

address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. Agency Comments—Federal, state, and local agencies are invited to file

comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 02-280 Filed 1-4-02; 8:45 am]

BILLING CODE 6717-01-P

## ENVIRONMENTAL PROTECTION AGENCY

[TX-FRL-7126-1]

### Notice of Deficiency for Clean Air Act Operating Permits Program; State of Texas

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of deficiency.

**SUMMARY:** Pursuant to its authority under section 502(i) of the Clean Air Act (Act) and the implementing regulations at 40 CFR 70.10(b)(1), EPA is publishing this Notice of Deficiency (NOD) for the Texas Clean Air Act title V Operating Permits Program. The Notice of Deficiency is based upon EPA's finding that the State's periodic monitoring regulations, compliance assurance monitoring (CAM) regulations, periodic monitoring and CAM general operating permits (GOPS), statement of basis requirement, applicable requirement definition, and potential to emit registration regulation do not meet the minimum federal requirements of the Act and 40 CFR part 70. Publication of this notice is a prerequisite for withdrawal of Texas' title V program approval, but EPA is not withdrawing the program through this action.

**EFFECTIVE DATE:** January 7, 2002.

Because this NOD is an adjudication and not a final rule, the Administrative Procedure Act's 30-day deferral of the effective date of a rule does not apply.

**FOR FURTHER INFORMATION CONTACT:** Jole C. Luehrs, Chief, Air Permits Section, Multimedia Planning & Permitting Division, Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202, (214) 665-7250.

**SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us," or "our" means EPA.

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### I. Description of Action

We are publishing this NOD for the Texas Clean Air Act (CAA or Act) title V program, which was granted interim approval on June 25, 1996. 61 FR 32693.<sup>1</sup> On May 22, 2000, we promulgated a rulemaking that extended the interim approval period of 86 operating permits programs until December 1, 2001. 65 FR 32035. The action was subsequently challenged by the Sierra Club and the New York Public Interest Research Group (NYPIRG). In settling the litigation, we agreed to publish a document in the **Federal Register** that would alert the public that it may identify and bring to our attention alleged programmatic and/or implementation deficiencies in title V programs, and that we would respond to the public's allegations within specified time periods if the comments were made within 90 days of publication of the **Federal Register** document (March 11, 2001).

Public Citizen, on behalf of the American Lung Association of Texas, Environmental Defense, the law firm of Henry, Lowere & Federick, Lone Star Chapter of the Sierra Club, Texas Center for Policy Studies, Sustainable Energy and Economic Development Coalition, Texas Campaign for the Environment, Galveston Houston Association for Smog Prevention, Neighbors for Neighbors, and Texas Impact (collectively referred to as "commenters") filed comments with EPA alleging several deficiencies with respect to the Texas title V program (Comment Letter). We have completed our review of those comments. We have identified deficiencies relating to Texas' periodic monitoring regulations, CAM regulations, periodic monitoring and CAM GOPs, statement of basis requirement, applicable requirement definition, and potential to emit registration regulation. These deficiencies are discussed below.

Under EPA's permitting regulations, citizens may, at any time, petition EPA regarding alleged deficiencies in state title V operating permitting programs. In addition, EPA may identify deficiencies

<sup>1</sup> On December 6, 2001, we promulgated final approval of Texas' Operating Permits Program. 66 FR 63318.

on its own. If, in the future, EPA agrees with a new citizen petition or otherwise identifies deficiencies, EPA may issue a new NOD or take other affirmative actions.

## II. Deficiencies

Below is a discussion of the comments that we have identified as deficiencies, and by this notice are requesting the State to correct the deficiencies.

### A. Periodic Monitoring Regulations

The commenters allege that instead of ensuring that every title V permit includes periodic monitoring, as required by 40 CFR 70.6(a)(3)(i)(B), 30 TAC 122.142(c) makes periodic monitoring optional because it only requires permits to include periodic monitoring "as required by the executive director."<sup>2</sup> Further, the commenters contend that the Texas Natural Resource Conservation Commission's (TNRCC) rules specifically state that no facility need submit an application for periodic monitoring for approximately two years, or longer.<sup>3</sup> Therefore, the commenters conclude that these provisions are inconsistent with federal requirements. The commenters also assert that TNRCC's failure to require timely periodic monitoring has caused the issuance of numerous defective title V permits. Comment Letter at 12.

