February 21, 2002

Ms. Kelly Haragan
Public Citizen
2812 Hemphill Park
Austin, TX 78705

Dear Ms. Haragan:

As you know, on May 22, 2000, the U.S. Environmental Protection Agency (EPA) promulgated a rulemaking that extended the title V interim approval period for 86 operating permits programs, including the State of Texas, until December 1, 2001. The action was subsequently challenged by the Sierra Club and the New York Public Interest Research Group. In settling the litigation, EPA agreed to publish a notice in the *Federal Register* that would alert the public that they may bring to EPA's attention, alleged programmatic and/or implementation deficiencies in title V programs. In addition, EPA agreed to publish a Notice of Deficiency (NOD) when we determine that a deficiency exists, or notify the commenter in writing to explain our reasons for not making a finding of deficiency.

On March 10, 2001, you submitted comments on behalf of the American Lung Association of Texas, Environmental Defense, the law firm of Henry, Lowerre & 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), alleging several deficiencies with respect to the Texas title V program (Comment Letter). We have completed our review of those comments.

Based on our review of the items set forth in your Comment Letter, EPA published an NOD in the *Federal Register* for the following items: periodic monitoring (PM) regulations, compliance assurance monitoring (CAM) regulations, PM and CAM general operating permits (GOPs),

statement of basis requirement, applicable requirement definition, and potential to emit registration regulation. 67 *Fed. Reg.* 732 (January 7, 2002). The bases for these deficiencies are set forth in the *Federal Register* dated January 7, 2002. With respect to the other alleged deficiencies you identified, we have outlined in the enclosure our response to each issue. In summary, we agree with some of the issues raised and have worked early with Texas Natural Resource Conservation Commission to ensure that the Texas program is being implemented consistent with the permitting program requirements of the Clean Air Act ("Act") and EPA's implementing regulations at Part 70 of title 40 Code of Federal Regulations (40 C.F.R. Part 70). The remainder of the issues raised, we do not agree with and have given an explanation in each case. We will continue to monitor the permitting authority's compliance to assure that the permitting authority implements the program consistent with the Act and 40 C.F.R. Part 70.

Thank you for your comments and your interest in the Texas Operating Permits Program. We look forward to working with you in the future. If you have any questions, please feel free to contact Daron Page at (214) 665-2222.

Sincerely yours,

/s/

Carl E. Edlund
Director,
Multimedia Planning and
Permitting Division

Enclosure

cc: Jeffrey A. Saitas
Executive Director
Texas Natural Resource Conservation Commission

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ENCLOSURE

Throughout this document, "we," "us," or "our" means EPA. Our analysis of the items in your Comment Letter are set forth below.

I. ENFORCEMENT AUTHORITY

A. NEGATIVE APPLICABILITY PERMIT SHIELDS

Comments

Your first allegation relates to the use of negative applicability permit shields by Texas Natural Resource Conservation Commission (TNRCC).[1] You claim that the Texas Title V program does not incorporate the federal requirement that TNRCC investigate and explain any negative applicability permit shields it includes in Title V permits (citing 30 T.A.C. § 122.148). Without investigating facilities' claims to grandfathered status, Texas is including provisions in Title V permits which state that facilities are grandfathered. In so doing, Texas is using negative applicability permit shields to "grandfather" facilities that may not truly qualify as grandfathered. You also contend that a negative applicability permit shield, must, therefore, be accompanied by an explanation for the issuing agency's determination that the facility is not required to comply with the listed regulation.

In addition, you contend that TNRCC does not specify in a permit shield how much pollution is grandfathered. The permits simply grandfather the emission unit. It is, therefore, impossible to determine from the Title V permit when a facility is exceeding its grandfathered limit and should be required to obtain a permit. Furthermore, you contend there is no monitoring or reporting required in permits to ensure that facilities (1) do not exceed their

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[1]A negative applicability permit shield is a permit provision that states that certain listed requirements are not applicable to a facility. If such a provision is included in a title V permit a facility does not have to comply with the listed requirements, even if the permitting agency has wrongly determined they are inapplicable.

grandfathered emissions limit and (2) do not make modifications which disqualify them from grandfathered status.

Comment Letter at 3 - 5.

EPA Response

40 C.F.R. § 70.6(f)(1)(ii) provides that the permitting authority may include a permit shield in the permit provided that the permitting authority determines that other requirements not specifically identified are not applicable to the source, and the permit include the determination or a concise summary thereof.
Texas' version of this regulation is set forth in 30 T.A.C. § 122.148(c)(1)(A), which provides that for emission units addressed by the permit shield, the Executive Director must make a determination establishing "potentially applicable requirements ... specifically identified during the application review process are not applicable to the source". The TNRCC states that it believes that this regulation is consistent with Part 70 because it requires that the Executive Director include in the permit shield section a basis for the permit shield determination. 26 *TexReg* 3747, 3769 (May 25, 2001).

A comparison between 40 C.F.R. § 70.6(f)(1)(ii) and 30 T.A.C. § 122.148(c)(1)(A) shows that the regulation requires the Executive Director to make such a determination. Therefore, we disagree that the Texas program is deficient in this regard.

The amount of detail required to justify a negative applicability permit shield will vary depending upon the complexity of the applicability determination. Since the permit shield protects the source from an enforcement action relating to particular applicable requirement, the determination must provide factual and legal support for the determination. In some cases, a brief summary may be sufficient. In other cases, a detailed explanation would be required. However, a citation alone is not sufficient. "One purpose of this documentation is to focus public comment on the source's exemption or nonapplicability to a given

requirement."[2]

You also asserted that there is no monitoring or reporting required in permits to ensure that facilities (1) do not exceed their grandfathered emissions limit and (2) do not make modifications which disqualify them from grandfathered status. The first item relates to the provisions of 40 C.F.R. §§ 70.6(a) and 70.6(c)(1) which require periodic monitoring sufficient to assure compliance with the terms and conditions of the permit.
Texas requires in 30 T.A.C. § 122.142(b)(2)(B)(ii) that each permit contain "the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards ... sufficient to ensure compliance with the permit." We approved this provision as meeting the requirement in 40 C.F.R. §§ 70.6(a) and 70.6(c)(1). This requirement applies to all applicable requirements, including those requirements approved as part of the Texas State Implementation Plan (SIP). Thus the monitoring required under 30 T.A.C. § 122.142(b)(2)(B)(ii) will ensure that sources will ensure that sources comply with all applicable requirements, including applicable grandfathered emissions limits approved as part of the Texas SIP.[3] The monitoring requirements in 30 T.A.C. § 122.142(b)(2)(B)(ii) will also serve to assist Texas in determining whether a source makes a modification which will require the source to undergo permitting under 30 T.A.C. Chapter 116 or to demonstrate that it qualifies for a permit by rule under 30 T.A.C. Chapter 106. The basis for determining whether such change is subject to permitting is based upon the facts relating to the nature of the change and how the proposed change affects the emissions. We believe that the monitoring is sufficient to ensure that a source meets its grandfathered

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[2]EPA, *Questions and Answers on the Requirements of Operating Permits Program Regulations* at 6-6 (July 7, 1993).

