification to provide information about the option of being placed on a mailing list. Information concerning mailing lists is included in each air, water, and waste permit notice published in newspapers. TCAA, §382.056(b)(6) requires newspaper notices for air permit applications to provide a description of the procedures by which a person may be placed on a mailing list in order to receive additional information about the application. Section 122.320(b)(9) requires newspaper notices for draft operating permits to contain a description of the procedures by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit. Enforcement actions or violations are matters of public record and information on these actions are available upon request. Citizens may also request a summary of all violations for a specific time period for any facility.

The opportunity to be placed on a mailing list is available for all permit actions the commission requires to have a newspaper notice. The following procedures explain how to be placed on a mailing list for permit applications that undergo newspaper public notice. Specifically, a person may submit a request to be added to the mailing list for one or more sites by submitting the request to the TNRCC Office of the Chief Clerk. The request must include the requestor's name and address (with zip code), the name of the site or sites of interest, and the application project number or permit number. In addition, the requestor may instead ask to be placed on a mailing list to receive permit notices for every site in a given county.

Comment

PC commented that the commission should work towards providing notice of all operating permit activities on its Title V website.

Response

In addition to the current list of pending and issued operating permits contained on the website, the commission agrees to add a list of all draft operating permits in public notice.

Comment

PC and Neighbor for Neighbors do not support concurrent public notice and EPA review, since this would deny the EPA the benefit of reviewing citizen comments on a draft permit. Because facilities are allowed to continue to operate while their operating permit applications are pending, the permitting process should not be expedited at the expense of public participation and thorough review. TCC was

supportive of the proposed §122.350(b)(1), to enable concurrent public notice and EPA review. TCC believes that this amendment will help make the NSR/Part 70 authorization more efficient and lessen the impacts on the permit holder's operations, especially on time-sensitive items. PC commented that §122.350(b)(1) should not be amended to allow public and EPA review periods. Part 70 does not provide for current public and EPA review period. TCC was supportive of the proposed §122.350(b)(1), to enable concurrent public notice and EPA review. TCC believes that this amendment will help make the NSR/Part 70 authorization more efficient and lessen the impacts on the permit holder's operations, especially on time-sensitive items. PC commented that §122.350(b)(1) should not be amended to allow concurrent public and EPA review periods. Part 70 does not provide for current public and EPA review periods.

Response

In response to this comment, the commission amends §122.350(b)(1) to state that EPA review may run concurrently with public notice and that, if appropriate, the executive director may extend the EPA review period. The commission also amends the definition of draft permit to clarify that it may be the same as a proposed permit. The commission adopts the option for concurrent review, since less than 4% of the issued SOPs have received public comment.

The draft permit is the permit the executive director intends to issue unless comments are received that result in a change to the permit. When no comments are received during public notice, the draft permit and the proposed permit are the same document. It is this same document that the executive director intends to issue as a proposed final action, which is consistent with Part 70. If

comments are not received, public participation and thorough EPA review are in no way impacted by concurrent notice and review.

When comments are received, the concurrent EPA review period may be extended. Consistent with §122.345, Notice of Proposed Final Action, a notice of proposed final action (action) is prepared and sent to each commenter, each person on a mailing list for that permit, the applicant, and the EPA. This action must contain: a listing of all comments received, the commission's responses, identification of any changes to the permit, the dates for the 45-day EPA review period, the dates for the public petition period, and the procedures by which a petition may be filed. In this case, the EPA review period may be extended.

Comment

TXOGA supported the revisions to Subchapter D.

Response

The commission appreciates TXOGA's support of the revisions to Subchapter D.

Comment

PC commented that §122.320(b)(5) be amended to specify that notice include the air pollutants with emission changes involved in any modification.

Response

The commission does not change the rule as a result of this comment. Section 122.320(b)(5) is consistent with 40 CFR §70.7(h)(2) because newspaper notice is only required for significant revisions. The commission provides for a public announcement period for minor revisions, but this is above and beyond what is required in Part 70.

Comment

PC commented that §122.320(f) should be amended to specify that a copy of the permit application, draft permit and any required notices will be provided to the EPA, not just made accessible to the EPA, for consistency with 40 CFR §70.7(a)(1)(iv). Section 122.501(e), General Operating Permits, and §122.502(h), Authorization to Operate, should also be amended to specify that copies of draft GOPs and a copy of the authorizations to operate be provided to the EPA, either in electronic or paper format, and not merely made accessible to the EPA, to be consistent with 40 CFR §§70.4(b)(3)(v), 70.7(a)(1)(v) and (d)(3)(ii), and 70.8(a).

Response

The preamble to the adopted October 1997 Chapter 122 rules stated that the EPA commented on the requirement appearing throughout the rule that information be submitted to the EPA. In response to that comment, the commission amended to the rule to specify that information will be made accessible to the EPA.

Comment

PC commented that the word “substantially” should be removed from §122.320(h)(1), since the amendment may result in public notice signs with lettering too small to adequately alert the public or signs with insufficient information. Conversely, TCC was supportive of adding the word “substantially” to §122.320(h)(1) to adequately meet public notice requirements.

Response

The commission does not change the rule in response to this comment. The commission believes the language provides the executive director with necessary discretionary authority and that 40 CFR Part 70 does not require a sign to be posted. This change is added for consistency with Chapter 39 sign posting requirements.

Comment

SEED commented that no one has ever seen postings and these notifications are inadequate. People do not look for these notifications. There needs to be a better way for citizens to find out who is applying for an operating permit and obtain information in a timely manner so that citizens can have input to the process and have it be meaningful. SEED has also attempted to contact the agency and found that it was difficult and frustrating to call and obtain information about operating permits, to contact and obtain information via E-mail, or to obtain information at the TNRCC offices. Staff seemed uninformed about Title V and Air Permits staff, specifically, had difficulty in obtaining information quickly and easily and aid citizens in finding information. Even permits that have not been issued were not in the public information office where they can be viewed with the other permits, applications, and history of the company so that they can be viewed together, because that is the reason why Title V is

potentially such a good tool. Permits that were viewed were very sketchy compared with those that have been held up as examples. These permits were already in place before citizens even knew about the process and the extent of the difficulty involved in trying to get a hold of this material. Therefore, SEED encourages the commission to make a system that works better. SEED recommended that the notification process be an easy, accessible process so citizens don't have to rely on catching some notification that they may easily miss in the newspaper if they don't read notifications every day of the year.

Response

As discussed in response to previous comments, the commission provides several avenues for providing notice to the public regarding operating permit actions. Some of these avenues are more comprehensive than federal requirements.

In addition, the commission commits to list all draft operating permits authorized to publish notice on the website and currently lists all pending and issued operating permits. To further assist the public, the commission will add the permit reviewer's name on the website. In September 1999, the commission amended §122.320(b)(9) to require that the newspaper notice include information on how a citizen may request to be on a mailing list. To provide for quicker transmission of open records requests, the commission has a specific e-mail address which is *openrecs@tnrcc.state.tx.us*. Each permitting division, including air, has a public notice coordinator and one or more open records request coordinators to assist in proper and prompt handling of information requests. Also, all notices for air, water, and waste permits include

information on how to be placed on a mailing list for notices and include the toll-free Office of Public Assistance number.

Starting in January 2000, air operating permit application public notices have been available through the Office of the Chief Clerk. Each notice specifies that the permit file may be viewed and copied at the TNRCC Austin Central Offices, the appropriate Regional Office, and in the public location that the applicant makes the permit application and draft permit available. In addition, to provide for easier public access to permit information, the commission provides electronic access to both NSR and operating permit actions and correspondence via the remote document server (RDS) located at: <http://www.tnrcc.state.tx.us/permitting/airperm/rdsinstr.htm>. Specifically the RDS provides electronic access to draft, proposed, and issued operating permits.

Comment

PC requested that §122.320(j) be amended to eliminate the requirement that a hearing be requested by a person who may be affected by emissions from a site. Operating permit hearings are not contested case hearings and should, therefore, not be so limited. Title 40 CFR §70.7(h) does not restrict the availability of a hearing. PC also commented that §122.340(d) should not give the executive director discretion to deny a public hearing request that is “unreasonable.” PC commented that §122.340(d), which specifies that the executive director is not required to hold a hearing if the basis is determined to be unreasonable, should be amended to state that a public hearing will be held on an operating permit application if such hearing is requested. Operating permit hearings are notice and comment hearings and are not overly burdensome for the commission. The commission formerly used a “reasonable”

standard in contested case hearings, which was ambiguous and led to numerous lawsuits, and the “reasonableness” standard was removed from the contested case hearing rules by the Texas Legislature and should be deleted from Chapter 122. PC commented that §122.508, Notice and Comment Hearings for General Operating Permits, should be amended to require a notice and comment hearing to be held if one is requested. It should not be limited to reasonable requests by an affected person.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. TCAA, §382.0561(c) specifies that a person who may be affected by emissions may request a hearing during the public notice period. It further specifies that the commission is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable. On May 6, 1996, the commission submitted an opinion from the Office of the Attorney General of Texas addressing the issue of standing to participate in contested case hearings. This opinion was requested by the EPA following the passage of SB 1546, of the 74th Texas Legislature, 1995. SB 1546 added a definition of “affected person” or “person affected” or “person who may be affected” for purposes of administrative hearings held by or for the commission involving a contested case. It was the opinion of the Attorney General that SB 1546 was intended to amend §5.115 of the TWC to address standing for the specific purpose of public participation in permitting matters for which a contested case hearing is required by the Administrative Procedures Act (APA) and the TCAA. Because §382.0561 specifically exempts operating permits from the contested case hearing requirements of the APA, the definition in SB

1546 does not apply to “affected persons” or “persons affected” or “persons who may be affected” as those terms may be used in reference to the operating permit program. Section 382.0561 continues to be the statutory authority for standing to participate in operating permit hearings. Thus, the commission believes that the reasonableness standard continues to apply to requests for hearings for operating permits. Procedurally, for operating permits, the commission has interpreted that a person that may be affected by emissions includes any interested person, which is consistent with Part 70. The commission has received eight hearing requests. Of these requests, five were granted, one was withdrawn by the requestor, and one was not granted since the request was dated after the end of public notice. So far, no hearing has been denied based upon executive director discretionary authority.

Comment

PC commented that the proposed language in §122.360(c) should not be adopted. The provision appears to run the public petition period for GOPs during the public notice and EPA review periods. This will not allow the public to know if the EPA objected to a permit and if there is a need to petition and is also inconsistent with Part 70.

Response

The commission does not change the rule in response to this comment. The commission wishes to clarify that by adopting this language, the commission is not running the public petition period during the public notice and EPA review periods. The public petition period for GOPs will start after completion of both the public notice period and the EPA review period. Adopting

§122.360(c) allows the commission to extend the start of the petition period to the date of GOP issuance. The GOP will never be issued before the completion of the EPA review period.

Comment

PC commented that §122.501(a)(1), (d)(1)(B), (2)(B), (3)(B), and §122.505(f)(1), Renewal of the Authorization to Operate Under a General Operating Permit, should be amended to include the requirement to comply with all applicable requirements and with all requirements of Chapter 122 for consistency with 40 CFR §70.4(b)(3)(v) and §70.7(a)(1)(iv). GOPs should assure compliance with all applicable requirements as well as all of the requirements in Chapter 122.

Response

The commission did not propose amendments to the sections identified by the commenter; therefore, under Texas administrative law, the sections cannot be amended at this adoption. The commission does not believe that these sections require amendments. Chapter 122 requires that all permits comply with any applicable requirements as defined in Chapter 122. Therefore, compliance with Chapter 122 requires compliance with all applicable requirements.

Comment

PC commented that §122.502(a) should be amended to specify that GOP applications be required to include, at least, a compliance plan and certification as well as information regarding emissions and applicable requirements. Also, the application needs to include sufficient information to allow for public participation and affected state and EPA review.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission disagrees with the comments regarding §122.502(a) and the suggestion to specify that GOP applications be required to include a compliance plan. A qualification criterion is in each GOP that requires emission units which are authorized to operate under the respective GOP to be in compliance with all codified requirements at the time of application submittal. If all units are in compliance, there is no need for a compliance plan to be submitted. Regarding a compliance certification, §122.501(a)(1) requires that the conditions of the GOPs provide for compliance with all requirements of Chapter 122. Therefore, the annual compliance certification requirement in §122.143(16) is inherent in all GOPs. The applications for GOPs do not require a submittal of applicable requirements because the purpose of the GOPs is to codify the applicable requirements for the applicants. GOP applications are not required to undergo public participation, affected state review, and EPA review because each GOP has already met these requirements prior to issuance under §122.501(a). Further, 40 CFR §70.6(d)(2) specifies that the permitting authority may grant a request for an authorization to operate under a GOP without repeating the public participation procedures. The applications are simply requests for approval to operate under the GOP.

Comment

PC commented that §122.503, Application Revisions for Changes at a Site, inappropriately allows sites authorized by GOPs to operate under provisional terms and conditions.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The provisional terms and conditions require permit holders to comply with the underlying applicable requirements as those requirements are changed in state and federal rules. Provisional terms and conditions do not allow for exemptions or any other condition of noncompliance with the state and federal rules.

Comment

PC commented that §122.506(a), Public Notice for General Operating Permits, should require notice of GOPs to be mailed to all persons who request to be included on an operating permit mailing list.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission agrees with this comment, will address it procedurally and may consider this comment for future rulemaking.

Comment

PC commented that §122.509, Public Announcement for General Operating Permits, should be amended to specify that permit revisions to GOPs comply with the revision process in §§122.210 - 122.221. The public announcement provisions do not provide for adequate notice to the public.