According to TNRCC, 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

<sup>2</sup> 30 TAC 122.142(c) provides that "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."

<sup>3</sup> 30 TAC 122.604(a)(1) & (2) provide that "for an emission unit that is subject to an emission limitation or standard on or before the issuance date of a periodic monitoring GOP containing the emission limitation or standard, the permit holder shall submit an application no later than 30 days after the end of the second permit anniversary following issuance of the periodic monitoring GOP. For an emission unit that becomes subject to an emission limitation or standard after the issuance date of a periodic monitoring GOP containing the emission limitation or standard, the permit holder shall submit an application no later than 30 days after the second permit anniversary following the date that the emission unit became subject to the emission limitation or standard."

The provisions of 30 TAC Chapter 122, Subchapter G (§ 122.600–122.612) "[do] not apply to emission limitations or standards for which the executive director has determined that the applicable requirement has sufficient periodic monitoring (which may consist of recordkeeping \* \* \*)." 30 TAC 122.602(b).

at start-up or when requested by the EPA. Each permit will contain periodic monitoring as appropriate.

26 *TexReg* 3747, 3785 (May 25, 2001).<sup>4</sup>

However, TNRCC's approach to implementing periodic monitoring does not comply with the requirements of part 70. The requirement for periodic monitoring is set forth in 40 CFR 70.6(a)(3)(i)(B), which requires that each permit must include:

where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit \* \* \*."

A review of the relevant Texas regulations reveals that Texas' periodic monitoring regulations do not meet the requirements of part 70 and must be revised. Under 30 TAC 122.600, the periodic monitoring requirements of 30 TAC 122.142(c) are implemented through a periodic monitoring GOP, or a periodic monitoring case by case determination, in accordance with 30 TAC Chapter 122, Subchapter G—Periodic Monitoring.<sup>5</sup> TNRCC's use of a phased approach through the GOP process does not ensure that all permits have periodic monitoring *when they are issued*, as required by 40 CFR 70.6(a)(3)(i)(B). The regulations do not meet the requirements of part 70 because a facility does not have to apply for a periodic monitoring GOP until two years after the periodic monitoring GOP has been issued. 30 TAC 122.604(a)(1). Since the two year period starts after issuance of the GOP, a source's title V permit could be in effect for longer than two years before periodic monitoring is incorporated into the permit.<sup>6</sup> Therefore, this regulatory deficiency must be corrected. TNRCC must revise its regulations to ensure that *all title V permits, including all GOPs, when issued, contain periodic monitoring requirements that meet the requirements of 40 CFR 70.6(a)(3)(i)(B).*

In addition, in implementing the periodic monitoring requirement,

<sup>4</sup> However, a one-time test is not considered periodic monitoring. *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000).

<sup>5</sup> 30 TAC 122.600(b) does allow TNRCC to establish periodic monitoring requirements through the permitting process for specific emission limitations or standards to satisfy 30 TAC 122.142(c).

<sup>6</sup> If the emission unit becomes subject to an emission limitation or standard after the issuance date of a period monitoring GOP, the permit holder must submit the application no later than 30 days after the end of the second permit anniversary following the date that the emission unit became subject to the emission limitation or standard. 30 TAC 122.604(a)(2).

TNRCC must ensure that each permit includes monitoring sufficient to assure compliance with the terms and conditions of the permit. *See* 40 CFR 70.6(c)(1).<sup>7</sup> Each permit must also include periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit. *See* 40 CFR 70.6(a)(3)(i)(B). Thus, if the periodic monitoring for a particular applicable requirement is inadequate to assure compliance with the terms and conditions of the permit, 40 CFR 70.6(c)(1) and 30 TAC 122.142(b)(2)(B)(ii) require TNRCC to provide enhanced monitoring to assure compliance with the permit.

### B. Compliance Assurance Monitoring Regulations

The commenters allege that TNRCC's permit content rules do not require that title V permits include testing and monitoring sufficient to assure compliance. Instead, the rules provide that applications for CAM need not be submitted for approximately two years, and maybe longer. 30 TAC 122.704.<sup>8</sup> Thus, the commenters assert that TNRCC's failure to require sufficient testing and monitoring in its title V permits is a defect in its title V program and has resulted in the issuance of many ineffective and incomplete title V permits. Comment Letter at 12–14.

