

The Texas Natural Resource Conservation Commission (commission) proposes 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 proposes this amendment to Chapter 106 in order to correct a deficiency on the Texas Title V Operating Permit Program, published by the EPA in the January 7, 2002 issue of the *Federal Register* (67 FR 732).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Title V of the Federal Clean Air Act Amendments of 1990 (FCAA) as codified in 42 United States Code (USC) required all states to develop operating permit programs that met federal criteria. The EPA has promulgated a final rule identifying the criteria for state operating permit programs, 40 Code of Federal Regulations (CFR) Part 70, State Operating Permit Programs. The general goal of the operating permit program 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 operating permit programs, and retains the authority to issue a notice of deficiency (NOD) for identified deficiencies in state operating permit programs after full approval of those programs.

The EPA promulgated source category-limited interim program approval of the Texas Title V Operating Permit Program on June 25, 1996. The EPA extended approval of interim programs three times. The third extension of interim program approvals was challenged in the Court of Appeals for the District of Columbia Circuit, and the third extension was withdrawn.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 interim approval deficiencies and obtain full approval for their operating permit programs by December 2001. Texas submitted its revised program that corrected all interim approval 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 Operating Permit Program. The EPA reviewed the comments and agreed that some of the comments received on the Texas Title V Operating Permit Program were deficiencies. These deficiencies were identified in the NOD published in the January 7, 2002 issue of the *Federal Register* (67 FR 732).

On January 7, 2002, the EPA published an NOD on the Texas Title V Operating Permit Program, detailing items that must be corrected in order for the Texas Operating Permit Program to retain approval. The commission is proposing this rule amendment to correct an item identified in the NOD relating to practical enforceability of potential to emit (PTE) limits. 40 CFR Part 70 specifies the EPA's authority to withdraw an approved operating permit program 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 the FCAA, §179(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 122, Federal Operating Permits, and 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, as well as the amendment to this chapter. The commission is proposing changes to the rules that implement its operating permit program 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 Chapter 122 is not practically enforceable, since it does not meet one of the requirements for practical enforceability that requires notice to the state from those establishing PTE limits.

The commission proposes to amend Chapter 106, as well as Chapters 122 and 116, since they also contain language relating to documentation requirements for establishing PTE limits. The commission proposes to amend §106.6 to require registrations to be submitted to the executive director, to the appropriate commission regional office, and all local air pollution control agencies having jurisdiction over the 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, since the applicable regulations were not part of the Texas SIP. In

response, the commission will submit §106.6, once amended, to the EPA as a revision to the Texas SIP.

SECTION BY SECTION DISCUSSION

The commission proposes to amend §106.6, Registration of Emissions, to address the NOD on the Texas Title V Operating Permit Program. The commission proposes to amend §106.6(e) to specify that certified registrations must be submitted to the commission if they are used to demonstrate that Chapter 122 does not apply to a site. The commission proposes new §106.6(e)(1) and (2) to establish the deadline for submitting certified registrations. The new paragraphs indicate that certifications previously established must be submitted on or before January 2, 2003 and that registrations must be submitted upon operation after the effective date of the rule.

The commission proposes new §106.6(f) and (g), containing some of the information specified in the existing §106.6(e). Proposed subsection (f) specifies that registrations not required to be submitted must be maintained on-site, or at an alternate site, if approved, and must be provided upon request. Some permits by rule do not require registration to be submitted for purposes of obtaining new source review authorization. The proposed amendment will not change this policy and the commission will not require certified registrations to be submitted for these types of permits by rule unless they are used to demonstrate that Chapter 122 does not apply to a site. Owners and operators must submit any registration if used to establish a federally-enforceable PTE limit for a source to avoid triggering major source thresholds, and thus, Chapter 122 applicability, even if a permit by rule registration is not required to be submitted according to Chapter 106. Also, a registration does not need to be submitted

if: 1) a registration is not required by Chapter 106; and 2) the PTE of a source, which is defined as the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration, is below the emission levels that would classify the source as a major source, as defined in §122.10. New §106.6(f) differs from the text in the existing §106.6(e) in that the citation refers to the "appropriate regional office of the commission" rather than the "regional manager," which is terminology that is no longer used in commission rules.

