

The Texas Commission on Environmental Quality (commission) adopts an amendment to §106.6, Registration of Emissions. Section 106.6 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the Texas state implementation plan (SIP). The commission adopts this amendment to Chapter 106 in order to correct a deficiency regarding the Texas Title V Operating Permit Program (OPP), published by the EPA in the January 7, 2002 issue of the *Federal Register* (67 FR 732). Section 106.6 is adopted *with changes* to the proposed text as published in the July 26, 2002 issue of the *Texas Register* (27 TexReg 6627).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Title V of the Federal Clean Air Act Amendments of 1990 (FCAA) as codified in 42 United States Code (USC), §§7661 - 7661(e), required all states to develop OPPs that met federal criteria. The EPA promulgated a final rule identifying the criteria for state OPPs in 40 Code of Federal Regulations (CFR) Part 70, State Operating Permit Programs. The general goal of the OPP requirement is to facilitate compliance and improve enforcement by issuing permits that consolidate all applicable requirements into a federally-enforceable document. EPA reviews all state OPPs, and retains the authority to issue a notice of deficiency (NOD) for identified deficiencies in state OPPs after full approval of those programs.

The EPA promulgated source category-limited interim program approval of the Texas OPP on June 25, 1996. The EPA extended approval of interim programs, including the Texas OPP, three times. The third extension of the interim program approval was challenged in the Court of Appeals for the District of Columbia Circuit, and the third extension was withdrawn. As a result of the litigation, on May 22,

2000, the EPA promulgated a rulemaking that extended approval of interim programs until December 1, 2001, in order to allow permitting authorities the time needed to correct all remaining identified interim approval deficiencies and obtain full approval for their OPPs by December 2001. Texas submitted its revised program that corrected all interim approval identified deficiencies and the EPA published the Texas full program approval notice in the December 6, 2001 issue of the *Federal Register* (66 FR 63318). The EPA also, through settling the litigation, agreed to solicit comments on programmatic or implementation deficiencies on Title V programs by publishing a notice in the *Federal Register*. This notice was published in the December 11, 2000 issue of the *Federal Register* (65 FR 77376) and EPA received comments on the Texas OPP. The EPA reviewed the comments, agreed that some of the comments received on the Texas OPP identified deficiencies, and those deficiencies were addressed in the NOD published in the January 7, 2002 issue of the *Federal Register*.

The January 7, 2002 NOD detailed items that must be corrected in order for the Texas OPP to retain approval. The commission is adopting this rule amendment to correct an item identified in the NOD relating to practical enforceability of potential to emit (PTE) limits established in certified registrations. 40 CFR Part 70 specifies the EPA's authority to withdraw an approved OPP when a state does not comply with the requirements of Part 70. If the state does not correct the deficiencies, the EPA administrator will apply sanctions, as specified in 42 USC, §7509(b), 18 months after the January 7, 2002 NOD. In addition, the EPA administrator will withdraw approval of the program, or a portion of the program, and promulgate, administer, and enforce a whole or partial federal program two years after the date of issuance of the NOD unless the deficiencies are corrected within 18 months of the January 7, 2002 NOD. Correcting all deficiencies requires amendments to 30 TAC Chapter 116,

Control of Air Pollution by Permits for New Construction or Modification, and 30 TAC Chapter 122, Federal Operating Permits, as well as the amendment to this chapter. The commission is adopting amendments to the rules that implement the Texas OPP and will submit program revisions to the EPA within 18 months of the NOD.

Resolution of the Deficiency

The January 7, 2002 NOD specified one deficiency that affects Chapter 106. In the NOD, the EPA stated that the commission's approach to establishing PTE limitations to avoid Title V permitting does not comply with the requirements of the FCAA. The EPA further noted that PTE limits established under §122.122 are not practically enforceable, because the rule does not meet one of the requirements for practical enforceability that requires notice to the state from those establishing PTE limits.

The commission adopts amendments to Chapter 106, as well as Chapters 122 and 116, because Chapter 106 also contains language relating to documentation requirements for establishing PTE limits. The commission amends §106.6 to require registrations establishing a federally-enforceable limit to be submitted to the executive director, to the appropriate commission regional office, and to all local air pollution control agencies having jurisdiction over the site, in addition to being maintained on-site. This will fulfill the requirement of practical enforceability.