Response

The commission did not propose amendments to §122.509; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission believes the GOP permit revision processes contained in §122.501(d) and §§122.506 - 122.509 parallel the permit revision processes in §§122.210 - 122.221. Specifically, §122.501(a) specifies the public participation required for issuance of a GOP which includes public notice, affected state review, EPA review, and public petition. Section 122.501(d) provides for administrative, minor, and significant revisions for GOPs. Section 122.501(d)(1) and (2), related to administrative and minor permit revisions, are included in case they are needed; although, the commission believes that GOP revisions will exclusively or almost exclusively use the significant revision process. Section 122.506 contains the public notice requirements for GOP issuance, significant permit revision, or rescission of any GOP. This section also requires notice of a draft GOP to be published in the *Texas Register*; on the commission's publicly accessible electronic media; and in the daily newspaper of largest general circulation in Austin, Dallas, and Houston if the GOP applies state-wide. Section 122.506 also specifies the information that must be contained in the newspaper notice, including an opportunity to request a notice and comment hearing. Section 122.508 contains the provisions for notice and comment hearings for GOPs and the hearing notice requirements. Section 122.509 contains the public announcement provisions that the commission will use to process a GOP minor revision which exceeds the 40 CFR §70.7(h) requirements.

Comment

PC commented that §122.510, General Operating Permits Adopted by the Commission, should be

amended to specify that GOPs expire every five years and requested an explanation of the commission's authority to automatically transfer an authorization to operate under one GOP to an authorization to operate under another GOP.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Additionally, it is not necessary to amend §122.510 because §122.501(f) requires that GOPs be renewed at least every five years after the effective date. The basis for the commission's authority to automatically transfer an authorization to operate under one GOP adopted by the commission to an authorization to operate under another GOP adopted by the executive director is found under the TCAA, §382.012, which provides the commission the authority to create a comprehensive plan for the proper control of the state's air; §382.017, which provides the commission authority to adopt rules; §382.051(b)(2), which provides the commission authority to issue permits for numerous similar sources; and §382.054, which prohibits operation of a federal source of air pollution without a FOP obtained from the commission.

Comment

PC commented that GOPs do not appear to incorporate all applicable requirements. NSR permits are excluded, specifically in §122.511(b)(4)(A), Oil and Gas General Operating Permit - Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties. Also, the rules do not appear to include

monitoring and reporting sufficient to meet the requirements of 40 CFR §70.6(a)(3)(i)(B) and §70.6(c)(1).

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the commission is currently in the process of revising the GOPs to include any new applicable requirement (including minor NSR), monitoring, recordkeeping, and reporting requirements. In addition, the executive director is implementing periodic monitoring and CAM through a phased approach. The executive director reviewed all applicable requirements to determine which requirements contain no monitoring and added any appropriate periodic monitoring to the GOPs scheduled to be issued in October 2001. The existing GOPs by rule are required to be renewed by October 26, 2001. Because of the extensive changes to the applicable requirements in every GOP, the commission is not renewing the GOPs by rule. Instead, the executive director will issue new GOPs which will include minor NSR. The executive director will institute proceedings to reopen previously approved authorizations to operate. Each owner or operator authorized to operate under a GOP by rule will be required to apply for a new authorization to operate under the executive director issued GOP or submit an application for an SOP.

The executive director, working with the EPA, developed acceptable procedures and appropriate monitoring requirements to satisfy the Part 70 periodic monitoring provisions. These

requirements are included in initially issued permits. The EPA is agreeable to phasing in the remainder of the needed periodic monitoring requirements. The executive director called in full applications based on Standard Industrial Classification (SIC) codes. CAM and periodic monitoring GOPs are being developed and phased in accordance to this call-in schedule. Therefore, the commission can ensure that adequate and appropriate CAM and periodic monitoring are available when needed for incorporation into permits.

Comment

PC commented that the site-wide GOP provided for in §122.516, Site-wide General Operating Permit, does not apply to similar sources.

Response

The commission did not propose amendments to the section identified by the; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission disagrees with the comment that the site-wide GOP provided for in §122.516 does not apply to similar sources. The site-wide GOP was developed for simple sites having only site-wide requirements or for major source sites with no applicable requirements.

Comment

PC commented on §122.516(b)(3)(A)(i), (B)(i), (D)(i) and (E)(i). The compliance certification should be based on any credible evidence and not limited to a once per year visual observation of stationary vents.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Section 122.146(4) specifies that the certification be based on, at a minimum, the monitoring method (or recordkeeping method, if appropriate) required by the permit to be used to assess compliance. Title 40 CFR §70.6(c)(5)(iii)(B) specifies that permits shall include a requirement that the compliance certification include the identification of the method or other means used by the owner or operator for determining the compliance status with each term and condition and that such methods and other means shall include, at a minimum, the methods and means required under 40 CFR §70.6(a)(3), Monitoring and Related Recordkeeping and Reporting Requirements. Likewise, the Chapter 122 definition of deviation is any indication of noncompliance with a term or condition of the permit as found using, at a minimum, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit. This also is consistent with the information contained in 40 CFR §70.6(c)(5)(iii)(B).

The commission's rules do not prevent the consideration of any credible evidence to determine compliance with a Title V permit, including instances where the commission receives that information from citizens. The commission's regional offices are charged with reviewing Title V certifications and may include consideration of all credible evidence in evaluating certifications of compliance. The commission has preferred using evidence obtained by commission staff because they are trained to collect evidence in accordance with standard and legal methods and to handle that evidence properly to preserve the chain of custody. These standards of collection and

handling are established to protect the reliability of that evidence. Whether the evidence is collected by the commission or by citizens, the information to be used as credible evidence must meet Texas Rules of Evidence before the commission can consider it in making decisions related to compliance or non-compliance. The commission is currently developing guidance concerning the use of evidence obtained from sources outside the commission and the criteria that must be met for the evidence to be considered in making decisions related to compliance. Once issued, the guidance will be consistent with any Texas legislation currently being considered that deals with credible evidence.

The commission determined that a once per year visual observation is acceptable periodic monitoring under §122.516(b)(3)(A)(i), (B)(i), (D)(i) and (E)(i). The EPA has accepted this through their review of SOPs containing the same terms and conditions.

Comment

PC commented on §122.516(c) in that general terms and conditions are subject to the same problems as that for the general terms and conditions of individual operating permits.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The executive director is currently reviewing the GOPs and expects to revise them in the near future.

The revisions will be consistent, as appropriate, with the general terms and conditions of individual operating permits.

Comment

The EPA commented that the commission never submitted Chapter 122, Subchapters G, Periodic Monitoring, and Subchapter H, Compliance Assurance Monitoring, for approval. It is not clear that the provisions of Subchapter H meet 40 CFR Part 64 (Part 64). If the commission intends to submit these subchapters to the EPA for approval, it must include documentation that these subchapters meet the requirements of Part 64 and other federal requirements applicable under Part 70.

Response

The commission is submitting Subchapters G and H as part of the full program submittal. Documentation demonstrating that the subchapters meet the requirements of Parts 64 and 70 will be provided with the submittal.

Comment

PC commented that the implementation of the CAM GOP, periodic monitoring GOP, and site-wide GOP are inconsistent with 40 CFR §70.6(d) in that they apply to sources that are not similar. Instead, CAM and periodic monitoring GOPS can cover every source and are not permits at all, but are required conditions of an operating permit and should be included in operating permits in the same manner as all other required conditions. PC also commented that periodic monitoring, provided in §122.600(a)(1), Implementation of Periodic Monitoring, should not be implemented through a GOP. Periodic

monitoring does not apply to numerous similar sources and is a site-specific determination. It is a permit condition, not a permit, and is required to be included in each operating permit. Any new permit must include periodic monitoring.

Response

The commission does not change the rules in response to this comment. While 40 CFR §70.6(d) references sources that are similar, the implementation of the CAM and periodic monitoring GOP are for similar sources subject to applicable requirements. While these emission units may be found at different sites, the emission units subject to the applicable requirements must have similar attributes. Therefore, the commission believes that the implementation of CAM and periodic monitoring through the GOPs is consistent with 40 CFR §70.6(d). The commission would like to note that periodic monitoring is implemented in two phases. The first phase is at initial issuance for those emission limitations or standards with no monitoring, testing, recordkeeping, or reporting. The second phase is through the GOPs for those emission limitations or standards which only require a one-time test at start-up or when requested by the EPA.

Comment

PC commented that the commission's implementation of CAM is inconsistent with the EPA's CAM rule.

Response

The commission does not change the rules in response to this comment. Although Part 64 focuses on a “case-by-case” approach, it allows permitting authorities the flexibility to use a programmatic approach, such as the CAM GOP approach, for the implementation of CAM. The commission submitted several comments to the EPA during the development of Part 64 recommending that permitting authorities be allowed to establish CAM requirements on a programmatic basis. This programmatic approach would allow permitting authorities to design CAM monitoring requirements for a class of emission units that can be used across the state. The preamble to the promulgated Part 64 rule states that “the EPA encourages States to consider adding monitoring requirements to existing and new rules that are consistent with 40 CFR 64 requirements.” In this manner, the burdens associated with source-specific monitoring development could be reduced. To provide an incentive for this type of rule, the final rule includes a provision (see 40 CFR §64.4(b)) that allows the owner or operator to rely upon this type of programmatic rule as the primary documentation of the appropriateness of its monitoring. This approach would reduce the number of case-by-case reviews necessary to implement Part 64 (62 FR 54903). Although the 40 CFR 64 preamble discusses the programmatic approach in the context of rulemaking, the commission believes that the CAM GOP approach is consistent with the goals of the programmatic approach and achieves the same results. Thus, the CAM GOP streamlined approach is designed to address 40 CFR 64 requirements in a programmatic manner.

Comment

PC commented that it is not appropriate to incorporate periodic monitoring, as specified in §122.608,

Procedures for Incorporating Periodic Monitoring or CAM, as specified in §122.708, through GOPs. Section 122.608(b)(1) allows the incorporation of periodic monitoring with no public participation. CAM GOPs and periodic monitoring GOPs do not allow public participation in determining the appropriateness of monitoring or deviation limits for specific facilities. Public comments on the CAM or periodic monitoring GOP itself is insufficient, since the public doesn't have the facility-specific information it needs for full participation at the time the GOP is issued, only until the facility submits an application for an individual permit. Thus, there is no real opportunity for the public to participate in the detailed site-specific determinations that must be made when determining monitoring. Since monitoring and reporting and the associated requirements are the only things that are added to an operating permit that are not included in underlying applicable requirements, it is very important that citizens have full participation in deciding what kind of reporting and monitoring requirements go into operating permits.

Response

The commission does not change the rule in response to this comment. The CAM and periodic monitoring GOPs are subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition, as are all GOPs when initially issued by the executive director. As permit holders apply to use a CAM and periodic monitoring GOP, the executive director will review the appropriateness of any monitoring option selected, as well as any additional, site-specific requirements that may be necessary to satisfy Part 64 if the emission unit is subject to CAM. Once approved, the monitoring option will be codified in either a FOP or a GOP. Therefore, when incorporating CAM or periodic monitoring into a FOP the monitoring

option chosen, the deviation limits, and the justification for the deviation limit will be subject to public notice or public announcement, affected state review, public petition, notice and comment hearing (if applicable and if requested), and EPA review. For permit holders operating under traditional GOPs and using a CAM GOP, the approved monitoring options become representations under which the permit holder shall operate.

Comment

PC commented that Part 70 requires adequate testing, monitoring, reporting and recordkeeping requirements to be incorporated into operating permits if the underlying applicable requirements do not contain them. Section 70.6(a)(3)(i)(B) requires periodic monitoring and §70.6(c)(1) requires monitoring sufficient to assure compliance. Compliance assurance monitoring is actually a separate requirement from the CAM requirement and the EPA has made it clear in its regulations that operating permits still need to include their own compliance assurance monitoring if the CAM isn't going to be in effect. Chapter 122 should be amended to make it clear that each and every permit has to include compliance assurance monitoring for every requirement.

Response

The commission does not change the rules in response to this comment. The commission disagrees that 40 CFR §70.6(c) requires a separate compliance assurance monitoring program from that required by Part 64. Section 70.6(c) provides general conditions for compliance purposes. On October 22, 1997, the EPA established the CAM Program with the promulgation of 40 CFR Part 64 to respond to FCAA, §114(a)(3), concerning enhanced monitoring and compliance

certifications, and FCAA, §504(b), concerning monitoring and analysis (62 FR 54901). The EPA states that “the general purpose of the monitoring required by Part 64 is to assure compliance with emission standards through requiring monitoring of the operation and maintenance of the control equipment and, if applicable, operating conditions of the pollutant-specific emissions unit” (62 FR 54918). While 40 CFR 64 requires additional monitoring and analysis for emission units which exceed the major source threshold, periodic monitoring is required for all other emission units with applicable requirements which require only a one-time test or do not require any monitoring, testing, recordkeeping, or reporting. Therefore, with the implementation of the CAM and periodic monitoring GOPs, each permit will contain monitoring so that compliance can be determined.

Comment

PC commented that §122.142(c) only requires periodic monitoring to be included as required by the executive director. Since Part 70 requires that all operating permits include periodic monitoring for each applicable requirement, this condition should be removed. EEP also commented that each operating permit requires periodic monitoring.

Response

The commission does not change the rules in response to this comment. On April 14, 2000, the United States Court of Appeals for the District of Columbia Circuit decided *Appalachian Power Company, et al, vs. Environmental Protection Agency*. Appalachian Power set aside, in its entirety, the EPA’s “Periodic Monitoring Guidance for Title V Operating Permits Programs,” released in

September 1998. The court stated that “state permitting authorities may not, on the basis of the EPA’s Guidance or 40 CFR §70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or Federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.” The commission would like to note that periodic monitoring is implemented in two phases. The first phase is at initial issuance for those emission limitations or standards with no monitoring, testing, recordkeeping, or reporting. The second phase is through the GOPs for those emission limitations or standards which only require a one-time test (at start-up or when requested by the Administrator). Each permit will contain periodic monitoring as appropriate.

Comment

PC commented that §122.604, Periodic Monitoring Application Due Dates, and §122.704, Compliance Assurance Monitoring Application Due Dates, require that no facility need submit an application for periodic monitoring or CAM for approximately two years or longer; periodic monitoring and CAM should be included in operating permits. Those permits already issued that do not include periodic monitoring are defective and should be reopened. PC commented that periodic monitoring is a requirement of every operating permit and cannot be deferred as specified in §122.604.