According to TNRCC, CAM, like periodic monitoring, is also being implemented in a phased approach:

<sup>7</sup> Also note that

Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, \* \* \* the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases, the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1)—like the statutory provisions it implements—calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit as necessary to be sufficient to assure compliance with the terms and conditions of the permit. *In the Matter of PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1 at 18–19 (Administrator November 16, 2000).

<sup>8</sup> 30 TAC 122.704(a)(1) & (2) provide that "for an emission unit that subject to this subchapter on or before the issuance date of this subchapter on or before the issuance date of a CAM GOP containing an emission limitation or standard that applies to that emission unit, the permit holder shall submit an application no later than 30 days after the end of the second permit anniversary following issuance of the CAM GOP. For an emission unit that becomes subject to this subchapter after the issuance date of a CAM GOP that applies to that emission unit, the permit holder shall submit an application no later than 30 days after the second permit anniversary following the date that the emission unit became subject to this subchapter."

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.

#### 26 *TexReg* at 3786–87.

CAM is implemented through 40 CFR part 64 and 40 CFR 70.6(a)(3)(i)(A). 40 CFR 64.5 provides that CAM applies at permit renewal unless the permit holder has not filed a title V permit application by April 20, 1998, or the title V permit application has not been determined to be administratively complete by April 20, 1998. CAM also applies to a title V permit holder who filed a significant permit revision under title V after April 20, 1998. However, in this case, CAM would only apply to pollutant specific emission units for which the proposed permit revision is applicable.

40 CFR 70.6(a)(3)(i)(A) requires that each permit include “all monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter [CAM] \* \* \* ”

The TNRCC implements CAM through either CAM GOPs or a CAM case-by case determination, in accordance with 30 TAC Chapter 122, Subchapter G—Compliance Assurance Monitoring. 30 TAC 122.700(a). The TNRCC’s use of a phased approach does not ensure that all permits will have the CAM required by 40 CFR 70.6(a)(3)(i)(A), according to the schedule in 40 CFR 64.5 because a facility does not have to apply for a CAM GOP until two years after the CAM GOP has been issued. Since the two year period starts after issuance of the GOP, a source’s title V permit could be renewed (or a significant permit revision issued) before CAM is incorporated into the permit.<sup>9</sup> The

<sup>9</sup> If the emission unit that becomes subject to Subchapter G after the issuance date of a CAM GOP

TNRCC regulations do not meet the requirements of the Act and part 70 and TNRCC must revise its regulations to ensure that all title V permits, including all GOPs, will have the CAM required by CFR 70.6(a)(3)(i)(A), according to the schedule in 40 CFR 64.5.

#### C. *Periodic Monitoring and Compliance Assurance Monitoring General Operating Permits*

The commenters allege that periodic monitoring and CAM are permit conditions which are required to be included in each title V permit. The TNRCC, however, is issuing title V permits without periodic monitoring or CAM, and allowing facilities to utilize the GOP process to adopt periodic monitoring and CAM. The commenters assert that because periodic monitoring and CAM are permit conditions, and not operating permits, the periodic monitoring and CAM GOPs do not comply with the requirement in 40 CFR 70.6(d) that GOPs must “comply with all requirements applicable to other part 70 permits.” For example, the commenters claim the periodic monitoring and CAM GOPs do not include enforceable emission limitations and standards, a schedule of compliance, and a requirement that the permittee submit to the permitting authority no less often than every six months, the results of any required monitoring, as required by title V. The commenters also assert that the CAM and periodic monitoring GOPs do not apply to “numerous similar sources”, as required by 40 CFR 70.6(d). They apply statewide to any source that has to comply with applicable requirements which are listed in the GOP. Therefore, the commenters believe that CAM and periodic monitoring GOPs simply do not meet title V’s definition of or requirements for general permits. Comment Letter at 21–22.

The TNRCC argues that the CAM and periodic monitoring GOPs were not designed to mimic a [site operating permit (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 U.S.C. 7661b, Permit Applications. The commission believes its application requirement is consistent with 40 CFR 70.6(a) and (b). These requirements have been

that applies to that emission unit, the permit holder must submit an application no later than 30 days after the second permit anniversary following the date that the emission unit became subject to this subchapter. 30 TAC 122.704(a)(2).

incorporated into a previously issued SOP or GOP and are not required for CAM or periodic monitoring GOP applications.