[3]In addition, we issued a Notice of Deficiency (NOD) on January 7, 2002. 67 *Fed. Reg.* 732. In this NOD, we cited deficiencies with Texas' periodic monitoring regulations, compliance assurance monitoring regulations, and periodic monitoring and compliance assurance monitoring general operating permits. 67 *Fed. Reg.* at 733 - 734. The NOD requires Texas to correct the deficiencies. Once corrected, the Texas periodic monitoring will fully meet the requirements of part 70.

emission limits and to verify whether a change at a source will result in increased emissions which are subject to new source review.

We therefore disagree with you that this is a deficiency.

B. UPSETS

Comments

Your second allegation relating to enforcement authority is that TNRCC's upset rules, although recently approved by EPA into the Texas SIP, are contrary to EPA guidance.[4] You also allege that TNRCC's Title V rules allow upsets to be reported according to the Texas Chapter 101 rules rather than the deviation reporting rules of Title V. The Chapter 101 rules only require reporting of upsets that result in emissions that meet or exceed the reportable quantity [30 T.A.C. § 101.6(a)]. Texas rules also exempt the reporting of upsets at boilers or combustion turbines equipped with continuous emission monitoring systems [30 T.A.C. § 101.6(d)]. Thus, you claim that it is unclear whether upsets below the reportable quantity or from boilers of combustion turbines equipped with continuous emission monitoring systems will be reported under the Texas program. Finally, you assert that the use of Chapter 101 reporting does not require certification by a responsible official. Comment Letter at 5 - 8.

EPA Response

Texas' upset rules were approved into Texas' State Implementation Plan (SIP), effective January 29, 2001. 65 *Fed. Reg.* 70792 (November 28, 2000). No comments were received on this rulemaking, and the time for challenging this rulemaking has passed. 42 U.S.C. § 7607. However, even if the upset rules were found not to satisfy the requirements of the Act, we could not properly make a finding of deficiency under Title V because the provision is derived from a federally approved SIP. We solicited comments on alleged deficiencies in Title V programs, not alleged deficiencies in SIP regulations.

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[4]Herman and Perciasepe, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown* (September 20, 1999).

65 *Fed. Reg.* 77376, 77377 (December 11, 2000). The upset rule is part of the approved SIP and therefore comments concerning the validity and implementation of the upset rule are beyond the scope of our authority under Title V.

In addition, your concerns relating to deviation reporting and certification are unfounded. Deviation is defined in 30 T.A.C. § 122.10(7) as "any indication of noncompliance with a term or condition of the permit as found using, at a minimum, but not limited to, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit." The TNRCC has stated that "any upset regardless of emissions resulting from it must be included in a six-month deviation report and is subject to the same certification requirement as any deviation report." 26 *TexReg* at 3767.[5] Therefore, we disagree with your comment that a deficiency exists as to this issue.

C. AUDIT PRIVILEGE

Comments

Your third allegation relating to enforcement authority involves the Texas Audit Privilege Act, Tex. Rev. Civ. Stat. Art. 4447cc. You claim that this law is inconsistent with EPA guidance and thus EPA should require Texas to amend its law to conform to EPA guidance. You cite several examples of alleged inconsistencies with the guidance. Comment Letter at 8 - 10.

EPA Response

In the June 25, 1996 *Federal Register* action granting interim approval to Texas, we stated that Texas would have to demonstrate that the passage of Texas House Bill 2473 (1995), the Texas Environmental, Health and Safety Audit Privilege Act (Audit Privilege Act) did not limit TNRCC's ability to adequately administer and enforce the federal operating permit program. *61 Fed. Reg.* 32693, 32697. We also stated that it would allow the public to have an opportunity to comment on the

[5]30 T.A.C. § 122.145(2) provides that the deviation reporting becomes a condition of the permit. Since deviation reports are required by the permit, they are required to be certified by a responsible official. 30 T.A.C. § 122.165(a)(7).

acceptability of this law for full Title V approval. *Id*. at 32696.

The EPA and TNRCC negotiated a set of technical amendments to the Audit Privilege Act. These amendments were enacted into law. In our proposed full approval and final approval of the Texas Operating Permits Program, we explained the rationale for concluding that TRNCC has adequate authority to enforce Title V, and that the Audit Privilege Act is not in conflict with this authority." 66 *Fed. Reg.* 51895, 51902 - 03 (October 11, 2001); 66 *Fed. Reg.* 66318, 66328 - 29 (December 6, 2001). Therefore, there is no need to require Texas to amend its Audit Privilege Act.

In addition, as stated above, we identified this issue as an interim approval issue in the June 25, 1996 *Federal Register*. The public was given the opportunity to comment on this item in the context of the proposed full approval of the Texas Title V program, and we responded to these comments in the full approval of the Texas Title V program. 66 *Fed. Reg.* at 51902 - 03; 66 *Fed. Reg.* at 63327 - 29. Therefore, this item is also outside the scope of what EPA solicited comments on in its December 11, 2001 *Federal Register* notice. *See* 65 *Fed. Reg.* at 77377.

D. VOLUNTARY EMISSION REDUCTION PERMITS

Comment

Your fourth comment relating to enforcement authority involves the effect of the Texas Voluntary Emission Reduction Permit (VERP) program, created by Texas Senate Bill (SB) 766 (1999), upon the approvability of the Texas title V program. You state that SB 766 created a loophole due to its amnesty provision that prevents the State's operating permits program from meeting the title V requirements for a fully approvable program.[6] You further state that by applying for a VERP by

[6]Section 12 of SB 766 provides that "the Texas Natural Resource Conservation Commission may not initiate an enforcement action against a person for the failure to obtain a preconstruction permit under Section 382.0518, Health and Safety Code, or a rule adopted or order issued by the (continued...)

August 31, 2001, a source that has significantly increased pollution in Texas by illegally avoiding pollution limits and failed to install best available control technology for the past twenty years, is insulated from enforcement action. Comment Letter at 10.

EPA Response

EPA disagrees that the specific provisions of Texas' SB 766 deprive the State of adequate authority to enforce the requirements of title V of the Clean Air Act (CAA or the Act). The Texas law does not provide a blanket amnesty to all title V sources, and, it does not excuse violations that result in serious harm or risk. The amnesty provision is very limited in source scope. It applies to a limited subcategory of sources (minor modifications/minor sources) within a limited category ("grandfathered" sources [7] that filed a timely VERP application). This limited subcategory of sources represents an extremely small subset of the Texas title V source universe. Through the issuance of a permit, the State will also regulate any unpermitted minor modifications/minor sources at that "grandfathered" source. Thus, the State will obtain from this limited subcategory of sources substantive control requirements and/or significant environmental benefits. As set forth more fully below, the State's strictly limited exemption satisfies the requirements for a ***de minimis*** exemption from the enforcement authority requirement.

The Texas VERP amnesty provision has little to no impact on TNRCC's title V program since:

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[6](...continued)
commission under that section, that is related to the modification of a facility that may emit air contaminants if, on or before August 31, 2001, the person files an application for a [VERP] permit for the facility under Section 382.0519, Health and Safety Code." SB 776, 76TH Reg. Sess § 12(a) (1999).

[7]Section 382.0518(g) of the Texas Health & Safety Code provides that "[s]ubsections (a) - (d) do not apply to a person who has executed a contract or has begun construction for an addition, alternation, or modification to a new or an existing facility on or before August 31, 1970 . . ."