Response

The commission does not change the rules in response to this comment. As previously discussed, the executive director is implementing CAM and periodic monitoring through a phased approach based on permit issuance and SIC codes. The commission considered several factors when

developing the schedule for application due dates. Due to the technical requirements in 40 CFR Part 64, compliance with CAM and periodic monitoring may require permit holders to purchase and install new equipment or conduct performance testing. The application submittal schedule should allow permit holders a reasonable amount of time to budget for, purchase, install, and test equipment necessary to comply with CAM and periodic monitoring requirements. Furthermore, the schedule allows the executive director time to develop comprehensive monitoring options for inclusion in various CAM and periodic monitoring GOPs issued over time. Finally, under the schedule, permit holders will submit applications to the executive director in manageable numbers throughout each calendar year. The executive director will be able to review these applications in a more timely fashion than if all applications were due at the same time.

Comment

PC commented that §122.142 does not specify that operating permits must include compliance assurance monitoring.

Response

The commission agrees with the comment and adopts new §122.142(h) which includes a requirement for CAM.

Comment

Sierra commented that the commission's rules do not provide for sufficient monitoring, reporting, and recordkeeping in order to ensure that there is continuous compliance around the clock, 365 days a year, in terms of all of the applicable requirements.

Response

The commission does not change the rule in response to this comment. The commission believes that the requirements in Chapter 122 are sufficient to determine compliance with the applicable requirements because the program implements all required monitoring and recordkeeping required under Part 70.

Comment

PC commented that if it were appropriate to incorporate periodic monitoring through a GOP (it is not), the addition of periodic monitoring would be a significant change in monitoring provisions of the existing permit and, for consistency with 40 CFR §70.7(e)(4)(i), would be required to be incorporated through a significant permit revision. It is also not appropriate to incorporate periodic monitoring through a minor permit revision, provided in §122.608(b)(2) and (c). Incorporating CAM requirements would be a significant change in monitoring and would require a significant permit revision, consistent with 40 CFR §70.7(e)(4)(i).

Response

The commission does not change the rule in response to this comment. Section 122.608(b)(2) specifies that permit holders operating under a permit other than a GOP and applying for a periodic monitoring GOP must comply with §122.217(f) and (g). The EPA states in the preamble to the adopted Consolidated Air Rule that an instance where a permit holder has significant discretion over the monitoring to be contained in a FOP constitutes a significant permit revision (65 FR 78272). These changes are not significant permit revisions because significant permit revisions to monitoring requirements are those over which the permit holder has significant discretion. Because the permit holder is selecting a monitoring option already determined by the executive director to satisfy periodic monitoring, the permit holder does not have significant discretion over those requirements. In addition, each periodic monitoring GOP is subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition; therefore, it is unnecessary to repeat these procedural requirements using the significant permit revision process.

Comment

PC commented that the periodic monitoring permit content in §122.610, Periodic Monitoring General Operating Permits Content, and the CAM permit content in §122.710, Compliance Assurance Monitoring General Operating Permit Content, do not meet the requirements of 40 CFR §70.6(a) and (b). PC commented that the periodic monitoring and CAM application requirements in §122.612, Periodic Monitoring Requirements in Permits and General Operating Permit Applications, and §122.706, Applications for Compliance Assurance Monitoring, do not contain all the information

required by 42 USC §7661b, necessary to determine qualification for the GOP, and necessary to assure compliance with the GOP.

Response

The commission does not change the rules in response to this comment. The CAM and periodic monitoring GOPs were not designed to mimic a SOP; therefore, the content will not be identical to the requirements of 40 CFR §70.6(a) and (b). The CAM and periodic monitoring GOPs are unique in that the information submitted will become a part of the existing SOP or GOP and are supplemental to an existing operating permit. The commission believes that Part 70 implements the requirements listed in 42 USC §7661b, Permit Applications. The commission believes its application requirement is consistent with 40 CFR §70.6(a) and (b). These requirements have been incorporated into a previously issued SOP or GOP and are not required for CAM or periodic monitoring GOP applications.

Comment

PC commented on §122.700(a)(1), Implementation of Compliance Assurance Monitoring. Part 64 does not provide for the use of a GOP for establishing CAM. CAM is a permit requirement of all operating permits and should not be implemented through a GOP.

Response

The commission does not change the rule in response to this comment. Although 40 CFR Part 64 focuses on a “case-by-case” approach, it allows permitting authorities the flexibility to use a

programmatic approach, such as the CAM GOP approach, for the implementation of CAM. The commission submitted several comments to the EPA during the development of 40 CFR 64, recommending that permitting authorities be allowed to establish CAM requirements on a programmatic basis. This programmatic approach would allow permitting authorities to design CAM monitoring requirements for a class of emission units that can be used across the state. The preamble to the promulgated 40 CFR 64 rule states that “the EPA encourages States to consider adding monitoring requirements to existing and new rules that are consistent with 40 CFR 64 requirements.” In this manner, the burdens associated with source-specific monitoring development could be reduced. To provide an incentive for this type of rule, the final rule includes a provision (see §64.4(b)) that allows the owner or operator to rely upon this type of programmatic rule as the primary documentation of the appropriateness of its monitoring. This approach would reduce the number of case-by-case reviews necessary to implement 40 CFR 64 (62 FR 54903). Although the 40 CFR 64 preamble discusses the programmatic approach in the context of rulemaking, the commission believes that the CAM GOP approach is consistent with the goals of the programmatic approach and achieves the same results. In addition, the CAM GOP approach would more easily accommodate changes in applicable requirements. The ability to quickly address revised applicable requirements is particularly important to ensure that FOPs reflect a site’s most current compliance obligations.

Comment

PC commented that §122.702(c)(6), Compliance Assurance Monitoring Applicability, should be amended to state “ ...continuous compliance determination method as defined in 40 CFR §64.1, unless

the....".

Response

The commission does not change the rule in response to this comment. Section 122.10 defines “continuous compliance determination method.” This definition is consistent with the definition contained in 40 CFR §64.1.

Comment

PC commented that the exemptions in §122.702(c)(7) and (8) are not provided for in §64.2.

Response

The commission does not change the rule in response to this comment. Section 122.702(c)(7) exempts emission limitations or standards, in addition to those identified in 40 CFR 64, that the EPA identifies in guidance as exempt from CAM. This exemption will allow the regulated community to take advantage of exemptions that the EPA identifies in guidance for 40 CFR 64. For example, the EPA states in its Compliance Assurance Monitoring Technical Guidance Document issued in August 1998 that the amendments to 40 CFR 61, Subpart L are exempt from CAM although the original emission limitations or standards were proposed before November 15, 1990. Section 122.702(c)(8) also exempts emission limitations or standards regulating fugitive emissions to be consistent with the EPA’s 40 CFR 64 preamble which states that “fugitive emissions are not subject to any specific part 64 monitoring requirements” (62 FR 54909).

Comment

PC commented that §122.704 allows for submittal of untimely CAM applications. CAM applications are required to be submitted in accordance with 40 CFR §64.5. In addition to CAM, all operating permits are required to include monitoring sufficient to assure compliance.

Response

The commission does not change the rule in response to this comment. The executive director is implementing CAM and periodic monitoring through a phased approach based on permit issuance and SIC codes. The commission considered several factors when developing the schedule for application due dates. Due to the technical requirements in 40 CFR Part 64, compliance with CAM and periodic monitoring may require permit holders to purchase and install new equipment or conduct performance testing. The application submittal schedule should allow permit holders a reasonable amount of time to budget for, purchase, install, and test equipment necessary to comply with CAM and periodic monitoring requirements. Furthermore, the schedule allows the executive director time to develop comprehensive monitoring options for inclusion in various CAM and periodic monitoring GOPs issued over time. Finally, under the schedule, permit holders will submit applications to the executive director in manageable numbers throughout each calendar year. The executive director will be able to review these applications in a more timely fashion than if all applications were due at the same time.

Comment

PC commented that a deviation limit is a very significant permit condition that should not be

determined outside the public participation process and must be established in accordance with §64.3(d).

Response

The commission does not change the rule in response to this comment. Some monitoring options contained in a CAM GOP may have a deviation limit established in the CAM GOP. If this is not the case, the permit holder will submit a proposed deviation limit and supporting justification for approval by the executive director in accordance with §122.706(a)(1)(E). The deviation limit will be based on information about the specific operation of the control device and emission unit. As specified in §122.706(a)(3), the permit holder will typically use performance testing, engineering calculations, historical data, and manufacturer’s recommendations to justify the proposed deviation limit. However, the CAM GOP may more specifically define the approach for justifying the deviation limit or provide alternatives to those specified in Subchapter H. In addition, 40 CFR §64.6(c)(1) specifies what monitoring needs to be codified in permit terms and conditions. Title 40 CFR §64.6(c)(1) states that the permit shall contain, at a minimum, the following: the indicator(s) to be monitored, the means or device to measure the indicator, and the performance requirements established to satisfy 40 CFR §64.3(b) and (d). Neither 40 CFR §64.3(b) or (d) contain indicator ranges or deviation limits, and the inclusion of the deviation limit is not required to be incorporated into the permit by 40 CFR §64.6.

Comment

PC commented that the phrase “Unless otherwise approved by the executive director,” should be

deleted from §122.706(a)(4) for consistency with 40 CFR §64.3, which requires that CEMS, COMS or PEMS be used. PC also commented that the phrase “Unless otherwise approved by the executive director,” should be deleted from §122.714(b), Compliance Assurance Monitoring Requirements in Permits and General Operating Permit Applications, for consistency with 40 CFR §64.3(d), which requires that CEMS, COMS, or PEMS be used.

Response

The commission does not change the rule in response to this comment. As required by 40 CFR §64.3(d)(1), §122.706(a)(4) specifies that owners or operators of emission units subject to applicable requirements that require continuous emission monitoring systems (CEMS), continuous opacity monitoring systems (COMS), or predictive emission monitoring systems (PEMS) must submit a CAM GOP monitoring option that includes the use of the CEMS, COMS, or PEMS to satisfy CAM requirements for the other emission limitations or standards that are subject to CAM for that particular emission unit. Since Subchapter H applies on a pollutant-by-pollutant basis, this requirement also applies on a pollutant-by-pollutant basis. For example, a nitrogen oxides (NO_x) CEMS would be used for NO_x emission limits that apply to the emission unit but would not be used for SO₂ emission limits. Therefore, §122.704(a)(4) is consistent with 40 CFR Part 64.

Comment

PC commented that the CAM GOP provided in §122.710 does not include the elements required by 40 CFR §64.4 or §64.6.

Response

The commission does not change the rule in response to this comment. The CAM GOP will include a list of emission limitations or standards that are subject to Subchapter H. Monitoring options established by the executive director to satisfy CAM will be associated with each emission limitation or standard. In addition, a CAM GOP will be subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition as are all GOPs when initially issued. The monitoring option from the CAM GOP will then be incorporated into the traditional GOP or SOP. Therefore, the commission believes that the CAM GOP in combination with a traditional GOP or a SOP meets all the permit content requirements.

Comment

PC commented that §122.716, Compliance Assurance Monitoring Quality Improvement Plans, should provide that operating permits may specify an appropriate threshold for requiring the implementation of a quality improvement plan (QIP). The QIP should include the requirements listed in 40 CFR §64.8.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Section 122.716 provides the executive director the authority to require permit holders to implement quality improvement plans (QIPs). Title 40 CFR §64.8 establishes that QIPs are optional, at the permitting authorities' discretion. The commission chose to establish QIPs on a "case-by-case" basis, as appropriate. A QIP may be required based on the frequency of

deviations, the cause of deviations, the magnitude of deviations, the permit holder's response to deviations, or other information that indicates that the emission unit or control device is not being maintained and operated consistently with good air pollution control practices. The data to evaluate these criteria will be collected from deviation reports, compliance certifications, site inspections, and any other appropriate sources. Nothing in this section is intended to limit the commission's options for taking other enforcement action. Since QIPs are optional, at the permitting authorities' discretion, the commission does not believe this section needs to be revised.

Comment

PC commented that the commission should ensure that every file from which confidential information is withheld contains a clearly recognizable notice to the public that such information has been withheld and review the substance for confidentiality claims.

Response

The commission maintains a records retention and management system to address statutory requirements for public records, open records requests and confidentiality of records, including requirements under the Public Information Act. Public notice authorization packets sent to instruct an applicant on how to properly publish notice for a draft operating permit state that if the application is submitted to the TNRCC with information marked as confidential, the applicant is required to indicate which specific portions of the application are not being made available to the public. These portions of the application must be accompanied with the following statement: "Any request for portions of this application that are marked as confidential must be submitted in

writing, pursuant to the Public Information Act, to the TNRCC Public Information Coordinator (MC 197), P. O. Box 13087, Austin, Texas 78711-3087." The commission's procedures include handling permit data and files in the same manner as specified above. So far, the commission is unaware of any open records request for an operating permit application that contained any confidential data. The commission has informed applicants that the whole operating permit application cannot be considered confidential and that data needed to determine which applicable requirements apply to the site are also not confidential. As discussed in a previous comment, the commission is obligated to address claims of confidential information consistent with the Texas Government Code, Title 5, Chapter 552, regarding public information and exceptions from required disclosure and THSC, §382.041 regarding confidential information.

