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Cyril J. Pittack,

Acting Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[TX–FRL–5526–4]

Clean Air Act Final Interim Approval of Operating Permits Program; the State of Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Source Category-Limited Interim Approval.

SUMMARY: The EPA is promulgating source category-limited interim approval of the Operating Permits program submitted by the Texas Natural Resource Conservation Commission (TNRCC) for the State of Texas for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, except any sources of air pollution over which an indian tribe has jurisdiction.

EFFECTIVE DATE: July 25, 1996.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing this source category-limited interim approval are available for inspection during normal business hours at the following location:

EPA, Region 6, Permits Section (6PD–R), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

TNRC

C, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: David F. Garcia, Permits Section (6PD–R), EPA, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7217.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (the Act), and implementing regulations at 40 CFR part 70 require that States develop and submit Operating Permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within one year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to two years. If EPA has not fully approved a program by two years after November 15, 1993, or by the end of an interim program, it must establish and implement a Federal program.

On June 7, 1995, EPA proposed source category-limited interim approval of the Operating Permits program for the State of Texas. See 60 FR 30037 (June 7, 1995). The EPA received comments on the proposal and compiled an updated Technical Support Document which describes the Operating Permits program in greater detail. In this document, EPA is taking final action to promulgate source category-limited interim approval of the Operating Permits program for the State of Texas.

II. Final Action and Implications

A. Analysis of State Submission

The Governor of Texas submitted a title V Operating Permits program for the State of Texas on September 17, 1993, and supplemental submittals from the Executive Director of TNRCC on October 28, 1993, and November 12, 1993. The Texas title V Operating Permits program includes among other things TNRCC Regulation XII, title 30 of the Texas Administrative Code (TAC) Chapter 122 ''Federal Operating Permits'' (the Texas permit regulation) and TNRCC General Rules, title 30 of TAC, section 101 (the Texas fee regulation).

The EPA identified and discussed the specific inconsistencies precluding full approval of the Texas program in the June 7, 1995, Federal Register document. It is essential that these inconsistencies be remedied by the State consistent with the Act and part 70 prior to EPA granting full approval of the State's Operating Permits program. The State committed to address certain of the identified inconsistences in a letter dated October 3, 1995, in a manner sufficient to satisfy EPA concerns. The State in the October 3, 1995, letter agreed to: (1) Revise section 122.120(4)(A–B) of the Texas permit regulation regarding source applicability; (2) revise section 122.010 of the Texas permit regulation to make the Texas definition of ''air pollutant'' consistent with part 70, as it relates to regulated air pollutant; (3) revise section 122.010 of the Texas permit regulation to make the definition of ''site'' consistent with part 70, as it relates to research and development activities; (4) revise section 122.132 of the Texas permit regulation in regard to compliance schedule requirements; (5) revise section 122.211 of the Texas permit regulation to require ''similar'' changes allowed under an Administrative Amendment to be approved by EPA; and (6) revise section 122.202 of the Texas permit regulation as it relates to General Permits. These particular rules will be acceptable for full approval if the State makes the changes in its rules as specified in the letter. Also, the State's criminal enforcement provisions meet title V and part 70. The EPA proposed in the June 7, 1995, notice to accept that these criminal enforcement statutory provisions satisfied the intent of part 70 and solicited comments. No adverse comments were received. The EPA's position is that the State's criminal enforcement provisions are acceptable for both interim and full approval.

During the State's process to revise the Operating Permit regulation for full title V approval, EPA will comment based on the part 70 rule in place at the time. In the action on the State's submittal for full approval, EPA will use the criteria in whatever is the final part 70 regulation, whether it be the existing July 21, 1992, regulation or a later version (part 70).

B. Response to Comments

The EPA received three comment letters (including one from TNRCC) during the 30-day public comment period held on the proposed interim approval of the Texas program. The commenters requested a 90-day extension of the public comment period based on interest to reevaluate the Texas title V program and submit a plan with a redesigned Texas title V program. The EPA extended the comment period until October 5, 1995, in a Federal Register notice published August 4, 1995. Comments were received from 27 parties during the extended period. Below is EPA's response to comments received on the proposed source category-limited interim approval for the Texas Operating Permits program.

1. *Comment 1*—All the comments received unanimously suggested EPA delay and/or defer final approval of the Texas interim program until such time as TNRCC is able to submit a revised Regulation XII and program submittal.