#### 26 *TexReg* at 3786.

The TNRCC’s use of GOPs to implement periodic monitoring and CAM does not comply with part 70. The requirements for GOPs are set forth in 40 CFR 70.6(d). 40 CFR 70.6(d)(1) provides that “any general permit shall comply with all requirements applicable to other part 70 permits.” The requirements for part 70 permits are set forth in 40 CFR 70.6. A review of Periodic Monitoring GOP No. 1 and CAM GOP No. 1 shows that the terms and conditions of these GOPs only relate to the respective monitoring requirements, monitoring options, and related monitoring requirements for certain applicable requirements.<sup>10</sup> Thus, they are missing a number of the requirements of 40 CFR 70.6, and therefore do not meet the requirements for GOPs set forth in 40 CFR 70.6(d). The fact that the missing requirements may be in another permit or permit application is irrelevant. 40 CFR 70.6(d) requires that all the requirements of 40 CFR 70.6 be included in a GOP. Therefore, Texas must revise its regulations to ensure that each GOP issued includes all of the requirements in 40 CFR 70.6, including the periodic monitoring and CAM requirements discussed in Sections II.A. and B above.<sup>11</sup> Furthermore, Texas must ensure that any GOP issued covers similar sources, as required by 40 CFR 70.6(d).

#### D. *Statement of Basis Requirement*

The commenters claim that TNRCC’s rules do not require that it prepare and make available a statement setting forth the “legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)”, otherwise known as a “statement of basis”.<sup>12</sup> Further, the commenters assert that there have been no statements of basis in the title V facility files they have reviewed. The files, however, do include a “Technical Summary”, which includes a process description and tracks the facility’s movement through the permitting process. The commenters claim that these “Technical Summaries” do not

<sup>10</sup> Periodic monitoring GOP No. 1 and CAM GOP No. 1 apply to nine different New Source Performance Standards, 40 CFR part 60, Subparts F, Y, CC, DD, HH, LL, NN, OOO, PPP; 30 TAC 111.111 (Visible Emissions), 30 TAC 111.151 (Emission Limits on Nonagricultural Processes), and 30 TAC 111.171 (Emission Limits on Agricultural Processes).

<sup>11</sup> Inclusion of CAM in GOPs is subject to the schedule set forth in 40 CFR 64.5.

<sup>12</sup> 40 CFR 70.7(a)(5).

explain the basis for the draft permit conditions. Therefore, the commenters contend that EPA should require TNRCC to prepare a statement of basis that meets the part 70 requirements. Comment Letter at 21–22.

According to TNRCC:

[t]he 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.

26 *TexReg* at 3769–70.

The TNRCC’s approach to the “statement of basis” requirement does not comply with the requirements of part 70. 40 CFR 70.7(a)(5) requires that “[t]he permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.” For example, in the *Fort James Camas Mill* title V Petition Response, EPA stated that this section required that “the rationale for the selected monitoring method must be clear and documented in the permit record.” *In the Matter of Fort James Camas Mill*, Petition No. X–1999–1 at 8 (Administrator December 22, 2000).

Our review of TNRCC’s regulations reveals that there is no state regulation corresponding to 40 CFR 70.7(a)(5). The “Technical Summaries” do not set forth the legal and factual basis for the draft permit conditions. Furthermore, the elements of the statement of basis may change depending on the type and complexity of the facility, and would also be subject to change because of future regulatory revisions. Accordingly, a statement of basis should include, but is not limited to, a description of the facility, a discussion of any operational flexibility that will be utilized at the facility, the basis for applying the permit shield, any federal regulatory applicability determinations, and the rationale for the monitoring methods selected.

Therefore, Texas must revise its regulations to require that it prepare and make available a statement setting forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory

provisions), and that this statement be sent to EPA and any person who requests it, as required by 40 CFR 70.7(a)(5). This provision will require TNRCC to explain why certain specific requirements, as set forth above, were included in the permit. *See In the Matter of Fort James Camas Mill*, Petition No. X–1999–1 at 8 (“rationale for selected monitoring method must be clear and documented in the permit record”).