Comment

QLEP and 118 individuals commented that the commission's rules should be amended to allow credible evidence of violations, including evidence gathered by citizens, to be used to prove air pollution violations and that the commission drafts operating permits so polluters can ignore citizen gathered evidence. NFN also requested that the agency recognize credible evidence gathered by responsible citizens whom Title V seeks to protect. PC commented that citizen gathered evidence is excluded from enforcement actions and requested the commission to amend 122 to specifically acknowledge that any credible evidence may be used to demonstrate a violation at a Title V facility. If citizens come up with credible evidence that there have been violations at a facility, the commission should be required to consider that evidence. PC also noted that public participation is crucial to the success of the operating permit program. The TNRCC cannot be everywhere at once, and citizens often have more information

regarding facilities in their communities than the TNRCC does. The participation of those citizens in ensuring that all applicable requirements are included in permits and that facilities are complying with those requirements is essential. An individual also commented on the commission's inability to gather, accept, recognize and act upon credible evidence to prove air pollution violations, including evidence gathered by its own employees, as well as citizens. Further, EEP commented that Title V provides for the use of any credible evidence to prove violations, that evidence gathered by members of the public should be used in enforcement actions, and that such citizens should be thanked and encouraged by the commission. (An example was given that if opacity is monitored on a continuous basis, such monitoring is legitimate evidence of an opacity violation. You can't be limited to visual inspection by the operator of the facility.) The fact that the commission does not recognize this evidence damages the credibility of the commission. Title V rules should be amended, and operating permits should be written, to allow the use of all credible evidence, regardless of how it is collected.

Response

The commenters have raised two different, but related issues: the use of credible evidence in demonstrating compliance with Title V requirements and the use of credible evidence to prove the existence of a violation in an enforcement action. With regard to the Title V issues, the commission's rules do not prevent the consideration of any credible evidence to determine compliance with a Title V permit, including instances where the commission receives that information from citizens. The commission's regional offices are charged with reviewing Title V certifications and may include consideration of all credible evidence in evaluating certifications of compliance. The commission has preferred using evidence obtained by commission staff because

they are trained to collect evidence in accordance with standard and legal methods and to handle that evidence properly to preserve the chain of custody. These standards of collection and handling are established to protect objectivity. Whether the evidence is collected by the commission or by citizens, the information to be used as credible evidence must meet Texas Rules of Evidence before the commission can use it as the basis for, or as a component of, decisions related to compliance or non-compliance. The commission is currently developing guidance concerning the use of evidence obtained from sources outside the commission and the criteria that must be met for the evidence to be considered in making decisions related to compliance. Once issued, the guidance will be consistent with any Texas legislation currently being considered that deals with credible evidence.

Comment

QLEP and 118 individuals commented that the commission's rules do not protect citizen's right to breathe clean air, the rules contain loopholes that allow facilities to illegally avoid pollution limits and penalties through claims of grandfathering, upsets and audit privilege and that it will be impossible to clean Texas' air until the commission closes these loopholes. Further, the commission's Title V rules should ensure that facilities are required to comply with every applicable requirement and that enforcement action is taken against facilities that do not comply. NFN commented that exemptions such as grandfathering, upsets and audit privilege laws, combined with the agency's failure to conduct meaningful investigations of whether the privilege of such exemptions is merited, allow emissions in excess of permit limits with no real threat of enforcement. Also, there is no assurance that a previously exempted facility will come under real scrutiny in advance of, or in connection with or after the

permitting process. PC concurred and added that these loopholes prevent the commission from having the enforcement authority required by 40 CFR §70.11. Grandfathering should be eliminated altogether or, at the very least, operating permits should be used as a tool to ensure that facilities do not falsely claim grandfathered status and, thereby, avoid pollution control requirements. Because the commission is granting negative applicability permit shields, it is especially important that the commission does not wrongly allow facilities to claim grandfathered status. To be consistent with Part 70, Chapter 122 should specify that applications must include a detailed explanation of how the facility qualifies for any exemption claimed and documented to support that explanation. Also, operating permits should also contain an explanation for any exemption from applicable requirements. Also, the commission is not actually examining whether or not the facility qualifies for an exemption and is not including any such explanation in permits, as required by Part 70. The commission should require permits to contain a detailed explanation of how the facility complies with each of the requirements of the exemption and the facility should be required to certify in its annual compliance certification whether or not it continues to meet each of the requirements for the exemption. The commission should not have the authority to issue permit shields unless its rules have procedures to ensure that facilities are not illegally claiming exemptions. NFN also expressed concern with grandfathered facilities and the possibility of a negative applicability permit shield as a result of a meaningless permit application review. Another individual commented that grandfather clauses and expecting companies to police themselves in an effort to clean up the environment will never adequately provide a healthy environment. Monetary penalties for failure to act or shutting down those who fail to comply with clean air acts will aid in providing air that is fit to breathe.

PC commented that the Texas Environmental, Health, and Safety Audit Privilege Act (the Act) prevents the commission from having adequate authority to enforce the requirements of Title V permits. This is contrary to §502(b)(5) of Title V, which requires that states have the authority to enforce the terms and conditions of operating permits. The Act is broad and allows facilities to claim audit privilege exemptions for a wide range of violations, thereby avoiding penalties or injunctive relief. Further, the Act prevents inspectors from having access to information they need to determine a facility's compliance history and even provides special penalties for commission staff, and anyone else, who discloses information that is privileged under the Act. The Act does not adequately prevent claims of immunity by repeat or continuous violators; facilities that benefit economically from their violations and have economic incentive to violate; facilities whose violations cause injuries or the risk of injuries. It appears that the Act is being abused by facilities that perform audits not to discover unknown violations, but to gain immunity for violations they for which they are already aware. PC commented that the rules should clearly state that the self reported notices of violation pursuant to the Act must be included with deviation reports.

Response

The commission disagrees with the commenters and believes its rules protect air quality and public health. Grandfathered facilities are exempt only from the requirement to obtain a preconstruction permit. They are not exempt from the emission rates and other restrictions on emissions of air contaminants contained in the commission's rules and state implementation plans. The commission does not currently have the authority to require grandfathered facilities to obtain

a state NSR permit. The commission does not intend to grant permit shields for NSR requirements.

The commission recognizes that upsets at industrial facilities can cause the release of significant amounts of air contaminants over restrictions in permits or rules. The commission also recognizes that upsets occur despite the exercise of good operating practices by a facility owner or operator. The commission believes a procedure should exist for exempting upset emissions from enforcement provided that procedure requires that the owner or operator demonstrate that the upset was unavoidable and that he or she took prompt corrective action. The commission's rules provide this procedure and require that the event not be the result of improper design, maintenance, or operation. The commission also requires that logs of corrective action be kept and that upsets not be part of a recurring pattern in order to qualify for an exemption from enforcement. The commission has previously explained how the criteria it uses to exempt upsets from enforcement is equivalent to the procedures identified in Part 70.

The Audit Privilege Act (the Act) provides incentives for facility owners or operators to conduct a self audit. The intent of the audit is to identify emission units and other facility operations that are in violation of permits, laws, and commission rules. Disclosure under the Act only provides immunity from penalties if all of the statutory requirements are met, not immunity from enforcement, up to and including injunctive relief if necessary. The Act specifically excludes immunity for violations that result in injury or imminent and substantial risk of injury, violations that result in substantial economic benefit to the entity, and repeated violations that constitute a

pattern of disregard of environmental laws. Additionally, immunity is conditioned upon correction of all violations. Failure to complete corrective action in accordance with a compliance schedule would be grounds for another enforcement action that would carry penalties. All disclosures of violations, notices of violations, and commission orders are part of a company's compliance record regardless of how the violations were disclosed. The Act does not limit an investigator's ability to inspect a facility. Pursuant to the Act, all documents, data, and reports required by the commission to be collected, developed, maintained, or reported under a federal or state law are not privileged. The commission believes this Act provides an incentive for owners and operators to identify and correct violations more quickly than would otherwise occur. Violations disclosed under the Act are deviations. Section 122.145(2)(A) requires all deviations to be reported.

In the June 25, 1996 EPA notice, the EPA commented that the commission would have to demonstrate that the passage of Texas HB 2473 (1995), the Texas Environmental, Health and Safety Audit Privilege Act does not limit the commission's ability to adequately administer and enforce the federal operating permit program.

EPA and the commission negotiated a set of technical amendments to the Act with the purpose of removing any barriers to state assumption of federal programs. The 75th Texas Legislature enacted Texas HB 3459 (1997) to adopt the amendments agreed upon without any other significant changes in the law. The amendments to the Act have been in effect since September 1, 1997, and the commission implements the Act consistent with the intent of the legislation and the agreement

with EPA. EPA has agreed to conclude that the commission retains adequate authority to enforce the requirements of any authorized or delegated program.

Comment

PC commented that the operating permit program should provide members of certain environmental groups with access to monitoring and reporting data and enable them to be active participants in ensuring that facilities in Texas comply with air pollution requirements.

Response

Monitoring and reporting data is supplied to the commission and is a public record. Any member of the public can request to review that data.

Comment

NFN, while commenting on the operating permit program, also expressed specific concerns with ALCOA. Similarly, QLEP expressed concerns with Jobe Concrete and encouraged the commission to amend the Title V rules to protect and give equal protection to breathe clean air to all neighborhoods.

Response

The ALCOA and Jobe Concrete permit applications will be processed under the commission's adopted rules. However, the specific compliance status of any site is independent of this rulemaking and, therefore, will not be discussed here.

Comment

Sierra commented that the proposed rules do not consider Title VI of the 1964 Civil Rights Act and the environmental justice implications of that statute. Although the EPA did not require anything in the state rules for Title V, Sierra requests the commission to consider the incorporation of environmental justice concerns into Chapter 122. The fact that there may be circumstances with chronic violators raises issues of violation of Title VI of the 1964 Civil Rights Act because the commission is a recipient of federal funding and, therefore, it is required by federal law in its own rules and regulations to comply with Title VI. Sierra thinks that a lot of the staff people are very aware of the fact that Texas has a lot of communities of color. Not all live on the fence lines of big industrial sources, but Title VI does raise this concern about disproportionate impacts, cumulative impacts, and that operating permits provide an opportunity for these kinds of issues to be addressed because, otherwise, it would be inconsistent and a violation of Title VI of the 1964 Civil Rights Act. There are also a number of outstanding Title VI administrative civil rights complaints that are pending and involve allegations that the agency has not fully complied with Title VI. Therefore, Title V of the FOP program does offer an opportunity for the agency to do the right thing.

Response

The commission does not believe the rule needs to be changed to incorporate Title VI issues in response to this comment but wishes to clarify how it addresses complaints under Title VI of the 1964 Civil Rights Act. It is important to note that all Title VI complaints challenging the issuance of a permit are formally filed with and investigated by the EPA. In addition, any person may

submit comments regarding Title VI issues on any operating permit application during the public comment period.

Any violation of an applicable requirement contained in an operating permit is grounds for enforcement action, regardless of whether or not there is a violation under Title VI of the 1964 Civil Rights Act. The commission's rules require compliance by the regulated facilities without regard to the ethnic makeup of the community. The commission believes its rules protect air quality and public health.

The FOP program will incorporate all applicable requirements for federal sources into one permit so that the permit holder is aware of all regulations that govern the operation of a site. FOPs are issued based on the accuracy and completeness of the application and whether the application ensures compliance with all applicable requirements. The commission implements these requirements through Chapter 122. FCAA, Title V requires permits to assure compliance with all applicable requirements and does not provide for the denial of a permit based on a complaint under the 1964 Civil Rights Act, Title VI.

Nonetheless, all environmental justice issues (including Title VI complaints) are addressed by the Environmental Equity Program within the Office of Public Assistance (OPA). The goals of the Environmental Equity Program are to thoroughly consider all citizens' concerns and handle them fairly. This is accomplished by seeking to: 1.) determine the nature of the problem or concern; 2.) identify the principal parties affected; 3.) provide opportunities for input by all interested

parties; 4.) develop a plan of intervention or mediation; 5.) establish effective communication among all parties; 6.) educate affected parties about all sides of the issue; and 7.) negotiate or mediate mutually acceptable solutions. The commission believes that addressing problems in the early stages can keep the issue from escalating into more confrontational situations such as class action lawsuits or Title VI complaints. The commission further believes early intervention promotes a spirit of cooperation and often saves everyone money and time.

Comment

TCE submitted a report on the TNRCC citizen complaint process, completed by Public Research Works, and made the following comments. The citizen complaint process is seriously flawed and changes can be incorporated into the operating permit program. Citizens have difficulty in finding out to whom complaints should be submitted. In 1999, the legislature required the commission to have a toll-free number, but it is not listed on the homepage or citizen page of the TNRCC website. It was pointed out to the agency in August, 2000, and it still has not changed, indicating that it was not just an oversight. Citizens, unlike facilities that get investigated, do not get adequate information about the complaint process. Most people (75%) do not get a written response from the commission as to what happened with their complaints. This is true for written complaints as well, which are required by law to receive a written response.

Response

The report referenced by the commenter does not relate directly to this rulemaking but has been sent to the appropriate internal division of the commission. The commission did establish a toll-

free number to register complaints as required by the legislature and made it available on commission's website at www.tnrcc.state.tx.us/enforcement/complaints.html.

Comment

TCE commented that the commission is required to keep a record of all complaints that it receives, however numerous examples have been found where the commission did not record complaints. TCE stated that this occurred when over 3,000 signed affidavits that were submitted to the Odessa regional office were never recorded in the database, falsely showing that the number of complaints in the state is declining. Also, in Harlingen, citizens were actually being dissuaded from filing complaints. Staff first accused them of being fellow community members instigating calls, then explained that further complaints would just slow the process down. When three nuisance violations for a similar problem within five years yields automatic enforcement action, it is critical that citizen's complaints not only be recorded, but be investigated promptly so that problems can be dealt with through automatic enforcement actions. They were told by the commission and other air pollution officials that, in many cases, the only way the agency learns of air pollution problems may be from citizen complaints. The agency also does not investigate complaints promptly, has an unfair rating system to address complaints, and some complaints were not given the correct rating or were not an accurate indicator of problems. This ranking system should be done away with and the commission should just go out and investigate complaints as quickly as they come in like other agencies do.

Response

The commission sets a priority on complaints so that the most potentially serious are addressed first, but all complaints are recorded and investigated in accordance with commission procedures.

These procedures are not addressed through this rulemaking.