- The amnesty provision applies only to “grandfathered” sources’ emission units subject to minor new source review (MNSR);

- The amnesty provision applies only to “grandfathered” sources’ emission units making unpermitted MNSR changes before March 1, 1999;

- To the extent that minor NSR permit conditions have been established for any source, the State has the authority, and is obligated, to include those conditions in any title V permit;

- “Grandfathered” sources applying under the VERP program are being inspected by EPA and EPA can take appropriate enforcement actions against any facilities that TNRCC is prohibited, as a result of the amnesty provision, from properly enforcing against. We have reviewed or have under review sources representing approximately 54% (169,867 tpy) of the total emissions from “grandfathered” units at title V facilities. To ensure that the majority of emissions from “grandfathered” units are evaluated, we will review additional “grandfathered” units at title V sources, representing approximately 69,128 tpy. These emissions along with those from sources already reviewed or under investigation will bring the total to 76% (238,995 tpy) of the emissions from “grandfathered” units at title V sources. The remaining “grandfathered” units’ emissions at title V sources are minimal, accounting for 2.9% of emissions in Texas;

- Eligibility for amnesty ended on August 31, 2001, which means no additional “grandfathered” sources can qualify for amnesty after that date;

- The TNRCC generally would require any “grandfathered” source obtaining a VERP to apply more current control technology to any of its “grandfathered” VERP units. *See*, TNRCC, “Determination of Generally Achievable Control Technology (GACT)”(March 23, 2001). For example, if the “grandfathered” VERP unit is in a nonattainment area, and the unit cannot meet more current control technology but its remaining useful life is less than five years, the permit will require the “grandfathered” VERP unit to be shut down at the end of that time period. If the unit cannot meet more current technology but wishes to operate

beyond five years, and the TNRCC determines that the more current technology would be economically unreasonable, the permit for the "grandfathered" VERP unit would require the offsetting of the unit's emissions with reductions elsewhere at the plant. These reductions must be surplus to any state and federal requirements. In certain circumstances, the "grandfathered" VERP unit's emissions could be offset with emission reductions outside the plant.

- Of the 31,500 site investigations TNRCC conducted in the past five years, only 0.4% (134) of the violations have been for failure to meet the NSR (major and minor) requirements.

- The EPA and the State jointly investigated PSD violations resulting from major modifications at a "grandfathered" title V source that had applied under the VERP program, thereby becoming eligible for amnesty - the Alcoa, Inc., Rockdale plant. We recently issued a Notice of Violation and TNRCC issued a Notice of Enforcement for the same PSD violations at Alcoa's Rockdale plant. Although Alcoa had filed a timely VERP application before the TNRCC issued the NOE, both agencies agreed that an enforcement action for failure to obtain a PSD permit against Alcoa was not barred by the VERP amnesty provision. The EPA and TNRCC found that Alcoa by law should have sought preconstruction permit approvals from the TNRCC for major modifications, which resulted in large increases of air pollution beginning in 1988 and continuing to the present. The action is based upon failure to comply with 30 TAC § 116.160(a), rather than Section 382.0518; therefore, the amnesty provision is inapplicable to the PSD enforcement action. The emissions from these noncomplying major modifications are 104,092 tpy (approximately 33% of the total emissions from "grandfathered" sources applying under the VERP program); and

- EPA Enforcement can compensate for the State's inability to collect civil penalties for the minor preconstruction permitting violations.

Background

The Texas Legislature created the Voluntary Emissions Reduction Permit (VERP) program to encourage “grandfathered” sources in the State of Texas to voluntarily obtain permits and voluntarily reduce air emissions. A “grandfathered” source’s incentive to participate in the VERP program is amnesty against state enforcement for failing to obtain an MNSR permit for any MNSR actions that took place at the source before March 1, 1999.

The 1970 Clean Air Act Amendments required states to submit for EPA approval as part of their state implementation plan (SIP), a preconstruction review program for new and modified stationary sources of air pollution. Such programs are known as new source review (NSR). The federally-approved 1972 Texas SIP excludes sources that were operating in Texas on or before August 30, 1971 from having to obtain a preconstruction permit. (See footnote 7.) These sources are commonly referred to as “grandfathered” sources. Grandfathered status in Texas under federal and state law means that sources existing prior to August 30, 1971, are not subject to the NSR permitting program requirements as long as they do not make a change that falls under the NSR requirements. If a “grandfathered” source makes a change that falls under the NSR requirements, it must obtain a preconstruction permit from the TNRCC. Otherwise, the owner/operator is violating state and federal law.

The 1977 Clean Air Act Amendments added two additional NSR programs: the prevention of significant deterioration (PSD) program for major sources and major modifications in attainment and unclassified areas and the new source review program for major sources and major modifications in nonattainment areas (NNSR). Since the original new source review program required by the 1970 amendments did not base applicability on whether the new or modified source was "major," that program is commonly referred to as the "minor" new source review (MNSR) program. The federally-approved Texas SIP has these three programs.

The PSD and NNSR programs have definitions for “major” sources” and “major modifications.” The present title V program as implemented by part 70 requires “major” sources to obtain a title V operating permit. (The title V definition of “major” source differs from the NNSR and PSD definitions.)

For purposes of implementing title V, the TNRCC assigns an "Air Quality Account Number" to an entire property owned or controlled by the applicant at the location ("a plant"). A company may have one or more Air Quality Account Numbers if it owns or operates property at different locations throughout the State.[8] There are about 1720 title V plants in the State of Texas.[9] Of these 1720 title V plants, 113 Air Quality Account Numbers (i.e., plants or title V sources) representing approximately 58 companies and 314,828 tpy, have submitted VERP applications. (See attached list).[10] Therefore, approximately 6.6% of the title V plant universe in Texas may have "grandfathered" sources on-site that qualify for amnesty under the State's law.

A title V plant might be a "grandfathered" VERP source in and of itself, or the title V plant could include "grandfathered" VERP sources plus PSD sources, PSD modifications, NNSR sources, NNSR modifications, MNSR sources, MNSR modifications, and "grandfathered" non-VERP sources. Further, the "grandfathered" VERP sources are located at title V plants which are scattered across Texas and involve many different types of industries. Within each title V plant, there could be many different source categories. The "grandfathered" VERP source could be an entirely different source category than any of the other sources on the title V plant's property.

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[8]For example, in TNRCC's list of VERP's, forwarded to EPA on September 19, 2001, TNRCC identifies separate accounts for Exxon-Mobil Oil Corporation in Jefferson County, Texas. Separate accounts are assigned to the Colonial Bulk Terminal (Account No. JE0149F) and the Magpetco Tank Farm (Account No. JE0066K). Each is a separate plant but owned by the same company. Each plant must obtain a title V permit.

[9]Texas title V Submittal, Section 1, § 70.4(b)(1) Program Description at 1 (June 2001).

[10]Some accounts list minuscule amounts of grandfathered emissions, *e.g.*, 4 tpy. Others are higher. For example, thirty-eight (38) account numbers list over 1,000 tpy of grandfathered emissions, with the largest claiming 104,902 tpy.