EPA Response—The EPA cannot ''delay and/or defer'' an action on a pending title V program submittal. However, in addition to preparing a Response to Comments and a Federal

Register notice after the end of the comment period in October, EPA also met with TNRCC a number of times to discuss possible significant changes to the State's program design. Thus, EPA tried to accommodate the State and industry's wishes to submit a revised program design and yet meet its own obligation to move forward on the pending program submittal. The EPA has expressed fundamental concerns regarding the approvability of such significant changes to the existing program design. Mary Nichols, Assistant Administrator for the Office of Air and Radiation, sent a letter, dated February 7, 1996, to Mr. Barry McBee, Chairman of TNRCC, which outlined EPA's broad concern with such a program redesign as presented to EPA in discussion meetings. A copy of the letter has been placed in the docket and is available for public review.

During this same timeframe, EPA reviewed and drafted a detailed response to comments received during the public comment period. In addition, EPA continued working on promulgation of part 71, the Federal operating permit rule. After the promulgation of the part 71 rule, States such as Texas without an approved program will be subject to a part 71 program. This rule is expected to be finalized and made effective in the summer of 1996. On March 14, 1996, EPA then received a request from Texas to proceed expeditiously with a final action on the June 7, 1995, proposal.

2. *Comment 2*—A commenter noted that EPA cannot impose the three conditions stated in the August 29, 1994, proposal for Operating Permits Programs Interim Approval Criteria until that action is promulgated. That proposal would revise part 70 to allow interim approval for States such as Texas whose programs do not provide for permits to incorporate all requirements established through an EPA-approved minor new source review (MNSR) program. The EPA proposed at 60 FR 30039 three conditions a State must meet in order to be eligible for interim approval. Texas must: (1) include in each operating permit issued during the interim approval period, a statement that MNSR requirements are not included; (2) include a cross-reference in each operating permit to the MNSR permit for that source; and (3) require reopening of permits for incorporation of MNSR permit conditions upon completion of the interim approval period.

EPA Response—The EPA agrees, and the August 29, 1994, proposal for Operating Permits Programs Interim Approval Criteria was finalized on June 20, 1996.

3. *Comment 3*—A commenter said that all companies cannot meet the three proposed conditions outlined in the August 29, 1994, Federal Register notice as previously discussed in comment 2. The concern is that EPA is assuming companies can list modifications found in State MNSR permits made years before, and cross-reference the modification in the MNSR permit with then-applicable enabling authority.

EPA Response—The EPA does not agree with the comment. Facilities that emit air pollutants are required to obtain and maintain the appropriate new source review authorization whether it is a major or MNSR permit. Due to these requirements, EPA believes that companies will be able to list and cross reference MNSR permits modifications made in the past. Where adequate company records do not exist, the facility may use State records. Where no company or State records exist, the facility must take steps to obtain the required permit and may be subject to appropriate enforcement action.

4. *Comment 4*—A commenter requested that the negative applicability requirement be eliminated for ''tier 3 permits.'' Only applicable requirements should be addressed in the application; no negative applicability requirements are necessary.

EPA Response—The EPA does not consider this comment relevant to this action. The TNRCC has not adopted a permitting program that includes ''tier 3 permits,'' nor has such a proposal been submitted for EPA approval.

5. *Comment 5*—The State commented that it does not agree with EPA that MNSR should be considered an ''applicable requirement'' under part 70. Should EPA determine MNSR to be an applicable requirement in the final part 70 rule, the State requested EPA allow it to use the ''program substitution'' concept presented in its comments on the EPA's August 29, 1994, proposed rulemaking.

EPA Response—The EPA does not agree with the State's comment. First, it continues to be the EPA's position that MNSR is an applicable requirement. Since July 21, 1992, in the promulgated rules which define the minimum elements of an approvable State Operating Permits program, EPA has interpreted the Federal definition of ''applicable requirement'' to include terms and conditions of ''any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I.'' Such permits include all MNSR permits. While the exclusion of certain MNSR provisions may be allowed under interim approval of the program, for full program approval, the State program must provide permits that include all MNSR permits.

Second, the State can use its ''program substitution'' concept as long as it meets all requirements of title V, including requirements for annual and initial compliance certification, the EPA veto, compliance plans and schedules, six month reporting, and prompt reporting of deviations. The Texas ''program substitution'' concept as presented to EPA does not meet title V and part 70. Furthermore, in the area of compliance for all part 70 permits, EPA believes that compliance certification places the burden of proof on the source, not on the permitting agency, for certifying compliance with all applicable requirements. It is EPA's position the burden of proof is placed on the source since the Texas permit regulation 122.132(b)(1) requires the responsible official of a source, not of the permitting agency, to sign the compliance documents.