Comment

TCE commented that examples were found where clear violations of air pollution laws were not given violations and made the following comments. Facilities operating without a permit for up to a year still continue to operate. They stated that an investigator, in response to a complaint, left a citizen's property noticing no odor because the wind had shifted. The inspector then went to the facility and had to leave because the odor was so strong, but the complaint was written up as no violations occurred. They believe the commission must change its policies so that an investigator's experience of noxious odors is enough to write violations, and that if the wind has shifted, every effort is made to have a complainant go to the place where the wind has shifted so that violations can be noted, that it does not necessarily have to continue to be on their property. TCE also commented that investigations are flawed because they do not occur 24 hours a day, seven days a week, as the controller recommended in 1990. TCE specifically noted photographs and videos of parents in Lakeway trying to protect their children from being sprayed with sewage were ignored by the commission's staff. Further, they stated the commission's staff would not meet with the parents until a governor's staffer was contacted and got involved to schedule the meeting.

Response

The report and individual circumstances referenced by the commenter are issues that are addressed through the internal policies of the commission and are not addressed in this rulemaking. The report will be made available to the Field Operations Division to determine if any changes to policy and procedures are needed.

Comment

SEED Coalition supported comments submitted by the EEP, PC, Sierra, TCE, and NFN and added concerns from a citizen activist perspective. No one knows about operating permits; they don't know what they are, and they've never heard of them. This contrasts with industries that are rapidly submitting operating permit applications before citizens can even find out about the process itself.

Response

The commission does not change the rule in response to these comments. Interested groups can contact the commission or the EPA concerning participation and outreach programs. The commission currently provides outreach through its website and, in response to this comment, intends to develop and publish a basic overview of the operating permit program, along with a diagram that identifies the opportunities for public participation in the operating permit process. The commission also notes that its Office of Public Assistance website currently contains contact information for individuals who seek information about agency permits, the permitting process, and public participation opportunities. Public notice requirements for operating permits exceed Part 70 notice requirements. For example, operating permit public notice requires a sign posting and bilingual public notice which is not required by Part 70.

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director;

§5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER A: DEFINITIONS

§122.10

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Air pollutant** - Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a National Ambient Air Quality Standard (NAAQS) has been promulgated;

(D) any pollutant that is subject to any standard promulgated under FCAA, §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the EPA by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r) including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established pursuant to FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to the FCAA, §112(g)(2) requirement.

(2) **Applicable requirement** - All of the following requirements, including requirements that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective compliance dates:

(A) All of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site.

(B) All of the requirements of Chapter 112 of this title (relating to Sulfur Compounds) as they apply to the emission units at a site.

(C) All of the requirements of Chapter 113 of this title (relating to Control of Air Pollution from Toxic Materials), as they apply to the emission units at a site.

(D) All of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site.

(E) All of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site.

(F) All of the requirements under Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as they apply to the emission units at a site.

(G) Any site specific requirement of the state implementation plan (SIP).

(H) All of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit.

(I) All of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under FCAA, §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain Program;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any increment or visibility requirement under FCAA, Title I, Part C or any NAAQS, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources).

(J) The following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surface Coatings containing less than 1.0% Lead), and §111.139 of this title (relating to Exemptions)).

(3) Compliance assurance monitoring (CAM) case-by-case determination - A
monitoring plan designed by the permit holder and approved by the executive director to satisfy 40 CFR Part 64 (Compliance Assurance Monitoring).

(4) **Compliance assurance monitoring general operating permit (CAM GOP) - A**

GOP issued under Subchapter F of this chapter (relating to General Operating Permits) which provides monitoring options established by the executive director to satisfy Subchapter H of this chapter (relating to Compliance Assurance Monitoring).

(5) **Continuous compliance determination method** - For purposes of Subchapter H of

this chapter and Subchapter G of this chapter (relating to Periodic Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(6) **Control device** - For the purposes of Subchapter H of this chapter, equipment that

is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere.

(A) A control device does not include the following:

(i) passive control measures that act to prevent pollutants from forming, such as the use of seals, lids, or roofs to prevent the release of pollutants, use of low-polluting fuel or feedstocks, or the use of combustion or other process design features or characteristics; or

(ii) inherent process equipment, which is equipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that is installed and operated primarily for purposes other than compliance with applicable requirements. Equipment that must be operated at an efficiency higher than that achieved during normal process operations in order to comply with the applicable emission limitation or standard is not inherent process equipment.

(B) If an applicable requirement establishes that particular equipment which otherwise meets this definition of a control device does not constitute a control device as applied to a particular emission unit, then that definition shall apply for purposes of Subchapter H of this chapter.

(7) **Deviation** - Any indication of noncompliance with a term or condition of the permit as found using, at a minimum, but not limited to, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit.

(8) **Deviation limit** - A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(9) **Draft permit** - The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(10) **Emission unit** - A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the acid rain program.

(11) **FCAA, §502(b)(10) changes** - Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(12) **Final action** - Issuance or denial of the permit by the executive director.

(13) **General operating permit (GOP)** - A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple stationary sources may be authorized to operate.

(14) **Major source** -

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under FCAA, §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the EPA through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" shall have the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

- (i) coal cleaning plants (with thermal dryers);
- (ii) kraft pulp mills;
- (iii) portland cement plants;
- (iv) primary zinc smelters;
- (v) iron and steel mills;
- (vi) primary aluminum ore reduction plants;
- (vii) primary copper smelters;
- (viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil-fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as “moderate”;

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as “serious”; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or

under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(15) **Notice and comment hearing** - Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(16) **Periodic monitoring case-by-case determination** - A monitoring plan designed by the permit holder and approved by the executive director to satisfy §122.142(c) of this title (relating to Permit Content Requirements).

(17) **Periodic monitoring GOP** - A GOP issued under Subchapter F of this chapter which provides monitoring options established by the executive director to satisfy Subchapter G of this chapter.

(18) **Permit or federal operating permit** -

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any GOP, or group of GOPs, issued, renewed, or revised by the executive director under this chapter. The term “permit” refers to a CAM GOP or periodic monitoring GOP only when clearly indicated by the context.

(19) **Permit anniversary** - The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(20) **Permit application** - An application for an initial permit, permit revision, permit renewal, permit reopening, GOP, or any other similar application as may be required.

(21) **Permit holder** - A person who has been issued a permit or granted the authority by the executive director to operate under a GOP.

(22) **Permit revision** - Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(23) **Potential to emit** - The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration or preconstruction authorization restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the EPA. This term does not

alter or affect the use of this term for any other purposes under the FCAA, or the term "capacity factor" as used in acid rain provisions of the FCAA or the acid rain rules.

(24) **Preconstruction authorization** - Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title. In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under FCAA, §112(g) (Modifications);

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit); and

(C) where appropriate, any preconstruction authorization under Chapter 120 of this title (relating to Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities) (as effective until December 1996) or Chapter 121 of this title (relating to Control of Air Pollution from Municipal Solid Waste Management Facilities).

(25) **Predictive emission monitoring system (PEMS)** - For purposes of Subchapter H of this chapter, a system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(26) **Proposed permit** - The version of a permit that the executive director forwards to the EPA for a 45-day review period.

(27) **Provisional terms and conditions** - Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;
and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(28) **Renewal** - The process by which a permit or an authorization to operate under a GOP is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(29) **Reopening** - The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(30) **Site** - The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development (R&D) operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial

Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the R&D operation is a support facility for the manufacturing facility.

(31) **State-only requirement** - Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the FCAA or under any applicable requirement.

(32) **Stationary source** - Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 CFR Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 1: GENERAL REQUIREMENTS

§122.120

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under

§382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit as defined in 40 CFR 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under FCAA, §129(e) (relating to Solid Waste Combustion); or

(4) any site that is a non-major source which the EPA, through rulemaking, has designated as no longer exempt or no longer eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA.

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit.

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 3: PERMIT APPLICATION

§§122.130 - 122.132, 122.134, 122.136, 122.139, 122.140

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under

§382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.130. Initial Application Due Dates.

(a) Owners or operators of any site subject to the requirements of this chapter on February 1, 1998, shall submit abbreviated initial applications by February 1, 1998. The executive director shall inform the applicant in writing of the deadline for submitting the remaining application information.

(b) Owners and operators of sites identified in §122.120 of this title (relating to Applicability) that become subject to the requirements of this chapter after February 1, 1998 are subject to the following requirements.

(1) If the site is a new site or a site that will become subject to the program as the result of a change at the site, the owner or operator shall not operate the change, or the new emission units, before an abbreviated application is submitted under this chapter. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(2) If the site becomes subject to the program as the result of an action by the executive director or the EPA, the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter.

(c) Applications submitted under 40 CFR 71 (Federal Operating Permit Programs).

(1) If 40 CFR 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

§122.131. Phased Permit Detail.

(a) Sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area may qualify for the phased permit detail process. Eligibility for the phased permit detail process shall be based on the number of emission units individually listed in all the initial permit applications for the site.

(b) Applicants with sites that qualify for the phased permit detail process may submit in the initial permit application detailed applicability determination information required by §122.132(e)(3) of

this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits) for a portion of the emission units with a proposed schedule for the submission of the remaining detailed applicability determination information. For each emission unit, the initial permit application must include detail sufficient to clarify the applicant's obligations with respect to its applicable requirements, including emission limits and compliance terms.

(c) Any detailed applicability determination information not submitted with the initial permit application shall be submitted according to the schedule included as a term or condition of the permit.

(d) The schedule in the permit must require the incorporation of the remaining detailed applicability determinations into the permit at least annually through the reopening or renewal process. The applications for permit reopenings shall be submitted no later than 30 days after each permit anniversary.

(e) All detailed applicability determinations shall be codified in the permit no later than July 25, 2003, or during the first permit renewal, whichever occurs first.

(f) The reopening requirements of this section may be satisfied by the procedures for significant permit revisions or permit renewals.

(g) Except for those applications received on or before July 22, 2000, no site may qualify for the phased permit detail process.

§122.132. Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits.

(a) A permit application shall provide any information, including confidential information as addressed in Chapter 1 of this title (relating to Purpose of Rules, General Provisions), required by the executive director to determine the applicability of, or to codify, any applicable requirement or state-only requirement.

(b) An application for a general operating permit shall only be required to provide the information necessary to determine qualification for, and to assure compliance with, the general operating permit.

(c) An applicant may submit an abbreviated initial permit application, containing only the information in this section deemed necessary by the executive director. The abbreviated application shall include at a minimum, a general application form containing identifying information regarding the site and the applicant and a certification by a responsible official. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(d) An application for a site qualifying under §122.131 of this title (relating to Phased Permit Detail) may be submitted under the phased permit detail process.

(e) An application shall include, but is not limited to, the following information:

(1) a general application form and all information requested by that form;

(2) for each emission unit, information regarding the general applicability determinations, which includes the following:

(A) the general identification of each potentially applicable requirement and potentially applicable state-only requirement (e.g., NSPS Kb);

(B) the applicability determination for each requirement identified under subparagraph (A) of this paragraph; and

(C) the basis for each determination made under subparagraph (B) of this paragraph;

(3) for each emission unit, except as provided in §122.131 of this title, information regarding the detailed applicability determinations, which includes the following:

(A) the specific regulatory citations in each applicable requirement or state-only requirement identifying the following:

(i) the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;

(B) the basis for each applicability determination identified under subparagraph (A) of this paragraph;

(4) a compliance plan including the following information:

(A) the following statement: "As the responsible official it is my intent that all emission units shall continue to be in compliance with all applicable requirements they are currently in compliance with, and all emission units shall be in compliance by the compliance dates with any applicable requirements that become effective during the permit term.";

(B) for all emission units addressed in the application, an indication of the compliance status with respect to all applicable requirements, based on, at a minimum, but not limited to, any compliance method specified in the applicable requirements;

(C) for any emission unit not in compliance with the applicable requirements identified in the application, the following information:

(i) the method used for assessing the compliance status of the emission unit;

(ii) a narrative description of how the emission unit will come into compliance with all applicable requirements;

(iii) a compliance schedule (resembling and at least as stringent as any compliance schedule contained in any judicial consent decree or administrative order to which the site is subject), including remedial measures to bring the emission unit into compliance with the applicable requirements; which shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based; and

(iv) a schedule for the submission, at least every six months after issuance of the permit, of certified progress reports;

(5) if applicable, information requested by the nationally-standardized forms for the acid rain portions of permit applications, and compliance plans required by the acid rain program;

(6) if applicable, a statement certifying that a risk management plan, or a schedule to submit a risk management plan has been submitted to the appropriate agency in accordance with FCAA, §112(r)(7) (Prevention of Accidental Releases);

(7) for applicants electing the phased permit detail process under §122.131 of this title, a proposed schedule for the incorporation of the remaining detailed applicability determinations into the permit;

(8) for applicants requesting a permit shield, any information requested by the executive director in order to determine whether to grant the shield;

(9) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official);

(10) fugitive emissions from an emission unit shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source; and

(11) for any application for which the executive director has not authorized initiation of public notice by the effective date of this rule, any preconstruction authorizations that are applicable to emission units at the site.

(f) The executive director shall make a copy of the permit application accessible to the EPA.

(g) An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement; however, any facilities that meet the requirements of §116.119 of this title (relating to De Minimis Facilities or Sources) are not required to be included in applications unless the facilities or sources are subject to an applicable requirement.

§122.134. Complete Application.

(a) An application is complete on the 61st day after receipt by the executive director, unless the executive director has requested additional information or otherwise notified the applicant of incompleteness.

(b) Except as provided in subsection (c) of this section, a complete application for a permit shall include the following:

(1) for initial permit issuance, all information required in §122.132 of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits);

(2) for permit renewal, an update of the information held by the executive director and any information required by this chapter that has not been previously submitted;

(3) for the initial authorization to operate under a general operating permit, information necessary to determine qualification for, and to assure compliance with, the general operating permit;

(4) for the renewal of an authorization to operate under a general operating permit, an update of the information held by the executive director and any information required by this chapter that has not been previously submitted; or

(5) for the authorization to operate under a revised general operating permit, the information required by §122.504 of this title (relating to Application Revisions When an Applicable Requirement or State-Only Requirement is Promulgated or Adopted or a General Operating Permit is Revised or Rescinded).