Title V Enforcement Requirements and Texas SB 766's Amnesty Provision

Section 502(b)(5)(A) of title V requires that the permitting authority have adequate authority to assure compliance by all title V sources with each applicable standard, regulation or requirement under the Act. Section 502(b)(5)(E) of title V requires, among other things, that the permitting authority have adequate authority to enforce the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation. 40 C.F.R. § 70.11 implements these statutory requirements.

On February 26, 2001, we asked TNRCC to request an Attorney General's (AG) Statement concerning the effect of SB 766's amnesty provision on the above authority. We will often request an AG Statement when provisions in state law are ambiguous.[11] On November 12, 2001, we received a Texas AG Statement interpreting SB 766. The AG Statement is clear that SB 766's amnesty provisions only apply to "grandfathered" sources that failed to obtain required minor new source review (MNSR) permits. AG Statement at 18 (October 29, 2001). The Attorney General states that the specific provisions of this law do not apply to PSD, NNSR, or section 112(g) Permits. Id. at 20 - 21.

Thus, the only effect on TNRCC's enforcement authority is that the TNRCC may not initiate an enforcement action against an owner or operator of a grandfathered VERP source for the failure to obtain a minor preconstruction permit if the MNSR triggering event occurred before March 1, 1999. This State law does not grant amnesty for any violation of PSD, NNSR, section 112(g), section 111, section 112, or any other applicable standard, regulation or requirement of the Act.

Amnesty Provision's *de Minimis* Effect upon the Texas Title V Program

Under the State's SB 766 amnesty provision, Texas does not have the authority to pursue enforcement against

[11]40 C.F.R. § 70.4(i)(3) provides that EPA may request a supplemental AG Statement when it has reason to believe that circumstances have changed with respect to a State program.

“grandfathered” sources that made minor modifications or constructed minor sources before March 1, 1999, without an MNSR permit, if the “grandfathered” source submitted a VERP application by August 31, 2001. Texas cannot initiate an enforcement action against this type of source for failure to obtain an MNSR permit. The source has immunity under SB 766. *See* AG Statement at 19 - 20. The State also believes that the Texas Constitution prohibits the Texas Legislature from repealing the amnesty it granted. However, it is EPA’s position that the effect of SB 766's amnesty provision on Texas's enforcement authority under its title V program, is ***de minimis***.

In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the Court provided that if the “Congress has not been extraordinarily rigid, there is likely a basis for an implication of ***de minimis*** authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value." Id. at 360-61. Moreover, ... "the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results, or where failure to allow a ***de minimis*** exemption is contrary to the primary legislative goal." *State of Ohio v. EPA*, 997 F.2d 1520, 1535 (D.C. Cir. 1993).

Applying that test to SB 766's amnesty provision, we believe that the State’s statute has a ***de minimis*** affect on Texas's title V enforcement authority. First, the amnesty provision is very limited in scope. It only applies to “grandfathered” sources that failed to obtain an MNSR permit for MNSR actions made to or at it, prior to March 1, 1999. The “grandfathered” source must have applied for a VERP by August 31, 2001. Since eligibility for amnesty ended on August 31, 2001, no additional “grandfathered” sources can qualify for amnesty. At most, only 6.6% of the Texas title V plant universe may even be eligible for amnesty for MNSR violations. Of that 6.6%, some most likely did not make any MNSR changes and therefore, the amnesty provision does not come into play. Further, of that 6.6%, some more than likely obtained the requisite MNSR permits for any MNSR changes so that the amnesty provision is not applicable. Therefore, it is likely that the percentage of the Texas title V plant universe with “grandfathered” sources qualifying for MNSR amnesty is even less than 6.6%.

Second, it should be noted that the amnesty provision does

not apply to EPA. Although the State may be constrained, EPA is still free to take enforcement actions for the failure of a "grandfathered" VERP source to obtain any required MNSR permits. This includes Federal enforcement actions against title V sources that have a "grandfathered" VERP source failing to obtain any required MNSR permits. Only a review by EPA or TNRCC could determine whether illegal NSR changes did or did not take place at "grandfathered" VERP sources at title V sources. As noted previously, we will review 76% of the emissions from "grandfathered" VERP units at title V sources. The remaining emissions from "grandfathered" units at title V sources account for just less than 3% of the total air emissions in Texas. If violations are found, e.g., the Alcoa, Rockdale enforcement action, EPA or TNRCC will take appropriate action.[12]

Third, it is important to note from an environmental benefit standpoint that the effect of enforcement amnesty is further minimized by the requirement that any VERP applicant's final permit will include the State's technical and economic decisions on what is the appropriate control technology for the non-permitted MNSR unit. The State will take into account technical feasibility, economics, and the air quality impact.

Thus, EPA believes that the amnesty provision will have a *de minimis* impact on Texas's title V enforcement authority. The amnesty provision is limited to the failure of a "grandfathered" VERP source to obtain an MNSR permit, and not to the failure to obtain a PSD or NNSR permit. The amnesty provision is narrow in scope. We have reviewed or will review 76% of the emissions from "grandfathered" VERP units at title V sources, and will take appropriate enforcement action if violations are found. The amnesty program terminated August 31, 2001, which means no additional "grandfathered" sources can apply under the VERP program and potentially receive amnesty for MNSR violations. It is anticipated that more stringent controls and/or more environmental benefits will occur at the MNSR source than if the "grandfathered" source had received any required MNSR permits. Therefore, the State's strictly limited exemption satisfies the *de minimis* exemption.

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[12]Since the amnesty law only involves MNSR, TNRCC has the authority to take enforcement actions for the failure to obtain PSD or NNSR permits. AG Statement at 18 - 22.

Conclusion

For the reasons given above, we view the Texas enforcement amnesty provision as a limited exemption within the framework of the overall Texas title V program. Texas has jurisdiction to require title V permits from all of its title V universe. There is no unambiguous demonstration of Congressional intent found within title V to foreclose such a *de minimis* exemption. The environmental consequences of this *de minimis* exemption are trivial. The amnesty provision does not provide immunity from violations of previous state and federal decrees, orders and agreements. It does not provide immunity from violations resulting in serious harm or risk of harm. It does not appear to provide immunity from violations resulting in significant economic benefit to the violator. Violators must obtain a permit. Realistically, the State is foreclosed only from assessing and obtaining monetary penalties for failure to obtain an MNSR preconstruction permit. If one considered this limited Texas law as a bar to full approval of the Texas title V program, we would have to implement a Federal operating permits program in all of the State of Texas for all of its title V sources. Such a construction of the Act would give us no choice but to impose sanctions. We see no practical value in such a broad interpretation of the Act. Therefore, because the effect of SB 766's enforcement amnesty provision meets the *de minimis* test set forth in *Alabama Power*, and the belief that Congress did not intend that a part 71 Federal operating permit program be implemented in a State when a state law has a *de minimis* impact on a State's implementation of an operating permit program, we do not view SB 766 as a title V deficiency and are not issuing an NOD for this item.

II. CREDIBLE EVIDENCE

A. ENFORCEMENT

Comments

Your first allegation involving credible evidence involves TNRCC policy concerning citizen gathered evidence of air violations. You claim that TNRCC's policy requires that TNRCC staff personally verify air violations, and thus citizen gathered evidence is excluded from consideration in enforcement

actions.[13] Therefore, you claim that this policy prevents TNRCC from taking enforcement action where credible evidence indicates there have been significant violations. Comment Letter at 14.