In addition, the EPA specified in the NOD that the commission's approach to establishing PTE limits was not federally-enforceable, because the applicable regulations were not part of the Texas SIP. In response, the commission will submit the amended §106.6 to the EPA as a revision to the Texas SIP.

SECTION DISCUSSION

The commission amends §106.6 to address the NOD on the Texas OPP. The commission amends §106.6(a) to clarify that the section pertains to establishing federally-enforceable allowable emission rates. The commission adopts §106.6(e) with changes to specify that in order to avoid applicability of Chapter 122, certified registrations must be maintained on-site and submitted to the commission and all local air pollution control agencies having jurisdiction over the site if they are used to demonstrate that Chapter 122 does not apply to a site, and to correct a grammatical error. This requirement to submit a certified registration applies even if there is no other requirement to register a permit by rule (PBR) for purposes of obtaining new source review authorization. The commission adopts new §106.6(e)(1) and (2) to establish the deadlines for submitting certified registrations. The new paragraphs indicate that certifications previously established must be submitted on or before February 3, 2003 and that registrations established on or after the effective date of the rule must be submitted upon operation. The commission originally proposed a submittal date of January 2, 2003, but because the rule adoption is scheduled to occur close to the holiday season, the commission determined that it would be appropriate to allow more time for owners and operators to process this required information. Also, in response to a comment received, the commission adopts §106.6(e)(2) with changes to clarify the language specifying the registration requirement.

The commission adopts new §106.6(f) and (g), containing some of the information specified in the existing §106.6(e). The commission is adopting subsection §106.6(f) with changes in response to comments submitted to specify that registrations must be maintained on-site and must be provided upon request. Additionally, the commission adopts §106.6(f) with changes to clarify that records must be

maintained at an office within Texas having day-to-day operational control of the site if the site normally operates unattended. This is consistent with the recordkeeping requirements contained in §106.8. The commission also adopts changes to §106.6(f) to specify that the commission will make the records available to members of the public upon request. This is consistent with changes proposed in a concurrent Chapter 122 rulemaking to address the NOD. Additionally, for consistency with the adopted changes to §106.6(e), the language in §106.6(f) is amended to refer to local air pollution control agencies having jurisdiction over the site.

The previously existing language in §106.6(e) also specified that copies of certified registrations must be included in applications for new source review permits. The commission proposed and is now adopting the moving of this language to new §106.6(g). The language moved to §101.6(g) has also been edited for readability.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking action in accordance with the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule. A “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.

Although the adopted rule amendment, to implement the requirements of 42 USC, §§7661 - 7661e, is intended to protect the environment or reduce risks to human health from environmental exposure through increased compliance with requirements already applicable to facilities, the rule is not anticipated to have adverse effects on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule requires registrations for establishing PTE limits to be submitted to the executive director, the appropriate commission regional office, and all local air pollution control agencies having jurisdiction, in order to assure that the registrations are practically enforceable.

The requirements of the adopted rule are expected to result in little or no impact on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. All facilities affected by the adopted rule were already required to document the establishment of PTE limits in order to avoid the applicability of the federal OPP or to establish PTE limits to avoid other applicable requirements, such as maximum achievable control technology (MACT) requirements. Previously, the registrations were required to be kept on-site at the facilities. This adopted amendment is discussed in detail in the SECTION DISCUSSION of this preamble.

Title V required all states to develop OPPs that met federal criteria. The EPA has promulgated a final rule identifying the criteria for state OPPs at 40 CFR Part 70. The general goal of the OPP requirement is to facilitate compliance and improve enforcement by issuing permits that consolidate all applicable requirements into a federally-enforceable document. EPA reviews all state OPPs, and retains the authority to issue an NOD for identified deficiencies in state OPPs after full approval of

those programs. The commission was granted final approval of the Texas OPP in the December 6, 2001 issue of the *Federal Register*. EPA issued an NOD on January 7, 2002 for the Texas OPP, identifying items which must be resolved within 18 months after the NOD to avoid withdrawal of program approval and the application of sanctions under 40 CFR §70.10 and 42 USC, §7509. The adopted rule corrects one of the deficiencies identified by the EPA in the NOD, in order to provide the basis for an EPA approval of the Texas OPP. If the commission fails to submit a program that is approvable by EPA, the EPA will implement a whole or partial federal OPP in Texas under 40 CFR Part 71, and impose sanctions, including a loss of federal highway funds and increased emission offsets in nonattainment areas.