(c) An applicant may submit an abbreviated initial permit application, containing only the information in §122.132 of this title deemed necessary by the executive director. The abbreviated application shall include at a minimum, a general application form containing identifying information regarding the site and the applicant and a certification by a responsible official. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

§122.136. Application Deficiencies and Supplemental Information.

- (a) All applications submitted under this chapter are subject to the requirements of this section.
- (b) If an applicant omits any relevant facts or submits incorrect information in an application, the applicant shall submit the relevant facts or correct the information no later than 60 days after discovering the error.
- (c) An applicant shall provide additional information as necessary to address any applicable requirements or state-only requirements that become applicable to the site after the date the applicant

files a complete application but prior to release of the draft permit. Such information is not required to be submitted prior to the executive director's technical permit review period.

(d) If while processing an application, the executive director determines that additional information is necessary to evaluate or take final action on that application, the executive director may request the information and set a reasonable deadline for a response.

§122.139. Application Review Schedule.

The executive director shall take final action to approve, void, or deny permit applications according to the following schedule.

(1) For those initial applications required to be submitted by February 1, 1998, the executive director shall take final action on at least one-third of those applications annually.

(2) For any permit application containing an early reduction demonstration under FCAA, §112(i)(5) (Early Reduction), the executive director shall take final action no later than nine months after receipt of the complete application.

(3) Except as noted in paragraphs (1) and (2) of this section, the executive director shall take final action on an application for an initial permit or permit renewal no later than 18 months after the date on which the executive director deems the application complete.

§122.140. Representations in Application.

The only representations in a permit application that become conditions under which a permit holder shall operate are the following:

- (1) representations in an acid rain permit application;
- (2) upon the granting of authorization to operate under a general operating permit, applicability determinations and the bases for the determinations in a general operating permit application;
- (3) upon the granting of the authorization to operate under a CAM GOP or periodic monitoring GOP, the information specified in §122.714(a) or §122.612 of this title (relating to Compliance Assurance Monitoring Requirements in Permits and General Operating Permit Applications and Periodic Monitoring Requirements in Permits and General Operating Permit Applications, respectively), excluding the justification for those requirements; and
- (4) any representation in an application which is specified in the permit as being a condition under which the permit holder shall operate.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 4: PERMIT CONTENT

§§122.142, 122.143, 122.145, 122.146

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under

§382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.142. Permit Content Requirements.

(a) The conditions of the permit shall provide for compliance with the requirements of this chapter.

(b) Each permit issued under this chapter shall contain the information required by this subsection.

(1) Unless otherwise specified in the permit, each permit shall include the terms and conditions in §§122.143 - 122.146 of this title (relating to General Terms and Conditions; Recordkeeping Terms and Conditions; Reporting Terms and Conditions; and Compliance Certification Terms and Conditions).

(2) Each permit shall also contain specific terms and conditions for each emission unit regarding the following:

(A) the generally identified applicable requirements and state-only requirements (e.g., NSPS Kb);

(B) except as provided by the phased permit detail process, the detailed applicability determinations, which include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph sufficient to ensure compliance with the permit.

(3) Each permit for which the executive director has not authorized initiation of public notice by the effective date of this rule shall contain any preconstruction authorization that is applicable to emission units at the site.

(c) Each permit shall contain periodic monitoring requirements, as required by the executive director, that are designed to produce data that are representative of the emission unit's compliance with the applicable requirements.

(d) For permits undergoing the phased permit detail process, the permit shall contain a schedule for phasing in the detailed applicability determinations consistent with §122.131 of this title (relating to Phased Permit Detail).

(e) For emission units not in compliance with the applicable requirements at the time of initial permit issuance or renewal, the permit shall contain the following:

(1) a compliance schedule or a reference to a compliance schedule consistent with §122.132(e)(4)(C) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits); and

(2) a requirement to submit progress reports consistent with §122.132(e)(4)(C) of this title. The progress reports shall include the following information:

(A) the dates for achieving the activities, milestones, or compliance required in the compliance schedule;

(B) dates when the activities, milestones, or compliance required in the compliance schedule were achieved; and

(C) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(f) At the executive director's discretion, and upon request by the applicant, the permit may contain a permit shield for specific emission units.

(g) Where an applicable requirement is more stringent than a requirement under the acid rain program, both requirements shall be incorporated into the permit and shall be enforceable requirements of the permit.

(h) Permits shall contain compliance assurance monitoring as specified in Subchapter H of this chapter (relating to Compliance Assurance Monitoring).

§122.143. General Terms and Conditions.

Unless otherwise specified in the permit, the following general terms and conditions shall become terms and conditions of each permit.

(1) Compliance with the permit does not relieve the permit holder of the obligation to comply with any other applicable rules, regulations, or orders of the commission, or of the EPA, except for those requirements addressed by a permit shield.

(2) The term of the permit shall not exceed five years from the date of initial issuance or renewal of the permit. The authorization to operate under a general operating permit shall not exceed five years from the date the authorization was granted or renewed.

(3) Consistent with the authority in Texas Health and Safety Code, Chapter 382, Subchapter B (Powers and Duties of Commission), the permit holder shall allow representatives from the commission or the local air pollution control program having jurisdiction to do the following:

(A) enter upon the permit holder's premises where an emission unit is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(B) access and copy any records that must be kept under the conditions of the permit;

(C) inspect any emission unit, equipment, practices, or operations regulated or required under the permit; and

(D) sample or monitor substances or parameters for the purpose of assuring compliance with the permit at any time.

(4) The permit holder shall comply with all terms and conditions codified in the permit and any provisional terms and conditions required to be included with the permit. Except as provided for in paragraph (5) of this section, any noncompliance with either the terms or conditions codified in the permit or the provisional terms and conditions, if any, constitutes a violation of the FCAA and the TCAA and is grounds for enforcement action; permit termination, revocation and reissuance, or

modification; or denial of a permit renewal application. It shall not be a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to comply with the permit terms and conditions of the permit.

(5) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal or before the granting of a new authorization to operate.

(6) In every case, the applicable requirements and state-only requirements are always enforceable.

(7) The permit may be reopened for cause and revised or terminated. Permit terms or conditions remain enforceable regardless of the following:

(A) the filing of a request by the permit holder for a permit revision, reopening, or termination;

(B) a notification of planned changes or anticipated noncompliance; or

(C) a notice of intent by the executive director for a permit reopening or termination.

(8) The executive director may request any information necessary to determine compliance with the permit or whether cause exists for revising, reopening, or terminating the permit. The permit holder shall submit the information no later than 60 days after the request, unless the deadline is extended by the executive director. Upon request, the permit holder shall also furnish to the executive director copies of records required to be kept by the permit, including information claimed to be confidential.

(9) If a state-only requirement is determined by the commission to be an applicable requirement, the permit holder shall submit an application for a significant permit revision for the incorporation of the requirement into the permit as an applicable requirement. The application shall be submitted no later than 12 months after the determination by the commission that the requirement is an applicable requirement.

(10) The permit holder shall pay fees to the commission consistent with the fee schedule in §101.27 of this title (relating to Emissions Fees).

(11) Each portion of the permit is severable. Permit requirements in unchallenged portions of the permit shall remain valid in the event of a challenge to other portions of the permit.

(12) The permit does not convey any property rights of any sort, or any exclusive privilege.

(13) A copy of the permit shall be maintained at the location specified in the permit.

(14) For general operating permits, a copy of the permit, the enforceable general operating permit application, and the authorization to operate shall be maintained at the location specified in the authorization to operate.

(15) Any report or annual compliance certification required by a permit to be submitted to the executive director shall contain a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(16) Representations in acid rain applications and applicability determinations, and the bases for the determinations in general operating permit applications are conditions under which the permit holder shall operate. Representations in general operating permit applications for CAM and periodic monitoring, as specified in §122.140(3) of this title, are conditions under which the permit holder shall operate.

(17) No emissions from emission units addressed in the permit shall exceed allowances lawfully held under the acid rain program.

(18) State-only requirements will not be subject to any of the following requirements of this chapter: public notice, affected state review, notice and comment hearings, EPA review, public

petition, recordkeeping, six-month monitoring reporting, six-month deviation reporting, compliance certification, or periodic monitoring.

§122.145. Reporting Terms and Conditions.

Unless otherwise specified in the permit, the following reporting requirements shall become terms and conditions of the permit.

(1) Monitoring reports.

(A) Reports of monitoring data required to be submitted by an applicable requirement, or by the permit, shall be submitted to the executive director.

(B) Reports shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting.

(C) The monitoring reports shall be submitted no later than 30 days after the end of each reporting period.

(D) The reporting of monitoring data does not change the data collection requirements specified in an applicable requirement.

(2) Deviation reports.

(A) The permit holder shall report, in writing, to the executive director all instances of deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit.

(B) A deviation report shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting. However, no report is required if no deviations occurred over the six-month reporting period.

(C) The deviation reports shall be submitted no later than 30 days after the end of each reporting period.

(D) Reporting in accordance with §101.6 and §101.7 of this title (relating to Upset Reporting and Recordkeeping Requirements and Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements) does not substitute for reporting deviations under this paragraph.

§122.146. Compliance Certification Terms and Conditions.

Unless otherwise specified in the permit, the following compliance certification requirements shall become terms and conditions of the permit.

(1) The permit holder shall certify compliance with the terms and conditions of the permit for at least each 12-month period following initial permit issuance.

(2) The certification shall be submitted to the executive director and the EPA administrator no later than 30 days after the end of the certification period.

(3) The executive director shall make a copy of the compliance certification accessible to the EPA.

(4) The certification shall be based on at a minimum, but not limited to, the monitoring method (or recordkeeping method, if appropriate) required by the permit to be used to assess compliance. If necessary, the permit holder shall identify any other material information that must be included in the certification to comply with FCAA, §113(c)(2), which prohibits knowingly making a false certification or omitting material information.

(5) The annual compliance certification shall include or reference the following information:

(A) the identification of each term or condition of the permit for which the permit holder is certifying compliance, the method used for determining the compliance status of each emission unit, and whether such method provides continuous or intermittent data;

(B) for emission units addressed in the permit for which no deviations have occurred over the certification period, a statement that the emission units were in continuous compliance over the certification period;

(C) for any emission unit addressed in the permit for which one or more deviations occurred over the certification period, the following information indicating the potentially intermittent compliance status of the emission unit:

(i) the identification of the emission unit;

(ii) the applicable requirement for which a deviation occurred;

(iii) the monitoring method (or recordkeeping method, if appropriate) used to assess compliance;

(iv) the frequency with which sampling, monitoring, or recordkeeping was required to be conducted by the monitoring or recordkeeping requirement of the permit; and

(v) the total number of times that the assessment required by the monitoring or recordkeeping method specified in the permit indicated that a deviation had occurred;

(D) the identification of all other terms and conditions of the permit for which compliance was not achieved; and

(E) the annual compliance certification does not need to include any information regarding facilities identified as de minimis under §116.119 of this title (relating to De Minimis Facilities or Sources) unless the facilities or sources are subject to an applicable requirement.

(6) The executive director may request additional information if necessary to determine the compliance status of an emission unit.

CHAPTER 122: FEDERAL OPERATING PERMITS

**SUBCHAPTER C: INITIAL PERMIT ISSUANCES, REVISIONS, REOPENINGS, AND
RENEWALS**

DIVISION 2: PERMIT REVISIONS

§§122.210 - 122.213, 122.215 - 122.219, 122.221, 122.222

STATUTORY AUTHORITY

The amendments and new sections are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for

delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.210. General Requirements for Revisions.

(a) The permit holder shall submit an application to the executive director for a revision to a permit for those activities at a site which change, add, or remove one or more permit terms or conditions.

(b) The executive director shall make a copy of the permit application, the permit, and any required notices accessible to the EPA.

(c) Provisional terms and conditions are not eligible for a permit shield.

(d) The permit holder may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.

(e) Changes qualifying as administrative permit revisions may be processed as minor or significant permit revisions at the permit holder's discretion.

(f) Changes qualifying as minor permit revisions may be processed as significant permit revisions at the permit holder's discretion.

(g) General operating permits and authorizations to operate under general operating permits are not subject to the permit revision requirements of this subchapter, but instead are subject to the requirements of Subchapter F of this chapter (relating to General Operating Permits).

§122.211. Administrative Permit Revisions.

A change to a permit may qualify as an administrative permit revision if the change satisfies one or more of the following:

- (1) corrects typographical errors;
- (2) identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar administrative change at the site;
- (3) increases the frequency of monitoring or reporting requirements without changing any existing emission limitations or standards;

(4) changes the permit identification of ownership or operational control of a site where the executive director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the old and new permit holder is maintained with the permit;

(5) incorporates the requirements from preconstruction authorizations under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to those of Subchapters C and D of this chapter that would be applicable to the change if it were subject to review as a permit revision, and compliance requirements substantially equivalent to those contained in §§122.143, 122.145, and 122.146 of this title (relating to General Terms and Conditions, Reporting Terms and Conditions, and Compliance Certification Terms and Conditions, respectively);

(6) affects or adds a state-only requirement; or

(7) is similar to those in paragraphs (1) - (6) of this section and approved by EPA.

§122.212. Applications for Administrative Permit Revisions.

And application must include a record of any changes that took place over the previous 12 months that have not already been incorporated into the permit. An application for administrative permit revision must include, at a minimum, the following:

- (1) a description of each change;
- (2) a description of the emission units affected;
- (3) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements or state-only requirements;
- (4) a statement that each change qualifies for an administrative permit revision; and
- (5) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

§122.213. Procedures for Administrative Permit Revisions.

(a) If the following requirements are met, changes at a site listed in §122.211 of this title (relating to Administrative Permit Revisions) requiring an administrative permit revision may be operated before issuance of the revision:

- (1) the permit holder records the information required in §122.212 of this title (relating to Applications for Administrative Permit Revisions) before the change is operated; and
- (2) the permit holder maintains the information required by §122.212 of this title with the permit until the permit is revised.

(b) In every case, the applicable requirements and state-only requirements are always enforceable.

(c) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal.