EPA's Response

During the last Texas legislative session, House Bill (HB) 2912 was enacted. Section 1.24 of this bill added Texas Water Code § 7.0025. This section provided that TNRCC may initiate an enforcement action using information provided by a private citizen, if it determines that the information is of sufficient value and credibility to initiate an enforcement action. On December 11, 2001, TNRCC adopted rules to implement this bill. The enactment of Section 1.24 of HB 2912, and the adoption of the proposed rules have overridden TNRCC's policy, and therefore we have no basis for making a finding of deficiency as this time.
We will review the rule and take appropriate action at a later date once the rule is submitted to EPA.

B. DEVIATION REPORTING AND COMPLIANCE CERTIFICATIONS

Comments

Your second allegation regarding credible evidence involves deviation reporting and compliance certifications. You have concerns with TNRCC's definition of deviation and its relationship to deviation reporting and compliance certification. TNRCC's proposed rules define "deviation" as "any indication of noncompliance with a term or condition of the permit as found using, at a minimum, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit." 30 T.A.C. § 122.10(7).[14] You assert that TNRCC's definition suggests that facilities are not required to consider evidence of noncompliance, other than that resulting from monitoring required by the permit, in determining whether or not there has been a deviation. Because the definition of

[13]Comment Letter, Exhibit 12 - Letter from Amy Johnson to Bob Kramer and Jesse Macias dated June 24, 1998 and reply from Paul Sarahan to Amy Johnson dated July 10, 1998.

[14]The proposed definition was later amended to add the phrase "but not limited to". 26 *TexReg* at 3768 and 3793.

deviation does not require that indications of noncompliance detected by methods other than those required in the permit be considered "deviations," it is likely that facilities will not report these indications of noncompliance either in their deviation reports or in their compliance certifications. Thus, you contend that EPA should require TNRCC to revise the definition of deviation to be "any indication of noncompliance with a term or condition of the permit." Comment Letter at 15 - 16.

EPA Response

"Deviation" is defined in 40 C.F.R. § 71.6(a)(3)(iii)(C) as "any situation in which an emission unit fails to meet a permit term or condition. A deviation is not always a violation." Regarding compliance certifications, 40 C.F.R. § 71.6(c)(5)(iii)(B) requires that the methods or other means for certifying compliance shall include, at a minimum, the method or means required under [§ 71.6(a)(3), i.e., compliance assurance monitoring and periodic monitoring]"

The definition of "deviation" in 30 T.A.C. § 122.10(7) is as follows:

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

Texas' use of the phrase "any indication of noncompliance with a term or condition of the permit" is similar to EPA's definition of deviation - "any situation in which an emission unit fails to meet a permit term or condition". Therefore, the two definitions of deviation are sufficiently similar to cover the same situations.

In regard to identifying the means to certify compliance under a Part 70 program, we use the phrase "at a minimum". Texas uses the phrase "at a minimum, but not limited to", which is broader than EPA's phrase "at a minimum." A Part 70 program requires the owner/operator to certify compliance, at a minimum, with § 71.6(a)(3) [*i.e.*, compliance assurance monitoring and periodic monitoring]". Texas requires the owner/operator to certify compliance, at a minimum, but not limited to, the methods required by the permit. Compliance

assurance monitoring and periodic monitoring are required to be in a Title V permit.

Therefore, we interpret the Texas' definition of deviation as requiring sources to consider all credible evidence when determining deviations. We will monitor this issue, to ensure that TNRCC is interpreting the rule appropriately.

C. PERMITS

Comments

Your third allegation concerning credible evidence relates to your contention that TNRCC's Title V permits contain specific language limiting the use of credible evidence, contrary to what EPA stated when its promulgated its Compliance Assurance Monitoring rule. You cite the language from Texas Utilities' Big Brown Steam Electric Station permit which states:

> For purposes of the annual compliance certification under 30 T.A.C. § 122.146, the permit holder is required to conduct an observation of visible emissions from the source once during each 12-month certification period.
>
> If visible emissions are not observed, the RO may certify that the source is in compliance with the applicable opacity requirement in 30 T.A.C. § 111.111(a)(8) and (a)(8)(A). Documentation is not required for observations where no visible emissions are present.[15]

You contend that this language suggests that the only information the source need consider in making a certification regarding its compliance with the opacity limit is a once per year visual observation. You believe that this is contrary to EPA's credible evidence rule, particularly when this facility has monitoring equipment installed which provides continuous data regarding the facility's opacity emissions. Therefore, you assert that EPA should require that TNRCC reopen and correct permits containing such credible evidence limiting language.

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[15]Comment Letter, Exhibit 14 (Permit No. O-00065, p. 6).

Comment Letter at 16.

EPA Response

A review of the cited permit and other Title V permits reveals that your comments are correct. The language in the permits does suggest that the only information the source needs to consider in making a certification regarding its compliance with the opacity limit is a once per year visual observation. This is contrary to our credible evidence rule and thus constitutes a problem. However, TNRCC has agreed to include the following language in all its permits to ensure that all credible evidence is considered in compliance certifications:

> The permit holder shall certify compliance with all permit terms and conditions using, at a minimum, but not limited to, the continuous or intermittent compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information. The certification period may not exceed 12 months and the certification must be submitted within 30 days after the end of the period being certified.

Therefore, this problem has been corrected because future permits will be issued in accordance with federal requirements.

III. GENERAL PERMITS

Comments

You claim that Texas' general permits do not comply with Title V and deny the public meaningful public participation. You claim that 76% of the operating permits issued are general operating permits (GOPs). You also assert that extensive use of general permits denies meaningful participation because citizens do not follow agency rulemakings, they only become involve with Title V when a facility in their neighborhood has applied for a Title V permit. Comment Letter at 17.

EPA Response

40 C.F.R. § 70.6(d) authorizes the use of general permits covering numerous similar sources. The general permit must follow the public participation requirements of

40 C.F.R. § 70.7(h). 30 T.A.C. § 122.501(a)(2) provides that the Executive Director may issue a general operating permit provided that the requirements under 30 T.A.C. § 122.506 has been satisfied. 30 T.A.C. § 122.506(a) provides that the Executive Director shall publish notice of the opportunity for public comment and hearing on the draft general operating permit. The public notice includes all the requirements of 40 C.F.R. § 70.7(h), including the following:

- notice of the draft permit in the *Texas Register*, and in a newspaper in general circulation in the area affected by the general operating permit,
- notice is also available on the TNRCC's publically accessible electronic media.

The notice is required to contain the following:

- description of the activities involved in the permit,
- the location and availability of copies of the draft permit,
- description of the comment procedures,
- a person affected by the emissions from the permit may request a notice and comment hearing, and
- the name, address, and phone number of the commission office to be contacted for further information.

Therefore, we believe that the public participation requirements of 30 T.A.C. § 122.506 are consistent with 40 C.F.R. § 70.7(h). Thus, we disagree with your comment that a deficiency exists as to this issue.