Additionally, the analysis required by Texas Government Code, §2001.0225(c) does not apply because the adopted rule does not meet any of the four applicability requirements of a major environmental rule. The rulemaking action does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The rule is adopted specifically to comply with the requirements of 42 USC, §§7661 - 7661e and related provisions of Texas Health and Safety Code (THSC), Chapter 382, also referred to as the Texas Clean Air Act (TCAA), and does not exceed the requirements of either. Additionally, the adopted rule does not exceed a requirement of a delegation agreement, because there is no agreement applicable to this rulemaking, and is not adopted solely under the general powers of the agency.

The commission solicited public comment on the draft regulatory impact analysis, but received no comments specifically regarding the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The purpose of the adopted rule is to fulfill the commission's obligation to implement the requirements of 40 CFR Part 70 through the creation of a state OPP. The commission was granted final approval of the Texas OPP in the December 6, 2001 issue of the *Federal Register*. EPA issued an NOD on January 7, 2002 for the OPP, identifying items which must be resolved within 18 months after the NOD to avoid withdrawal of program approval and the application of sanctions in accordance with 40 CFR §70.10 and 42 USC, §7509. The adopted rule advances this purpose by responding to one of the deficiencies identified by EPA in the NOD.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this rule because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The adopted rule implements requirements of 42 USC, §§7661 - 7661e. The action is mandated by federal law because the state is required to submit a state OPP to avoid the imposition of sanctions under 42 USC, §7509.

Additionally, promulgation and enforcement of this rule will not burden private real property. The rule does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the rule does not meet the definition of a takings under Texas Government Code, §2007.002(5).

The commission solicited public comment on the draft takings impact assessment, but received no comments specifically regarding the draft takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the rulemaking 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 rules in 30 TAC Chapter 281, Subchapter B, Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) 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 the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal at 31 TAC §501.12(l) to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to this rulemaking is the policy at 31 TAC §501.14(q) that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal area. The permits issued under Chapter 122 do not authorize new air emissions. Requiring submission of the registrations limiting PTE will provide a practically enforceable mechanism providing potential air quality benefits to the citizens of Texas. Therefore, this rulemaking is consistent with the applicable CMP policy and goal.

The commission solicited public comment on the consistency of the proposed rulemaking with applicable CMP goals and policies, but received no comments specifically regarding the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

This adoption will effect owners and operators using a certified registration of emissions to demonstrate that a site is not subject to the OPP. To ensure practical and federal enforceability of the PTE limits, owners and operators that have established or will establish such certified registrations must maintain them on-site in addition to submitting the certified registrations to the executive director, to the appropriate commission regional office, and to all local air pollution control agencies with jurisdiction over the site.

HEARING AND COMMENTERS

The commission held a public hearing on this rulemaking action on August 19, 2002 at the commission complex. The following commenters provided written and/or oral comment: EPA; Public Citizen on behalf of Public Citizen, SEED Coalition, Sierra Club, Galveston-Houston Association for Smog Prevention, and Hilton Kelley (Public Citizen); and BakerBotts, LLP, on behalf of the Texas Industry Project (TIP).

RESPONSE TO COMMENTS

Public Citizen expressed general support of the proposed rule amendments. No commenter expressed general opposition to the proposed rule amendment. EPA, Public Citizen, and TIP expressed concerns and/or suggested changes to the proposed rule.

General Comments

Public Citizen supported the commission's efforts to improve the Title V program to make it more consistent with federal requirements and more useful as a tool for improving compliance.

The commission appreciates the support.

Public Citizen supported the rule revisions to make PTE limits more enforceable, and the requirement that registrations used to limit PTE below Title V thresholds be submitted to the agency and local air pollution control agencies.