(d) The permit holder shall submit an application for an administrative permit revision to the executive director no later than 30 days after each permit anniversary.

(e) An administrative permit revision may be issued by the executive director provided the following:

(1) the change meets the criteria for an administrative permit revision;

(2) the executive director has received an application; and

(3) the conditions of the permit provide for compliance with the requirements of this chapter.

(f) The executive director shall take final action on an administrative permit revision no later than 60 days after receipt of the application.

§122.215. Minor Permit Revisions.

Minor permit revisions include any change that satisfies the following:

- (1) does not violate any applicable requirement;
- (2) does not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;
- (3) does not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;
- (4) does not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:
 - (A) a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of the FCAA, Title I; and

(B) an alternative emissions limit approved pursuant to regulations promulgated under the FCAA, §112(i)(5); and

(5) is not a modification under any provision of FCAA, Title I.

§122.216. Applications for Minor Permit Revisions.

An application for a minor permit revision must include, at a minimum, the following:

- (1) a description of each change;
- (2) a description of the emission units affected;
- (3) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements;
- (4) a statement that the change qualifies for a minor permit revision;
- (5) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official); and
- (6) the emissions resulting from the change.

§122.217. Procedures for Minor Permit Revisions.

(a) If the following requirements are met, changes at a site requiring a minor permit revision may be operated before issuance of the revision:

(1) the permit holder complies with the following:

(A) all applicable requirements governing the change;

(B) all state-only requirements governing the change; and

(C) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) governing the change;

(2) the permit holder submits to the executive director an application containing the information required in §122.216 of this title (relating to Applications for Minor Permit Revisions) before the change is operated;

(3) the permit holder maintains the information required by §122.216 of this title with the permit until the permit is revised.

(b) For changes to a permit required as the result of the revision of a compliance assurance monitoring general operating permit or periodic monitoring general operating permit, the following requirements apply.

(1) The permit holder shall comply with the following:

(A) all applicable requirements governing the change;

(B) all state-only requirements governing the change; and

(C) the provisional terms and conditions as defined in §122.10 of this title governing the change.

(2) The information in §122.216(1) - (5) of this title shall be submitted no later than the compliance date of the new requirement or effective date of the repealed requirement, whichever is applicable.

(3) The permit holder shall maintain the information required in §122.216 (1) - (4) of this title with the permit until the permit revision is final.

(c) In every case, the applicable requirements are always enforceable.

(d) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal.

(e) The executive director shall notify the EPA administrator and affected state(s) of the requested permit modification within five working days of receipt of a complete minor revision permit application.

(f) A minor permit revision may be issued by the executive director provided the following:

(1) the changes meet the criteria for a minor permit revision;

(2) the executive director has received a complete application;

(3) the conditions of the permit provide for compliance with the requirements of this chapter; and

(4) the requirements of this chapter for public announcement, affected state review, and EPA review have been satisfied.

(g) The executive director shall take final action on the permit revision application no later than 90 days after receipt of an application, or 15 days after the end of the EPA review period, whichever is later.

§122.218. Minor Permit Revision Procedures for Permit Revisions Involving the Use of Economic Incentives, Marketable Permits, and Emissions Trading.

Notwithstanding §122.215 of this title (relating to Minor Permit Revisions), minor permit revision procedures may be used for permit revisions involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit revision procedures are explicitly provided for in the Texas state implementation plan or in applicable requirements promulgated by the EPA.

§122.219. Significant Permit Revisions.

(a) Significant revision procedures shall be used for changes to the permit at a site that do not qualify as administrative or minor revisions.

(b) At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered a significant permit revision.

(c) A change to a permit shield or a new permit shield is a significant revision.

§122.221. Procedures for Significant Permit Revisions.

(a) Changes requiring a significant permit revision shall not be operated before the permit is revised. For those changes, the permit holder shall do the following:

(1) comply with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) submit to the executive director a request for a permit revision including the information required in §122.220 of this title (relating to Applications for Significant Permit Revisions).

(b) A significant permit revision may be issued by the executive director only if all of the following conditions have been satisfied:

(1) the permit holder has submitted a complete application;

(2) the conditions of the permit provide for compliance with the requirements of this chapter; and

(3) the requirements of this chapter for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied.

(c) The significant permit revision shall not be final until the public petition requirements of this chapter have been satisfied.

§122.222. Operational Flexibility and Off-Permit Changes.

(a) An owner or operator may make changes at a permitted site without applying for or obtaining a permit revision provided that the following conditions are met:

- (1) the changes are not modifications under FCAA, Title I;
- (2) the changes are allowed under FCAA, §502(b)(10);
- (3) the changes do not exceed the emissions limitation under the permit; and
- (4) the owner or operator has obtained any applicable preconstruction authorization.

Such preconstruction authorization cannot be a modification under FCAA, Title I.

(b) When an owner or operator removes a unit from the site, the unit and its applicable requirements and any other associated permit terms and conditions may be removed from the permit

when this removal does not result in changes to applicable requirements or permit terms and conditions for remaining units.

(c) The owner or operator shall provide the EPA and the executive director written notification for changes to the permit which qualify under this section. The written notification shall be submitted to the executive director and the EPA administrator at least seven days in advance of the proposed changes, except for an emergency. Notice may be provided within two working days of implementation of operational flexibility changes due to an emergency. Such notice shall also include an explanation of the emergency.

(d) For those cases where the permit does not already provide for emissions trading, an owner or operator may trade increases and decreases in emissions without applying for or obtaining a permit revision and based on the seven-day notice prescribed in subsection (c) of this section.

(e) Upon request, the executive director shall issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements.

(f) Written notification shall include the following information:

(1) for changes specified in subsections (a) and (b) of this section, a description of the change, the date on which the change is proposed to occur, the emissions resulting from the change, and any permit term or condition that is no longer applicable as a result of the change; or

(2) for changes specified in subsection (d) of this section, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the SIP, the pollutants emitted subject to the emissions trade, and reference to the provisions in the SIP with which the source will comply and that provide for the emissions trade; or

(3) for changes specified in subsection (e) of this section, when the proposed change will occur, a description of the changes in emissions that will result, and how these increases and decreases in emissions will comply with the terms and conditions of the permit; and

(4) certification by a responsible official, consistent with §122.165 of this title (relating to Certification by a Responsible Official), that the proposed change meets the criteria for the use of operational flexibility under this section and a request that such procedures be used.

(g) The owner or operator, the executive director, and the EPA shall attach each such notice to their copy of the relevant permit.

(h) Changes that qualify under this section are not subject to the public notice, affected state review, notice and comment hearing, EPA review, and public petition requirements for permit revisions.

(i) Upon satisfying the requirements of this section, the owner or operator may begin operating the change at the expiration of the time period provided for in subsection (c) of this section.

(j) Except as provided in subsection (e) of this section, the permit shield described in §122.148 of this title (relating to Permit Shield) shall not apply to any change made pursuant to this section.

(k) An off-permit change may be made at a site, when the following conditions are met:

(1) The change shall meet all applicable requirements and shall not violate any existing permit term or condition;

(2) The permittee shall provide written notice to the executive director and the EPA administrator concurrent with each such change, except for changes that qualify as insignificant activities. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change;

(3) The change shall not qualify for the permit shield under §122.148; and

- (4) The permittee shall keep a record of any off-permit changes with the permit.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER C: INITIAL PERMIT ISSUANCES, REVISIONS, REOPENINGS, AND

RENEWALS

DIVISION 2: PERMIT REVISIONS

§122.215, §122.219

STATUTORY AUTHORITY

The repeals are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties

under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.215. Minor Permit Revisions.

§122.219. Significant Permit Revisions.

CHAPTER 122: FEDERAL OPERATING PERMITS

**SUBCHAPTER C: INITIAL PERMIT ISSUANCES, REVISIONS, REOPENINGS, AND
RENEWALS**

DIVISION 3: PERMIT REOPENINGS

§122.231

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties

under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.231. Permit Reopenings.

(a) The executive director shall reopen a permit for cause. Cause shall be limited to one or more of the following:

(1) the promulgation or adoption of a new applicable requirement affecting emission units at the site, unless one of the following applies:

(A) the new requirement is incorporated into a permit which addresses the emission unit subject to the new requirement;

(B) the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended

pursuant to §§122.133 of this title (relating to Timely Application) or §122.134 of this title (relating to Complete Application); or

(C) the remaining permit term is less than three years;

(2) the executive director or the EPA administrator determines that the permit contains a material mistake;

(3) inaccurate statements were made in establishing the emissions standards or other terms and conditions of the permit;

(4) the executive director or the EPA administrator determines that the permit must be revised or terminated to assure compliance with the applicable requirements;

(5) a phased application schedule in the permit requires a reopening; or

(6) additional requirements, including excess emissions requirements, become applicable to an affected source under the acid rain program. Upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(b) The following procedures shall apply if EPA initiates a reopening by notifying the executive director in writing that cause, as defined in this section, exists to terminate or revise a permit.

(1) The executive director shall submit a proposed determination regarding the reopening to the EPA no later than 90 days after receipt of the notification. If the EPA extends the period for response by the executive director, the executive director shall submit the proposed determination no later than 180 days after receipt of the notification.

(2) Upon receipt of the proposed determination, the EPA shall have 90 days to object, in writing, to the proposed determination.

(3) The executive director shall have 90 days from receipt of an EPA objection to resolve the objection and take action on the reopening.

(c) The executive director shall institute proceedings to reopen permits or authorizations to operate to incorporate requirements under Chapter 106, Subchapter A of this title (relating to General Requirements) or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or any term or condition of any preconstruction permit.

(1) Before December 1, 2001, the executive director will institute proceedings to reopen permits no later than renewal of the permit. Such reopenings need not follow full permit issuance procedures nor the notice requirement of subsection (e) of this section but may instead follow the permit revision procedure in effect under the State's approved Part 70 program for incorporation of minor NSR permits.

(2) Before December 1, 2001, the executive director will institute proceedings to reopen authorizations to operate.

(3) Requirements under Chapter 106, Subchapter A, or Chapter 116 of this title or any term or condition of any preconstruction permit will be incorporated no later than permit renewal for applications for which the executive director has authorized initiation of public notice by the effective date of this section.

(d) Except as provided in subsection (c) of this section, reopenings shall be made as soon as possible. Reopenings shall be completed and the permit issued by the executive director not later than 18 months after promulgation or adoption of the applicable requirement.

(e) The executive director shall provide a 30-day notice of intent to reopen, unless a shorter notice is authorized by the executive director due to an emergency.

(f) Reopenings shall be subject to the requirements of §122.201 of this title (relating to Initial Permit Issuance). These procedures shall affect only those parts of the permit for which cause to reopen exists.

(g) The permit holder shall provide any information requested by the executive director to complete the reopening.

CHAPTER 122: FEDERAL OPERATING PERMITS

**SUBCHAPTER D: PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, AFFECTED STATE
REVIEW, NOTICE AND COMMENT HEARING, NOTICE OF PROPOSED FINAL ACTION,
EPA REVIEW, AND PUBLIC PETITION**

§§122.320, 122.330, 122.340, 122.350, 122.360

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties

under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.320. Public Notice.

(a) Public notice requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) The executive director shall direct the applicant to publish a notice of draft permit and preliminary decision, at the applicant's expense, in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. The executive director shall direct the applicant to make a copy of the application and draft permit available for review and copying at a public place in the county in which the site is located or proposed to be located. The notice shall contain the following information:

(1) the permit application number;

(2) the applicant's or permit holder's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information;

(3) a description of the location of the site or proposed location of the site;

(4) a description of the activity or activities involved in the permit application;

(5) for significant permit revisions, the air pollutants with emission changes;

(6) the location and availability of the following:

(A) the complete permit application;

(B) the draft permit;

(C) all other relevant supporting materials in the public files of the agency;

(7) a description of the comment procedures, including the duration of the public notice comment period and procedures to request a hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(8) a statement that a person who may be affected by the emission of air pollutants from the site is entitled to request a notice and comment hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit;

(10) if applicable, the time and location of any public meeting; and

(11) the name, address, and phone number of the commission office to be contacted for further information.

(c) One notice may be published for multiple permits at a site with the approval of the executive director.

(d) The applicant shall submit a copy of the public notice and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

(e) The applicant shall submit a statement to the executive director, with a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the sign

required by subsection (h) of this section has been posted consistent with the provisions of that subsection.

(f) The executive director shall make a copy of the permit application, the draft permit, and any required notices accessible to the EPA.

(g) The executive director shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located.

(h) At the applicant's expense, a sign shall be placed at the site declaring the filing of an application for a permit and stating the manner in which the executive director may be contacted for further information.

(1) The sign shall be provided by the applicant and shall substantially meet the following requirements.

(A) The sign shall consist of dark lettering on a white background and shall be not smaller than 18 inches by 28 inches and all lettering shall be no less than one and one-half inches in size and block printed capital lettering.

(B) The sign shall be headed by the words "APPLICATION FOR FEDERAL OPERATING PERMIT".

(C) The sign shall include the words "APPLICATION NO." and the number of the permit application.

(D) The sign shall include the words "for further information contact".

(E) The sign shall include the words "TEXAS NATURAL RESOURCE CONSERVATION COMMISSION," and the address of the appropriate commission regional office.

(F) The sign shall include the phone number of the appropriate commission office.

(G) The sign shall include the name of the company applying for the permit.

(2) The sign shall be in place by the date of publication of the newspaper notice and shall remain in place and legible throughout the period of public comment.

(3) The sign placed at the site shall be located at or near the site main entrance, provided that the sign is legible from the public street. If the sign would not be legible from the public street, then the sign shall be placed within ten feet of a property line paralleling a public street.

(A) The executive director may approve variations if the applicant has demonstrated that it is not practical to comply with the specific sign-posting requirements.

(B) Alternative sign-posting plans proposed by the applicant must be at least as effective in providing notice to the public.

(C) The executive director must approve the variations before signs are posted.

(4) One sign may be posted for multiple permits at a site with the approval of the executive director.