#### E. Applicable Requirement Definition

The commenters allege that Texas’ definition of “applicable requirement” does not include all applicable provisions of the Texas State Implementation Plan (SIP). For example, 30 TAC Chapter 101, Sections 101.1 through 101.30 (Subchapter A), are included in the Texas SIP. Yet the TNRCC only includes Subchapter H of Chapter 101 as an “applicable requirement.” Second, the commenters contend that the TNRCC’s applicable requirement definition refers to Texas Administrative Code sections which may change without corresponding changes in the Texas SIP. Because title V facilities are obligated to comply with all provisions of the Texas SIP, the commenters assert that the Texas rules should generally state that any current provision of the Texas SIP is an applicable requirement. Comment Letter at 22–23.

The definition of applicable requirement in 40 CFR 70.2 includes, as they apply to emission units in a part 70 source, “any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act, that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 CFR part 52]”. Thus, the phrase “relevant requirements of the Act” is not limited to requirements relating to permit content.”<sup>13</sup>

A review of Chapter 101, Subchapter A reveals that a number of these regulations are applicable requirements of the Act, including, but not limited to, 30 TAC 101.1, 101.6, 101.7, and 101.11.<sup>14</sup> Therefore, TNRCC must revise its definition of “applicable requirement” in 30 TAC 122.10(2) to

<sup>13</sup> TNRCC has stated that it “includes in the definition of applicable requirement those chapters and portions of chapters provided in the SIP that are relevant to permit content.” 26 *TexReg* at 3759 (emphasis added).

<sup>14</sup> This is not an exhaustive list. We will work with TNRCC to identify all applicable requirements that must be included in its definition of applicable requirements, including any regulations outside of Chapter 101.

include all the applicable provisions of its SIP in its definition of applicable requirement.

However, contrary to the commenters’ assertions, we have concluded there is no requirement that TNRCC adopt a definition to generally state that any current provision of the Texas SIP is an applicable requirement. A State may cite to specific provisions of its administrative code, as Texas has done. Failing to adopt the general definition as set forth in 40 CFR 70.2 may result in TNRCC having to revise its title V program if it adopts an applicable requirement elsewhere in the SIP that does not fit within its definition of applicable requirement in its title V regulations.

#### F. Potential to Emit Registration Regulation

The commenters state that although part 70 allows facilities to avoid title V permitting by limiting their potential to emit (PTE), EPA Guidance requires that the limits be practically enforceable. However, the commenters assert that 30 TAC 122.122(e), which allows a facility to keep all documentation of its PTE limitations on site without providing those documents to the State or to EPA, is not practically enforceable.<sup>15</sup> The public files on the facility would contain no information regarding the limitations that the facility has adopted. Neither the State nor EPA would know about the limitations unless they specifically inquire about them at the facility, and therefore these limits would not be practically enforceable. Thus, the commenters contend that EPA should require that any limitations Texas allows on PTE be recorded in public files and practically enforceable. Comment Letter at 26–27.

(a) For purposes of determining applicability of the Federal Operating Permit Program under this chapter, the owner or operator of stationary sources without any other federally enforceable emission rate may limit their sources’ potential to emit by maintaining a certified registration of emissions, which shall be federally enforceable.

\* \* \*

\* \* \* \* \*

(d) In order to qualify for registrations of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source in § 122.10 of this title (relating to General Definitions).

(e) The certified registrations of emissions and records demonstrating compliance with such registration shall

<sup>15</sup> 30 TAC 122.122 reads as follows:

be maintained on-site, or at an accessible designated location, and shall be provided, upon request, during regular business hours to representatives of the Texas Air Control Board or any air pollution control agency having jurisdiction.

According to TNRCC,

[it] agrees that a regulation limiting a site's potential to emit must be practically enforceable, but that certified registrations kept on site 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 certain 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.

26 *TexReg* at 3761.