The commission appreciates the support.

Public Citizen commented that the requirement for submission of PTE registrations should be expanded, and expressed a belief that all registrations that are used to limit a source's emissions below any federal threshold should be submitted. Public Citizen also commented that all registrations containing conditions that become permit terms which are applicable requirements for any Title V facility should be submitted to the commission.

The commission made no change in response to this comment. The commission is adopting amendments to its rules to require that all registrations that establish federally-enforceable limits will be submitted. In addition, Chapter 106 requires registrations to be submitted, when appropriate, for purposes of obtaining new source review authorizations by claiming a permit by

rule (PBR). As such, all registrations will be submitted and will become part of the commission's files.

Public Citizen commented that they cannot access the underlying PBR registrations that actually have operating procedures in them, and cannot review them to determine if they need additional monitoring or if they have been incorporated properly into the permit. Public Citizen further commented that permit engineers and members of the public have no way to review the representations and ensure that they are adequately monitored and reported. Public Citizen commented that monitoring to demonstrate compliance with conditions included in registrations should be submitted to the commission with other Title V monitoring. Public Citizen further commented that any monitoring to demonstrate compliance with PBR registrations should be submitted with all other Title V monitoring at least every six months. Public Citizen commented that representations in registrations with regard to construction plans, operating procedures, and maximum emission rates should be reflected in the Title V permit, or at least should be included in the Title V file, because they become permit conditions.

The commission made no changes in response to this comment. Owners and operators of sites submitting registrations limiting PTE do so to either: 1) avoid permitting under Title V; or 2) limit hazardous air pollutant emissions such that the site is not subject to MACT requirements, even though the site may be subject to Title V permitting. If a registration is claimed under the first scenario, representations are not reflected in a Title V permit and Title V monitoring is not submitted because the site is not subject to Title V. A discussion of how these registrations meet the EPA's guidelines on limiting PTE to ensure practical enforceability is included elsewhere in

this preamble. If a registration is claimed under the second scenario, the limit, along with other appropriate representations needed to demonstrate compliance with the limit, and any appropriate monitoring, recordkeeping, and reporting is included in the Title V permit. Compliance certification and deviation reporting requirements also apply to these Title V permit conditions in the same manner as all other applicable requirements. Lastly, because all registrations will now be required to be submitted, they will become part of the commission's files, which in accordance with state law, are open to the public for review.

Public Citizen commented that sources with PTE limits that just have “tons per year” emission limits should be required to get federal permits. They are not actually limiting their PTE to keep them below the major source thresholds.

The commission made no change in response to this comment. Chapters 106, 116, and 122 provide mechanisms for establishing federally-enforceable PTE limits. Certifications establishing federally-enforceable emission limits do not solely contain “tons per year” emission limits, but meet the federal guidance for appropriately limiting PTE below the major source thresholds. Therefore, sources that have established federally-enforceable emission limits through one of the mechanisms provided in the commission's rules will not be required to get federal permits for this purpose.

Specific Rule Language Comments

The EPA commented that §106.6 does not require the certified registrations to be maintained on-site.

The EPA further stated that the commission should address why certified registrations under Chapter 106, which are submitted to demonstrate inapplicability of Chapter 122, should not be maintained on-site, while certified registrations submitted under Chapters 116 and 122 are required to be maintained on-site.

The commission agrees with this comment, and has amended §106.6(f) to specify that all certified registrations must be maintained on-site.

The EPA commented that to ensure practical enforceability, certified registrations submitted under §106.6 to limit a source's PTE must meet the EPA's guidance on limiting PTE. Specifically, EPA stated that to ensure practical enforceability, certified registrations generally must contain: 1) a production or operational limitation, in addition to the emission limitation, in cases where the emission limitation does not reflect the maximum emissions of the source at full design capacity without pollution control equipment; 2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and 3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting. Public Citizen commented that the PTE rules should require registrations used to limit PTE to include: 1) short-term emission limits, not tons-per year emission limits, so that compliance can be determined in a timely manner; 2) production or operational limits, not just emission limits; and 3) specific monitoring and reporting to demonstrate compliance with the limit. The general requirement to keep records necessary to demonstrate compliance is not practically enforceable because

it is too vague. Public Citizen pointed out that the court case *U.S. versus Louisiana-Pacific Corp.* stated that just blanket restrictions on emissions are not enough to limit a source's PTE.