The existing §106.6(e) also specifies that copies of certified registrations must be included in applications for new source review permits. Since this applies to both registrations that demonstrate that Chapter 122 does not apply to a source and to all other certified registrations, the commission proposes to include this information in a new §106.6(g). The information in §106.6(g) has been edited for readability from its original text as it exists in §106.6(e).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendment is in effect, there will be no significant additional fiscal implications for any unit of state and local government due to administration and enforcement of the proposed amendment. Units of government that operate sources with the PTE air pollutants equivalent to a major source that are establishing federally-enforceable emission limits would be required to submit data demonstrating that they are not subject to the Title V Operating Permit Program.

A major source has the PTE: more than 100 tons per year (tpy) of any single air pollutant; or 25 tpy of nitrogen oxides (NO_x) or volatile organic compounds (VOCs) in a severe ozone nonattainment area; or 50 tons of NO_x or VOCs in a serious ozone nonattainment area; or ten tpy of any single hazardous air pollutant; or 25 tpy of any combination of hazardous air pollutants. These sites are normally regulated under the commission's Chapter 122; however, if a site with the PTE equivalent to a major source agrees to federally-enforceable emission limits below the major source thresholds, it is not required to obtain a federal operating permit.

This rulemaking is intended to revise existing Chapter 106 permit regulations to address issues raised by the EPA in a January 7, 2002 NOD. This rulemaking applies to owners and operators that have established certified registrations of PTE limitations to demonstrate that the commission's Title V program does not apply to their sources. Currently, permit by rule sites, with a PTE equivalent to a major source, are required to maintain certified registrations of emissions on-site that demonstrate the site's emissions are below the major source thresholds. The proposed amendment would require owners and operators of an affected site to mail a copy of the certified registration of emissions to the executive director, the appropriate regional office, and to any air pollution control agency that has jurisdiction over the affected site. Since the amendment requires the submission of existing data, no significant fiscal implications are anticipated for units of state and local government due to implementation of the proposed amendment.

PUBLIC BENEFITS AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be increased availability of information on sites that claim to be emitting below major source thresholds. The existing Chapter 106 allows certified registrations of enforceable emission limits to be kept on-site. Members of the public may have difficulty accessing on-site registrations. This rulemaking will require all certified registrations established to avoid operating permit requirements to be submitted. The submitted certified registrations will be made available to members of the public in the commission's central office file room and appropriate regional office, and any local air pollution control agency with jurisdiction over the site.

This rulemaking is intended to revise existing Chapter 106 permit regulations to address issues raised by the EPA in a January 7, 2002 NOD. This rulemaking applies to owners and operators who have established certified registrations of PTE limitations to demonstrate that the commission's Title V program does not apply to their sources. The proposed amendment would require owners and operators of affected sites to mail a copy of the certified registration of emissions to the executive director, the appropriate regional office, and to any air pollution control agency that has jurisdiction over the affected site. Since the amendment requires the submission of existing data, no significant fiscal implications are anticipated for individuals and businesses due to implementation of the proposed amendment.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no significant adverse fiscal implications to small or micro-business as a result of implementing the proposed amendment. This rulemaking is intended to revise existing Chapter 106 permit regulations to address issues raised by the EPA in a January 7, 2002 NOD. This rulemaking applies to owners and operators who have established certified registrations of PTE limitations to demonstrate that the commission's Title V program does not apply to their sources. The proposed amendment would require owners and operators of affected sites to mail a copy of the certified registration of emissions to the executive director, the appropriate regional office, and to any air pollution control agency that has jurisdiction over the affected site. Since the amendment requires the submission of existing data, no significant fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking 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 proposed rules to implement the requirements of 42 USC, §§7661 - 7661e are intended to protect the environment or reduce risks to human health from environmental exposure through increased compliance with requirements already applicable to facilities, the proposed amendment 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 proposed 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 proposed rule are expected to result in little or no impacts 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 proposed rule were already required to document the establishment of PTE limits in order to avoid the applicability of the Federal Operating Permit Program. Previously, the registrations were required to be kept on-site at the facilities. This proposed amendment is discussed in detail elsewhere in this preamble.