The TNRCC's approach to PTE limitations does not comply with the requirements of the Act. First, 30 TAC 122.122 is not part of the Texas SIP. The EPA has not approved 30 TAC 122.122, into the SIP. Therefore it is not federally enforceable.<sup>16</sup>

Even if the rule were federally enforceable, the rule must also be practically enforceable.<sup>17</sup> One of the requirements for practical enforceability

<sup>16</sup> Texas' definition of "federally enforceable" in 30 TAC 101.1(31) also supports this conclusion. Federally enforceable is defined as "all limitations and conditions which are enforceable by the EPA administrator, including those requirements developed under 40 CFR parts 60 and 61, requirements within any applicable state implementation plan (SIP), any permit requirements established under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program."

<sup>17</sup> Seitz and Van Heuvelen, *Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit* (January 22, 1996), and Stein, *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits* (January 25, 1995)

is notice to the State.<sup>18</sup> Under 30 TAC 122.122, there is no requirement that the State be notified and the registrations are kept on site. Therefore, neither the public, TNRCC, or EPA know what the PTE limit is without going to the site. A facility could change its PTE limit several times without the public or TNRCC knowing about the change. Therefore, these limitations are not practically enforceable, and TNRCC must revise this regulation to make the regulation practically enforceable. The revised regulation must also be approved into the SIP before it, and the registrations, become federally enforceable.

### III. Effect of Notice of Deficiency

Title V of the Act provides for the approval of state programs for the issuance of operating permits that incorporate the applicable requirements of the Act. To receive title V program approval, a state permitting authority must submit a program to EPA that meets certain minimum criteria, and EPA must disapprove a program that fails, or withdraw an approved program that subsequently fails, to meet these criteria. These criteria include requirements that the state permitting authority have authority to "assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter." CAA Section 502(b)(5)(A).

40 CFR 70.10(c)(1) provides that EPA may withdraw a part 70 program approval, in whole or in part, whenever the approved program no longer complies with the requirements of part 70. This section goes on to list a number of potential bases for program withdrawal, including the case where the permitting authority fails to promulgate or enact new authorities when necessary. 40 CFR 70.10(c)(1)(i)(A).

40 CFR 70.10(b) sets forth the procedures for program withdrawal, and requires as a prerequisite to withdrawal that the permitting authority be notified of any finding of deficiency by the Administrator and that the notice be published in the **Federal Register**. Today's notice satisfies this requirement and constitutes a finding of deficiency. If the permitting authority has not taken "significant action to assure adequate administration and enforcement of the program" within 90 days after publication of a notice of deficiency, EPA may take action under 40 CFR

<sup>18</sup> Stein, *Guidance on Enforceability Requirements for Limits Potential to Emit through SIP and § 112 Rules and General Permits* at 6-8.

70.10(b)(2). 40 CFR 70.10(b)(3) provides that, if a state has not corrected the deficiency within 18 months of the NOD, EPA will apply the sanctions under section 179(b) of the Act, in accordance with section 179(a) of the Act. Upon EPA action, the sanctions will go into effect unless the state has corrected the deficiencies identified in this notice within 18 months after signature of this notice.<sup>19</sup> 40 CFR 70.10(b)(4) provides that, if the state has not corrected the deficiency within 18 months after the date of finding of deficiency, EPA must promulgate, administer, and enforce a whole or partial program within 2 years of the date of the finding.

This document is not a proposal to withdraw Texas' title V program. Consistent with 40 CFR 70.10(b)(2), EPA will wait at least 90 days, at which point it will determine whether Texas has taken significant action to correct the deficiencies.

### IV. Administrative Requirements

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of today's action may be filed in the United States Court of Appeals for the appropriate circuit by March 8, 2002.

Dated: December 20, 2001.

Gregg A. Cooke,

*Regional Administrator, Region 6.*

[FR Doc. 02-298 Filed 1-4-02; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-7126-4]

### Sole Source Aquifer Determination for Glen Canyon Aquifer System, Moab, Utah

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of final determination.

**SUMMARY:** Pursuant to section 1424(e) of the Safe Drinking Water Act, the Acting Regional Administrator of the U.S. Environmental Protection Agency (EPA) in Region VIII has determined that the Glen Canyon Aquifer System at Moab, Utah and the immediately adjacent recharge area is the sole or principal source of drinking water for the area. The area is located in southeast Utah extending from the City of Moab, southeast, encompassing approximately 76,000 acres in Townships 25 through 28 South and Ranges 21 through 24 East

<sup>19</sup> The EPA is developing an Order of Sanctions rule to determine which sanction applies at the end of this 18 month period.