The commission made no change in response to these comments. The commission's rules regarding PTE limits and registrations establishing federally-enforceable emission limits adhere to guidance published by the EPA on limiting PTE. Registrations do not solely contain blanket emissions restrictions. Registrations cannot solely include a tons per year limit, but must also include a short-term pounds per hour limit. The June 13, 1989 EPA guidance document entitled "Limiting Potential to Emit (PTE) in New Source Review (NSR) Permitting" specifies that, "To appropriately limit potential to emit consistent with the opinion in *Louisiana-Pacific*, all permits . . . must contain a production or operational limitation" The guidance document further notes that, "Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency." The commission's registration forms specifically require an applicant to identify either: 1) maximum hourly emission rates, and a maximum operating schedule in hours per day, days per week, and weeks per year, in addition to annual emission rates; or 2) hourly and annual emission rates, and documentation (including calculations, emission factors, equipment capacity, fuel consumption rate, sampling, monitoring, etc.) which demonstrates the basis for each emission rate. The January 25, 1995 EPA guidance document entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)" asserts that mechanisms should ensure that states can create federally-

enforceable limitations "without undue administrative burden to sources or the agency." In accordance with this goal, the commission's rules specify that records must be kept to demonstrate that a site is in compliance with any certified registration. The commission notes, however, that the January 25, 1995 EPA guidance document states that, "In general, practical enforceability . . . means that the permit's provisions must specify . . . the method to determine compliance including appropriate monitoring, recordkeeping, and reporting." Registrations may include monitoring, however, recordkeeping is generally the method to determine compliance. Establishing recordkeeping as the method to determine compliance fulfills a site's requirement for establishing enforceable PTE limits. This is also consistent with the previously referenced June 13, 1989 EPA guidance document, which specifies that permits containing production or operational limits should have "recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits." The commission also notes that 40 CFR Part 70 specifies that recordkeeping may be sufficient for a Title V source to meet requirements for periodic monitoring.

TIP suggested a grammatical change to §106.6(e) by adding the word "to" to clarify that local air pollution control agencies are a designated recipient of registrations.

The commission agrees with this comment, and adopts §106.6(e) with the suggested change.

TIP suggested moving the phrase "after the effective date of this rule" in §106.6(e)(2) to clarify that the only registrations due on the date of operation are those established after the effective date of the rule.

The commission agrees, in part, with the comment. Registrations established on the effective date of the rule are also due on the date of operation, as well as registrations established after the effective date of the rule. The commission is adopting §122.122(e)(2) to clarify the intent of this amendment.

SUBCHAPTER A: GENERAL REQUIREMENTS

§106.6

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of TCAA; and §382.051, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under this chapter.

§106.6. Registration of Emissions.

(a) An owner or operator may certify and register the maximum emission rates from facilities permitted by rule under this chapter in order to establish federally-enforceable allowable emission rates which are below the emission limitations in §106.4 of this title (relating to Requirements for Permitting by Rule).

(b) All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated.

(c) It shall be unlawful for any person to vary from such representation if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in an increase in the discharge of the various emissions, unless the certified registration is first revised.

(d) The certified registration must include documentation of the basis of emission estimates and a written statement by the registrant certifying that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the facility.

(e) Certified registrations used to demonstrate that Chapter 122 of this title (relating to Federal Operating Permits) does not apply to a source shall be submitted on the required form to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site.

(1) Certified registrations established prior to the effective date of this rule shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after the effective date of this rule shall be submitted no later than the date of operation.

(f) All certified registrations shall be maintained on-site and be provided immediately upon request by representatives of the commission or any local air pollution control agency having jurisdiction over the site. If however, the site normally operates unattended, certified registrations and

records demonstrating compliance with the certified registration must be maintained at an office within Texas having day-to-day operational control of the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner.

(g) Copies of certified registrations shall be included in permit applications subject to review under Chapter 116, Subchapter B of this title (relating to New Source Review Permits).