IV. COMPLIANCE MONITORING

Comments

You contend that since Texas does not mandate that facilities use a specific compliance certification form, compliance certifications are submitted in varying degrees of compliance with Part 70 requirements. You also allege that the compliance certification form developed by the TNRCC is

inadequate (*i.e.*, the form does not require that a facility specifically identify the requirement for which it is certifying compliance, does not require a description of the monitoring used to determine compliance or a statement regarding whether such methods provide continuous or intermittent data). Therefore, EPA should require TNRCC to use EPA's Form I - Comp - Initial Compliance Plan & Compliance Certification or a similar form which meets Part 70 standards.

In addition, TNRCC's rules provide that a copy of compliance certifications shall be made "accessible to EPA" by the Executive Director, rather than submitting the certifications directly to EPA, as required by 40 C.F.R. § 70.6(c)(2)(iv). The EPA should require each Texas permittee to submit copies of all compliance certifications to EPA as well as TNRCC, as required by 40 C.F.R. § 70.6(c)(2)(iv).

Comment Letter at 18 - 19.

EPA Response

To help facilitate implementation, TNRCC developed annual compliance certification forms. It is our understanding that the Title V facilities use TNRCC's form. While we does not require the use of forms, State agencies may use such forms, provided the form is consistent with 40 C.F.R. § 70.6(c)(5). The compliance certification must include the identification of each term or condition of the permit that is the basis of the certification and the method used to determine compliance. We allow owners or operators to cross-reference the permit or previous reports to identify the various information elements required in a certification. 40 C.F.R. § 70.6(c)(5)(iii); 62 *Fed. Reg.* 54900, 54937 (October 22, 1997). This allows the actual certification to be a short, concise compliance statement that is not burdened by restating detailed information that has already been provided.

Therefore, since cross-referencing is allowed, a statement similar to that which is contained in Part I, Section I of TRNCC's Permit Compliance Certification form, satisfies the aforementioned requirements for those terms or conditions of the permit for which the permitee is certifying compliance. In addition, Parts II and III would satisfy the same requirements for any deviations reported.

However, EPA has determined that there were three problems with TNRCC's Permit Compliance Certification form. First, EPA believes that the statement in Section 1 - "Certification of Continuous Compliance with Permit Terms and Conditions" was too restrictive. Specifically, the certification language did not encompass all compliance methods identified in the permit. TNRCC's compliance statement bases a facility's compliance status "on the compliance method specified by the applicable requirement". Not all compliance methods are specified by an applicable requirement. Some are specified in the permit. However, TNRCC revised this statement to include all monitoring methods identified in the permit. The TNRCC provided a draft certification form on November 9, 2001, which contains the above described items. In addition, the TNRCC has agreed to work with the EPA to address the concern in an appropriate manner. Second, the Permit Compliance Certification form did not include a statement indicating whether compliance method data is continuous or intermittent. TNRCC also revised its form to require the identification of whether such monitoring methods or other means provide continuous or intermittent data. Third, TNRCC amended the form to require consideration of credible evidence. Furthermore, TNRCC amended 30 T.A.C. § 122.146(2) to require that all compliance certifications be submitted to EPA. Therefore, EPA believes that this problem has been corrected.

V. FUNDING

Comments

You have alleged that Texas has neither sufficient funding nor personnel to administer its Title V program, claiming that TNRCC itself has stated that it will have a $3.2 million shortfall in its Clean Air Account by fiscal year 2003. You also assert that Texas currently charges $26 per ton of state regulated or criteria pollutants emitted, up to a 4,000 ton limit per account. Because Texas has so many large emitters, there is huge inequity in the fees paid by various sources due to the 4,000 ton cap. Some smaller facilities pay $26 per ton while some large facilities pay as little as $3.07 per ton. Besides creating a disincentive to polluting less, this fee structure simply does not allow TNRCC to collect sufficient fees to cover the costs of its Title V program.

You also contend that Texas has repeatedly alleged that it cannot do things required by Title V because it has such a huge number of Title V facilities and simply does not have the resources and staff to meet certain requirements. For example, Texas claims it cannot possibly incorporate minor new source review into Title V permits though the reopening process in 18 months as required by 40 C.F.R. § 70.7(f)(1). Because Title V provides the mechanism for sufficiently funding a state's program, this is no excuse. If Texas does not have the funding to complete the required tasks, it should remove the 4,000 ton cap or raise its fees as necessary to sufficiently fund the program. If Texas does not correct both its funding and personnel shortfalls, full Title V program approval should be denied.

Comment Letter at 19 - 20.

EPA Response

This issue was addressed in our December 6, 2001 *Federal Register* notice granting full approval to Texas' Title V Operating Permits Program. 66 *Fed. Reg.* at 63326 - 27. For the reasons set forth in the *Federal Register*, we believe that TNRCC has demonstrated that it will receive sufficient funding to implement its Title V program. With sufficient funding, TNRCC can provide adequate personnel to implement its Title V program. Therefore, we disagree with your comment that a deficiency exists as to this item.

VI. PERMIT APPLICATIONS

Comments

You claim that Texas Title V rules do not require that facilities submit applications that include sufficient information to allow TNRCC to draft a Title V permit and allow the public to begin gathering sufficient information to participate in permitting proceedings. Public Citizen claims that TNRCC's rules allow facilities to submit "abbreviated initial applications" which contain only (1) identifying information regarding the site and applicant, (2) certification by a responsible official and (3) any other information deemed necessary by the Executive Director. This information is entirely insufficient to provide the public with necessary information. The TNRCC must require that facilities submit a

complete application, as defined in Part 70, before public notice is given. Comment Letter at 20 - 21.

EPA Response

Texas rules provide for a two stage permit application process. Section 122.132(c) provides that a permit applicant may submit an abbreviated application and that the Executive Director shall inform the applicant in writing of the deadline for submitting the remaining information. The remaining information required for a full application is set forth in 30 T.A.C. § 122.132(e), which is consistent with 40 C.F.R. § 70.5(c). The TNRCC used abbreviated applications primarily to identify major sources and to provide the basis for the development of a schedule requiring applicants to submit full applications. Once all information has been submitted, the Executive Director performs a technical review and develops a draft permit. *See* 26 *TexReg* at 3762. Furthermore, we addressed this issue in more detail in our full approval of Texas' Title V program. 66 *Fed. Reg.* at 63326. Therefore, contrary to your assertions, Texas does require facilities to submit a complete application. Accordingly, we disagree that a deficiency exists.

VII. DEVIATION REPORTING

Comments

The Part 70 regulations provide that Title V permits require “prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken." 40 C.F.R. § 70.6(a)(3)(iii)(B). The regulations also state that prompt shall be defined "in relation to the degree and type of deviation likely to occur and the applicable requirements." *Id.*

Texas requires that all deviation reports be submitted within six months of the deviation. You contend that this is not "prompt", citing EPA’s notice of proposed interim approval of Arizona's Title V program:

> The EPA believes that prompt should generally be defined as requiring reporting within two to ten days of the deviation. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. For sources with a low level of excess emissions, a longer time period may be acceptable. However, prompt reporting must be more frequent than the semiannual reporting requirement, given this is a distinct reporting obligation under 40 C.F.R. § 70.6(a)(3)(iii)(A).

60 *Fed. Reg.* 36083 (July 13, 1995).