Title V of the FCAA of 1990 required all states to develop operating permit programs that met federal criteria. The EPA has promulgated a final rule identifying the criteria for state operating permit programs, 40 CFR Part 70. The general goal of the operating permit program 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 operating permit programs, and retains the authority to issue an NOD for identified deficiencies in state operating permit programs after full approval of those programs. The commission was granted final approval of the operating permit program in the December 6, 2001 issue of the *Federal Register* (66 FR 63318). EPA issued an NOD on January 7, 2002 for the operating permit program, 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 proposed rule corrects one of the deficiencies identified by the EPA in the NOD, in order to provide the basis for an approval of the Texas Federal Operating Permit Program by EPA. If the commission fails to submit a program that is approvable by EPA, the EPA will implement a Federal Operating Permit Program 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 proposed rule does not meet any of the four applicability requirements of a major environmental rule. The proposed rule 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 proposed specifically to comply with the requirements of 42 USC,

§§7661 - 7661e and related provisions of the Texas Clean Air Act (TCAA), and does not exceed the requirements of either. Additionally, the proposed rule does not exceed a requirement of a delegation agreement, since there is agreement that is applicable to this rulemaking, and is not proposed solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule is subject to Texas Government Code, Chapter 2007. The purpose of the proposed rule is to fulfill the commission's obligation to implement the requirements of 40 CFR Part 70 through the creation of a state operating permit program. The commission was granted final approval of the operating permit program in the December 6, 2001 issue of the *Federal Register* (66 FR 63318). EPA issued an NOD on January 7, 2002 for the operating permit program, 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 proposed 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 proposed 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 proposed rule implements requirements of 42 USC, §§7661 - 7661e. The action is mandated by federal law because the state is required to submit a state operating permit program to avoid the imposition of sanctions under 42 USC, §7509. Additionally, promulgation and enforcement of this rule will not burden private

real property. The proposed 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 proposed rule does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the proposed 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 proposed 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 to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (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 (31 TAC §501.14(q)). 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 policy and goal.

The commission seeks public comment on the consistency of the proposed rulemaking with applicable CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

This proposal will effect owners and operators using a certified registration of emissions to demonstrate that a site is not subject to the operating permit program. Owners and operators that have established or will establish such certified registrations must submit the certified registrations to the executive director to ensure practical and federal enforceability of the PTE limits. A registration does not need to be submitted if a registration is not required by Chapter 106; and the PTE of a source is below the emission levels that would classify the source as a major source, as defined in §122.10.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held on August 19, 2002 at 2:00 p.m. at the Texas Natural Resource Conservation Commission Complex in Building E, Room 201S, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-043-122-AI. Comments must be received by 5:00 p.m., August 26, 2002. For further information please contact Tara Capobianco, Technical Program Support Section, at (512) 239-1117, or Alan Henderson, Regulation Development Section, at (512) 239-1510.

SUBCHAPTER A: GENERAL REQUIREMENTS

§106.6

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code (THSC), TCAA, §382.011, which authorizes the commission to administer the requirements of TCAA; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.051, which authorizes the commission to issue a permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under this chapter; and Texas Water Code (TWC), §5.103, which authorizes the commission to propose rules.

The proposed amendment implements THSC, §382.011, concerning General Powers and Duties; §382.017, concerning Rules; §382.051, concerning Permitting Authority of Board and Rules; and TWC, §5.103, concerning Rules.

§106.6. Registration of Emissions.

(a) - (d) (No change.)

(e) Certified registrations used to demonstrate that Chapter 122 of this title (relating to Federal Operating Permits) does not apply to a source [The certified registration] shall be submitted on the required form to the executive director; to the appropriate commission regional office; and all local air

pollution control agencies [maintained on-site and be provided immediately upon request by representatives of the commission or any air pollution control agency] having jurisdiction over the site. [If the plant site is unmanned, the regional manager may authorize an alternative site to maintain this documentation. Copies of the certified registration shall be included in applications for permits subject to review under the divisions in Chapter 116, Subchapter B of this title (relating to New Source Review Permits).]

(1) Certified registrations established prior to the effective date of this rule shall be submitted on or before January 2, 2003.

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

(f) All other certified registrations shall be maintained on-site and be provided immediately upon request by representatives of the commission or any air pollution control agency having jurisdiction. If the plant site is unmanned, the appropriate regional office of the commission may authorize an alternative site to maintain this documentation.

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