(i) The executive director shall receive public comment for 30 days after the notice of the public comment period is published. During the comment period, any person may submit written comments on the draft permit.

(j) During the 30-day public notice comment period, any person who may be affected by emissions from a site regulated under this chapter may request in writing a notice and comment hearing on the draft permit.

(k) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(l) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

(m) The applicant, in cooperation with the executive director, may hold a public meeting in the county in which the site is located or proposed to be located. Notice of this public meeting shall be provided in the notice required by subsection (b) of this section.

§122.330. Affected State Review.

(a) Affected state review requirements apply to initial issuances, minor permit revisions, significant permit revisions, reopenings, and renewals.

(b) An affected state may be New Mexico, Oklahoma, Kansas, Colorado, Arkansas, or Louisiana if either of the following criteria are satisfied:

(1) The state is contiguous to Texas and the state's air quality may be affected by the issuance or denial of a federal operating permit, revision, or renewal; or

(2) The state is within 50 miles of the site or proposed site.

(c) The executive director shall provide notice of the draft permit to any affected state on or before the time notice is provided to the public through public announcement or public notice.

(d) Affected states shall have 30 days from date of notification to comment on the draft permit.

(e) The executive director shall notify the EPA and any affected state, in writing, of the refusal to incorporate any recommendations into the proposed permit that the affected state submitted during the affected state review period. The notice shall include the executive director's reasons for not accepting any of the recommendations.

(f) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(g) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

§122.340. Notice And Comment Hearing.

(a) Notice and comment hearing requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) Any hearing regarding a permit will be conducted under the procedures in this section, and not under the APA.

(c) Any person who may be affected by emissions from a site regulated under this chapter may request the executive director to hold a hearing on the draft permit. The request must be made during the 30-day public comment period.

(d) The executive director shall decide whether to hold a hearing. The executive director is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a site is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a site regulated under this chapter, and that request is reasonable, the executive director shall hold a hearing.

(e) At the applicant's expense, notice of a hearing on a draft permit must be published in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. The notice must be published at least 30 days before the date set for the hearing. The notice must include the following:

(1) the time, place, and nature of the hearing;

(2) a brief description of the purpose of the hearing; and

(3) the name and phone number of the commission office to be contacted to verify that a hearing will be held.

(f) The applicant shall submit a copy of the notice of hearing and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

(g) At the executive director's discretion, the hearing notice may be combined with the notice of the draft permit required by this chapter.

(h) Any person, including the applicant, may submit oral or written statements and data concerning the draft permit.

(1) Reasonable time limits may be set for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments is automatically extended to the close of any hearing.

(3) At the hearing, the period for submitting written comments may be extended beyond the close of the hearing.

(i) A tape recording or written transcript of the hearing must be made available to the public.

(j) Any person, including the applicant, who believes that any condition of the draft permit is inappropriate or that the preliminary decision to issue or deny the permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting that position by the end of the public comment period.

(k) Any supporting materials for comments submitted under subsection (j) of this section must be included in full and may not be incorporated by reference, unless the materials are one of the following:

- (1) already part of the administrative record in the same proceedings;
- (2) state or federal statutes and regulations;
- (3) EPA documents of general applicability; or
- (4) other generally available reference materials.

(l) The executive director shall keep a record of all comments received and issues raised in the hearing. This record is available to the public.

(m) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(n) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

§122.350. EPA Review.

(a) EPA review requirements apply to initial issuances, minor permit revisions, significant permit revisions, reopenings, and renewals.

(b) The executive director shall submit the proposed permit to the EPA.

(1) For initial issuances, significant permit revisions, reopenings, and renewals the proposed permit shall be submitted to the EPA. At the discretion of the executive director, the procedural requirements of §122.320 of this title (relating to Public Notice), §122.322 of this title (relating to Bilingual Notice), and the requirements for EPA Review under this section may run concurrently. If appropriate, the executive director may extend the EPA review period.

(2) For minor permit revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public announcement period.

(3) For general operating permit initial issuances and significant revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public comment

period. For general operating permit minor permit revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public announcement period.

(c) Upon receipt of the proposed permit, the EPA shall have 45 days to object, in writing, to the issuance of the proposed permit. The EPA may only object to the issuance of any proposed permit which is not in compliance with the applicable requirements or the requirements of this chapter.

(d) The executive director may issue the permit provided the following:

(1) the EPA does not object to the issuance of the proposed permit;

(2) the EPA notifies the executive director that the EPA will not object to the issuance of the permit; or

(3) the executive director resolves any objections received.

(e) If the executive director fails, within 90 days of receipt of an objection, to revise the proposed permit and submit a revised permit, if necessary, in response to the objection, the EPA will issue or deny the permit in accordance with the requirements of the federal program promulgated under FCAA, Title V (relating to Permit).

§122.360. Public Petition.

- (a) Public petition requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.
- (b) If the EPA does not file an objection with the executive director, any person, including the applicant, affected by a decision of the commission under this chapter may petition the EPA to make an objection. After receiving a petition, the EPA may only object to the issuance of any proposed permit which is not in compliance with the applicable requirements or the requirements of this chapter.
- (c) The petition must be filed with the EPA within 60 days after the expiration of EPA's 45-day review period. For general operating permits, the petition must be filed no later than 60 days after issuance of the general operating permit by the executive director.
- (d) A copy of the petition shall be provided to the executive director and the applicant by the petitioner.
- (e) The petition does not limit the effectiveness of a permit issued by the executive director or the finality of the executive director's action for purposes of an appeal under Texas Health and Safety Code, §382.032.

(f) Petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period, or that the grounds for the objection arose after the public comment period. The petition shall identify all objections.

(g) If the EPA objects to the permit as a result of a petition filed under this section before issuance of the permit, the executive director shall not issue the permit until EPA's objection has been resolved.

(h) If the executive director has issued a permit before receipt of an EPA objection based on a public petition, the permit remains effective and the executive director shall have 90 days from the receipt of an EPA objection to resolve any objection and, if necessary, terminate or revise the permit.

(1) In the event additional information is needed from the permit holder, the executive director may request from EPA a 90-day extension to resolve the objection.

(2) If the executive director fails to resolve the objection, EPA will revise, terminate, or revoke the permit, and the executive director may issue only a revised permit that satisfies EPA's objection.

(3) The permit holder will not be in violation of the requirement to have submitted a timely and complete application.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER G: PERIODIC MONITORING

§122.608

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the

commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.608. Procedures for Incorporating Periodic Monitoring Requirements.

(a) For permit holders applying for a periodic monitoring case-by-case determination, periodic monitoring requirements shall be initially incorporated into the permit in accordance with paragraph (1) or (2) of this subsection, except as in subsection (d) of this section.

(1) If the permit holder is authorized to operate under a general operating permit (GOP), the following requirements apply:

(A) the permit holder shall submit an application for a permit other than a GOP including the information specified in §122.606 of this title (relating to Applications for Periodic Monitoring); and

(B) the requirements of §122.201 of this title (relating to Initial Permit Issuance) shall be satisfied.

(2) If the permit holder is authorized under a permit other than a GOP, the following requirements for significant permit revisions apply:

(A) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(B) the requirements of §122.221(b) and (c) of this title (relating to Procedures for Significant Permit Revisions) shall be satisfied.

(b) For permit holders applying for a periodic monitoring GOP, periodic monitoring requirements shall be initially incorporated into a permit or GOP application in accordance with paragraph (1) or (2) of this subsection, except as in subsection (d) of this section.

(1) If the permit holder is authorized to operate under a GOP, the following requirements apply:

(A) the permit holder shall submit an application including the information in §122.606 of this title;

(B) the representations in the GOP application as specified in §122.140(3) of this title (relating to Representations in Application) shall provide for compliance with the requirements of this subchapter; and

(C) the executive director shall grant an authorization to operate provided the requirements of this paragraph are satisfied.

(2) If the permit holder is authorized under a permit other than a GOP, the following requirements for minor permit revision apply:

(A) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(B) the requirements of §122.217(f) and (g) of this title (relating to Procedures for Minor Permit Revision) shall be satisfied.

(c) Except as in subsection (d) of this section, periodic monitoring requirements implemented under §122.600(b) of this title (relating to Implementation of Periodic Monitoring) shall be initially incorporated into a permit or GOP application through the procedures in §122.201 of this title (relating to Initial Permit Issuance), the procedures in Subchapter F of this chapter (relating to General Operating Permits), or the following procedures for minor permit revision:

(1) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(2) the requirements of §122.217(f) and (g) of this title shall be satisfied.

(d) If the periodic monitoring requirements are incorporated at the time of renewal, the requirements of §122.243 of this title (relating to Permit Renewal Procedures), or §122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating Permit) apply.

(e) After periodic monitoring requirements are incorporated into a permit or a new authorization to operate under a periodic monitoring GOP is granted, subsequent revisions to periodic monitoring requirements shall be governed by the requirements of Subchapter C of this chapter (relating to Initial Permit Issuances, Revisions, Reopenings, and Renewals) or Subchapter F of this chapter (relating to General Operating Permits), as appropriate. However, changes in deviation limits, other than changes required as the result of the promulgation or adoption of applicable requirement, shall not be operated before the permit or authorization to operate under a general operating permit is revised.

CHAPTER 122: FEDERAL OPERATING PERMITS

SUBCHAPTER H: COMPLIANCE ASSURANCE MONITORING

§122.706, §122.708

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other

laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.706. Applications for Compliance Assurance Monitoring.

(a) For permit holders applying for a compliance assurance monitoring (CAM) general operating permit (GOP), the following requirements apply:

(1) The application shall include at a minimum the following:

(A) the identification of the emission unit;

(B) the emission limitation or standard subject to CAM;

(C) an appropriate monitoring option provided in a CAM GOP;

(D) if not defined by the monitoring option selected, a deviation limit;

(E) a justification for any deviation limit proposed under subparagraph (D) of this paragraph in accordance with paragraph (3) of this subsection; and

(F) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(2) The proposed CAM requirements submitted in the application shall be designed to provide reasonable assurance of compliance with the applicable requirements and reflect proper operation and maintenance of the control device.

(3) Unless otherwise specified in the CAM GOP, the permit holder shall provide justification for any deviation limit according to one of the following.

(A) The permit holder shall submit the following performance test data:

(i) control device operating parameter data from an applicable performance test conducted under conditions specified by the applicable rule;

(ii) if the applicable rule does not specify testing conditions or only partially specifies testing conditions, control device operating parameter data from an applicable performance test conducted under conditions representative of maximum emissions potential under anticipated operating conditions at the emission unit; and

(iii) a statement that no changes to the emission unit, including control device, have taken place that could result in a significant change in the control system performance,

indicators (such as emissions, control device parameters, process parameters, or inspection and maintenance activities) to be monitored, or deviation limits since the performance test was conducted.

(B) The permit holder shall submit manufacturer's recommendations, engineering calculations, and/or historical data.

(4) Unless otherwise approved by the executive director, if a continuous emission monitoring system (CEMS), continuous opacity monitoring system (COMS), or predictive emission monitoring system (PEMS) is required by an applicable requirement, the permit holder shall submit a monitoring option from the CAM GOP that includes the use of the CEMS, COMS, or PEMS to satisfy the requirements of this subchapter.

(b) For permit holders applying for a CAM case-by-case determination, the application shall be submitted in accordance with 40 CFR §64.3 (Monitoring Design Criteria) and 40 CFR §64.4 (Submittal Requirements).

§122.708. Procedures for Incorporating Compliance Assurance Monitoring Requirements.

(a) For permit holders applying for a compliance assurance monitoring (CAM) case-by-case determination, CAM requirements shall be initially incorporated into the permit in accordance with paragraph (1) or (2) of this subsection, except as in subsection (c) of this section.

(1) If the permit holder is authorized to operate under a general operating permit (GOP), the following apply:

(A) the permit holder shall submit an application for a permit other than a general operating permit including the information specified in 40 Code of Federal Regulations (40 CFR) §64.3 (Monitoring Design Criteria) and §64.4 (Submittal Requirements); and

(B) the requirements of §122.201 of this title (relating to Initial Permit Issuance) shall be satisfied.

(2) If the permit holder is authorized to operate under a permit other than a GOP, the following requirements for significant permit revisions apply:

(A) the permit holder shall submit an application including information specified in 40 CFR §64.3 and §64.4 and a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official); and

(B) the requirements of §122.221(b) and (c) of this title (relating to Procedures for Significant Permit Revisions) shall be satisfied.

(b) For permit holders applying for a CAM GOP, CAM requirements shall be initially incorporated into a permit or GOP application in accordance with paragraph (1) or (2) of this subsection, except as in subsection (c) of this section.

(1) If the permit holder is authorized to operate under a GOP, the following apply:

(A) the permit holder shall submit an application including the information in §122.706 of this title (relating to Applications for Compliance Assurance Monitoring);

(B) the representations in the GOP application as specified in §122.140(3) of this title (relating to Representations in Application) shall provide for compliance with the requirements of this subchapter; and

(C) the executive director shall grant an authorization to operate, provided the requirements of this paragraph are satisfied.

(2) If the permit holder is authorized under a permit other than a GOP, the following requirements for minor permit revision apply:

(A) the permit holder shall submit an application including the information specified in §122.706 of this title; and

(B) the requirements of §122.217(f) and (g) of this title (relating to Procedures for Minor Permit Revisions) shall be satisfied.

(c) If CAM requirements are initially incorporated into the permit or GOP application at the time of renewal, the requirements of §122.243 of this title (relating to Permit Renewal Procedures) or

§122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating Permit) shall apply, respectively.

(d) After CAM requirements are incorporated into a permit or a new authorization to operate under a CAM GOP is granted, subsequent revisions to those CAM requirements shall be governed by the requirements of Subchapter C of this chapter (relating to Initial Permit Issuances, Revisions, Reopenings, and Renewals) or Subchapter F of this chapter (relating to General Operating Permits), as appropriate. However, changes in deviation limits, other than changes required as the result of a promulgation or adoption of an applicable requirement shall not be operated before the permit or authorization to operate under a GOP is revised.