Thus, you contend that EPA should require that Texas amend its rules to require truly "prompt" reporting of deviations.

Comment Letter at 22.

EPA Response

40 C.F.R. § 70.6(a)(3)(iii)(B) specifies that each permit issued shall provide for "[p]rompt reporting of deviations from permit requirements,... , the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirements." Accordingly, Part 70 provides permitting authority with some discretion regarding the definition of prompt so long the permitting authority defines prompt considering the elements specified in the regulation. 30 T.A.C. § 122.145(2)(B) provides that "a deviation report shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting."

Although not a substitute for the deviation reports, Texas' upset regulations supplement the deviation reporting requirements. These reporting requirements require notification within 24 hours for upsets that exceed a reportable quantity, with followup notification within 14 days if the facility determines that information differs than what was originally provided to TRNCC. If the upset does not exceed the reportable quantity, then the facility must create a record of the upset. 30 T.A.C. § 101.6. According to TNRCC, "the list of [reportable quantities], which is the basis of upset

reporting [was] established using criteria for the protection of health and prevention of nuisances." 25 *TexReg* 6727, 6730 (July 14, 2000). In both cases, these reports must be included in the six month deviation report required by 30 T.A.C. § 122.145(2). Thus, Texas' deviation reporting requirements are consistent with the requirements of Part 70.

Additionally, 40 C.F.R. § 71.6(a)(3)(iii)(B) provides that for prompt reporting of deviations, the underlying applicable requirement applies. Where the underlying applicable requirement fails to address the time frame for reporting deviations, the report must be made within 24 hours for emissions of hazardous air pollutants (HAPs) or toxic air pollutants (TAPs) that continue for more than one hour in excess of permit limits, and within 48 hours for emissions of any regulated air pollutant other than HAPs or TAPs that continues for more than two hours in excess of permit requirements. For any other deviations, the report is submitted every six months.

Thus, Texas' upset regulations are very similar to the part 71 provisions for prompt reporting of deviation. Upsets exceeding a reportable quantity are to be reported within 24 hours. The TNRCC claims that it developed this list using health based criteria. Thus, the reporting of these upsets within 24 hours is similar to EPA's reporting requirements for HAPs and TAPs. Like Part 70, TRNCC requires deviation reports be submitted every six months unless the underlying applicable requirement requires more frequent reporting. Therefore, we disagree that a deficiency exists with respect to these comments.

VIII. PUBLIC PARTICIPATION

A. NOTICE

Comments

TNRCC's rules provide that notice of a Title V application is to be published once in the legal notice section of a local newspaper and posted on a sign at the facility applying for the permit. 30 T.A.C. § 122.320. This notice does not reach many citizens who are affected by emissions from Title V facilities.

In addition, there is not a mailing list for Title V applications. Individuals wishing to receive written notice of

Title V applications in their area must either (1) know the name of every facility which might apply for a Title V permit and ask to be placed on that facility's notice list or (2) ask to be placed on the notice list for all activities within their county. Furthermore, the notice of existing mailing lists is also so poor that few people know that they can have their names added to a mailing lists. The notice is apparently placed only in the *Texas Register* which is not even available in many counties in Texas.

The EPA should require the following changes to TNRCC's Title V notice requirements. First, notice should be mailed to all persons on a Title V mailing list, or on a mailing list for the specific facility in question, as well as to the state senator and representative who represent the area in which the facility is or will be located. Second, notice, or at least a reference to the full notice, should be published in a prominent location in the non-legal notice section of the newspaper. In addition, the TNRCC should work towards providing prompt notice of all Title V permitting activities on its Title V web site.

Comment Letter at 23 - 24.

EPA Response

40 C.F.R. § 70.7(h)(1) requires the following:

> Notice shall be given: by publication in a newspaper of general circulation in the area which the source is located or in a State publication designed to give the public general notice; to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public.

The TNRCC's public notice provisions are found in 30 T.A.C. § 122.320. This regulation requires, *inter alia*, publication "in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site." 30 T.A.C. § 122.320(b). It also requires that the notice give "a description of the procedure by which a person may be placed on

a mailing list in order to receive additional information about the application or draft permit." 30 T.A.C. § 122.320(b)(9). The TNRCC also states that the requestor may instead ask to be placed on a mailing list to receive permit notices for every site in a given county. 26 *TexReg* at 3779.

The TNRCC also provides electronic access to both new source review and operating permit actions and correspondence via its remote document server (RDS) located at: http://www.tnrcc.state.tx.us/ permitting/air-perm/rdsinstr.htm. Therefore, we disagree with your contentions that TNRCC's public participation requirements are inconsistent with Part 70. Accordingly, we believe that TNRCC has met the requirements of 40 C.F.R. § 70.7(h), and thus have no basis for making a finding of deficiency.

B. ACCESS TO DOCUMENTS

Comments

You contend that Texas should provide access to permitting records in the manner provided by the federal Freedom of Information Act (FOIA), and that TNRCC's implementation of its open records laws is inconsistent with FOIA.

You assert that citizens wishing to review documents in order to participate in Title V permitting or to track a facility's compliance are referred to the TNRCC file room. There a citizen may request the air files relating to a particular facility. Often, some of the files relating to the facility in question will be withheld from the citizen. If a facility marks a file as confidential, the TNRCC assumes the file truly is confidential and is exempt from the open record laws. The TNRCC, therefore, withholds the file from the public. There is usually no notice in the publicly accessible files that documents have been withheld under a claim of confidentiality. Citizens, therefore, do not even know that information has been withheld.

If a citizen does learn that information has been withheld and specifically asks for such information, you claim that the TNRCC refers the request to the Attorney General's office without independently evaluating whether or not the documents marked as confidential may legitimately be confidential. The Attorney General's office may take several months to issue a

ruling and by then, the permitting action for which the citizen sought the information has often been completed.

Finally, you also claim that facilities can abuse this system by marking files that clearly do not qualify for exemption from the open records laws, such as newspapers and emissions reporting, as confidential. To end this abuse of the open records system and to assure that the public has access to public records, TNRCC should be required to (1) review the substance of confidentiality claims without assuming that simply because a facility marks a document as confidential it is indeed confidential, (2) abate the Title V notice period while any confidentiality claims are pending, and (3) ensure that every file from which confidential information is withheld contains a clearly recognizable notice to the public that such information has been withheld and the procedures for seeking an Attorney General opinion regarding the information withheld.[16]

Comment Letter at 24 - 15.

EPA Response

Your first allegation is that when a facility marks a file as confidential, the TNRCC assumes the file is confidential, and withholds the file from the public without any notice that the documents have been withheld under a claim of confidentiality. However, TNRCC requires the Title V permit applicant to indicate on the permit application whether confidential information is being submitted in conjunction with

[16]TNRCC General Counsel Duncan Norton did sign a "confidentiality policy" in 1999 stating that when the agency receives a public information request during a time-sensitive period , and an applicant has asserted a claim of confidentiality, the agency will suspend the processing of the application after requesting an opinion of the Attorney General as to the confidentiality of the documents. This policy is not applied by TNRCC staff, who generally respond to open records requests by referring the requestor to the public files. Because there is no notice in the public files that documents have been withheld, the requestor does not know to press the issue, much less how to do so. Further, this "policy" must be adopted into rule if it is to be effective and if the public is to know of their right to have permit proceedings suspended.

the application.[17] Thus, the public is alerted to the existence of confidential information by reviewing the permit application. If confidential information is submitted on a standardized form, the applicant is instructed to identify confidential items with an asterisk (*). "Certain portions of the application, such as plot plans, process descriptions, and process flow diagrams are not submitted on standardized forms. The applicant must submit a nonconfidential version of these materials."[18]

The second allegation is that TNRCC refers a request for confidential information to the Attorney General's (AG) office without independently evaluating whether or not the documents marked as confidential may legitimately be confidential, and that AG's office may take several months to issue a ruling. If this occurs, you contend that TNRCC does not follow its own policy of suspending action on a permit application if the public has requested information that has been claimed as confidential. While you state that this policy is not applied by TNRCC staff, you provide no specific example of when TNRCC failed to suspend action on a permit application following a request for information that was claimed confidential. Furthermore, TNRCC is unaware of any open records request for an operating permit application that contained any confidential data. 26 *TexReg* at 3788.

The third allegation is that facilities abuse the system by marking files that clearly do not qualify for exemption from open records laws as confidential. However, you provided no specific examples of any "abuse."

Therefore, based on the foregoing, we have no basis for making a finding of deficiency at this time. However, we would be very concerned if because of pending confidentiality claims, members of the public were denied timely access to documents they need in order to review Title V permits. Therefore, we will monitor TNRCC's implementation of its confidentiality policy.

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[17]Form OP-1 (Page 2), Site Information Summary, Federal Operating Permit Application.

[18]Federal Operating Permit Application Guidance Document at 35 (July 2000).

C. PUBLIC HEARING REQUESTS

Comments

The Clean Air Act provides that each Title V program shall provide "for public notice, including offering an opportunity for public comment and hearing." 42 U.S.C. § 7661a(b)(6). Just as the regulation above does not allow a state to limit the public's right to comment on Title V applications, it does not allow a state to limit the public's right to a notice and comment hearing on a Title V application.

The TNRCC's rules, however, provide "the Executive director is not required to hold a hearing if the basis of the request by the person who may be affected by emissions from a site is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a site regulated under this chapter, and that request is reasonable, the Executive director shall hold a hearing." 30 T.A.C. § 122.340(d). You claim that this rule illegally restricts the public's right to a public hearing on Title V permits.

The TNRCC formerly used the “reasonableness” standard in determining who was entitled to the trial type “contested case” hearings it grants on preconstruction air permitting applications. You assert that this standard is ambiguous and led to numerous lawsuits. The “reasonableness” standard was removed by the Texas Legislature from the contested case hearing rules and should, likewise, be deleted from the Title V rules.

Finally, you state that Title V does not give TNRCC the authority to limit the availability of hearings. Title V hearings are not contested case, or trial-type, hearings. They are notice and comment hearings where the public is simply given the opportunity to make public comment. Notice and comment hearings are not overly burdensome for the agency. The EPA should require TNRCC to hold a public hearing on a Title V application if such a hearing is requested.

Comment Letter at 25.

EPA Response

Section 382.0561(c) of the Texas Health & Safety Code provides the following:

> The commission or its designee shall hold a public hearing on a federal operating permit, a reopening of a federal operating permit, or renewal application before granting the permit or renewal if within the public comment period a person who may be affected by the emissions or a member of the legislature from the general area in which the facility is located requests a hearing. The commission or its designee is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable.

30 T.A.C. § 122.340(d) [Notice and Comment Hearing] sets forth the following:

> The Executive director shall decide whether to hold a hearing. The Executive director is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a site is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a site regulated under this chapter, and that request is reasonable, the Executive director shall hold a hearing.

The TNRCC has stated, procedurally, for operating permits, the it has interpreted the phrase "a person that may be affected by emissions" includes any interested person. The TNRCC has received eight hearing requests. So far, no hearing has been denied based upon Executive Director discretionary authority. 26 *TexReg* at 3781.

40 C.F.R. § 70.7(h) is silent on the standards for granting a hearing on a Title V permit. However, the hearing procedures for federal Title V permitting in 40 C.F.R. § 71.11(f)(1) provide some guidance. This provision provides that "[t]he permitting authority shall hold a hearing whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit." Therefore, some standard in whether to grant a hearing request is appropriate. Based on TNRCC's interpretation that "a person that may be affected by emissions" includes any interested person, and absent any specific comments regarding a failure to grant a specific

request for a permit, we have no basis for making a finding of deficiency at this time.

D. CONCURRENT REVIEW BY EPA

Comments

The TNRCC's proposed revisions to its Title V rules allow for concurrent review by EPA and the public of Title V permits. This means that EPA's review period begins, and is largely completed, before citizens submit their comments on Title V permits. You contend that this concurrent review, although practiced by some states, is not provided for in the Part 70 rules. The EPA is intended to have access to citizen comments before its review period begins. Part 70 makes a distinction between the version of a Title V permit that the public comments on - which is a "draft" permit, and the version of the permit that EPA comments on, which is a "proposed" permit. Comment Letter at 26.

EPA Response

Title V and Part 70 do not prohibit concurrent review. 40 C.F.R. § 70.8(c) provides that a Title V permit cannot be issued if EPA objects to its issuance within 45 days of receipt of the proposed permit. “Proposed permit” is defined in 40 C.F.R. § 70.2 as “the version of the permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8.” 40 C.F.R. §70.7(h) provides that the permitting authority provide an opportunity for public comment and hearing on the “draft permit”. “Draft permit” is defined in 40 C.F.R. § 70.2 as “the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.” Therefore, there is nothing in Part 70 that prohibits the permitting authority from simultaneously submitting a permit to EPA for review (proposed permit) at the same time its submits the permit for public comment (draft permit). If the permitting authority makes any changes in the permit in response to public comment, it would have to resubmit the permit to EPA for review under 40 C.F.R. § 70.8. Therefore, we disagree that this is a deficiency in the Texas program.

IX. ENVIRONMENTAL JUSTICE

Comments

Texas has a large number of Title V sources clustered around poor and minority communities. Because these communities have traditionally borne a disproportionate share of the negative impacts of air pollution, it is essential that Texas Title V program provide open and meaningful participation for all Texans so these impacts may be considered and addressed. You contend that there are a number of barriers to public participation included in the Texas program, including:

- The failure to require monitoring which would allow citizens to track facility's compliance;

- The failure to accept citizen gathered evidence of violations;

- The use of general permits to issue the majority of title V permits in Texas;

- The failure to include a statement of basis in public files;

- The failure to require complete applications;

- Notice that does not reach average citizens who do not read the *Texas Register* or the legal notice section of newspapers; and

- Public hearings that are limited to affected persons whose requests are thought to be "reasonable" by the Executive Director.

Thus, you contend that EPA should not grant Texas full program approval as long as its Title V program denies the public full and meaningful participation in the issuance and enforcement of Title V permits.

Comment Letter at 27 - 28.

EPA Response

Your environmental justice comments mirror the comments already raised in the comment letter. These comments were addressed above. In addition, you provided no specific

examples that Title V is implemented any differently in poor and/or minority communities than elsewhere in Texas.