6. *Comment* 6—The conditions on permits issued during the interim approval period were proposed in the August 1994 proposal for programs that do not require MNSR changes to be incorporated in the operating permit as applicable requirements. These conditions were subsequently addressed in the June 7, 1995, proposal, and were commented on by the State. The State proposes to: (a) Include in each operating permit a standardized permit provision stating ''Preconstruction authorizations including permits, standard permits, flexible permit, special permits, or special exemptions which are referenced in this permit will only be enforced under Regulation VI''; (b) use the permit form entitled ''Preconstruction Authorization References'' for cross referencing; and (c) if MNSR is determined to be an applicable requirement in the final part 70 rule, the TNRCC staff will propose to use the ''program substitution'' concept.

EPA Response—The final regulation revising the interim approval criteria (*Operating Permits Program Interim Approval Criteria*) requires any operating permit issued during an interim approval meet certain conditions if the permit does not incorporate minor New Source Review (MNSR) requirements. These conditions are:

(1) Each permit must state that MNSR requirements are not incorporated.

(2) Each permit must provide a cross reference, such as a listing of the permit number, for each MNSR permit

containing an excluded minor NSR term.

(3) The State must reopen or use a substantially equivalent revision process to incorporate any excluded MNSR applicable requirements into each operating permit prior to or upon program transition to full approval.

(4) Each permit must indicate how citizens may obtain access to excluded MNSR permits.

(5) Each permit must state that the MNSR requirements which are excluded are not eligible for the permit shield under section 70.6(f).

The State's comment in (a) above indicates that the title V permit will reference NSR permit actions as enforceable under Regulation VI. The EPA does not agree this response satisfies criterion (1) above. This provision must be revised to state that MNSR requirements are not incorporated in each operating permit issued during the interim approval period. Additionally, the State must be quite clear in any standardized permit provision that all its major ''preconstruction authorizations including permits, standard permits, flexible permit, special permits, or special exemptions'' are incorporated by reference into the operating permit as if fully set forth therein and therefore enforceable under regulation XII (the Texas operating permit regulation) as well as regulation VI (the Texas preconstruction permit regulation). As noted in (b) above of the comment, the State plans to use the ''Preconstruction Authorization Reference'' form. This form must list all MNSR authorizations (permit number) for each minor emission unit not being incorporated into the operating permit. This reference form which is part of the permit application and permit will adequately meet criterion (2). Criterion (3) requires the State to reopen/revise permits for incorporation of MNSR permit conditions prior to or upon full program approval. As noted in (c) above, the State proposes to use its ''program substitution'' concept. The EPA believes that this concept is acceptable as long as each permit issued during the interim period is revised to meet all requirements of title V, including requirements for annual and initial compliance certification, the EPA veto, compliance plans and schedules, six month reporting, and prompt reporting of deviations.

The State must also ensure that the additional conditions of the final interim approval criteria rule, not addressed in its comments, are met during the interim period. As noted in (4) above, the State must indicate in the operating permit how citizens may obtain access to excluded MNSR permits. Finally, criterion (5) requires the State to document in the title V permit that excluded minor MNSR terms are not eligible for the permit shield under section 70.6(f).

7. *Comment 7*—The State proposes to revise section 122.120(4)(C), pertaining to Applicability, to state ''any area source, in a source category designated by the Administrator'' shall obtain an operating permit. The TNRCC believes this revision to the Texas permit regulation is consistent with 40 CFR 70.3(a). The TNRCC believes this suggested revision to the Texas permit regulation corrects the deficiency identified by EPA in the June 1995 Federal Register and makes section 122.120(4)(C) consistent with 40 CFR 70.3(a).

EPA Response—The EPA does not agree with TNRCC's comment. The proposed language restricts the Administrator to only ''area sources'' for designation to title V permitting. Pursuant to 40 CFR 70.3(a), the Administrator may designate a number of different types of sources other than area sources subject to title V permitting. As a condition for full approval, TNRCC must revise section 122.120(4)(C) to be consistent with 40 CFR 70.3(a).

8. Comment 8—The State commented that until a final part 70 and section 302(j) rulemaking become final they do not plan to correct the identified deficiency requiring the definition of ''major source'' to be revised to require the inclusion of fugitive emissions for source categories regulated under section 111 or 112 of the Act. Specifically, in the State's definition, source category xxvii only applies to ''any other stationary source category which as of August 7, 1980, is being regulated under section 111 or 112 of the Act.''

EPA Response—Currently, part 70 requires fugitive emissions to be counted for all sources subject to section 111 and 112 standards, and does not limit the stationary source categories to those which existed as of August 7, 1980. However, the August 29, 1994, part 70 proposed revisions and the August 31, 1995, supplemental part 70 proposal, if finalized, would not include fugitive emissions for source categories subject to section 111 or section 112 standards which were promulgated after August 7, 1980. The August 31, 1995, supplemental proposal further requires the Administrator to make an affirmative determination under section 302(j). For full approval, the State must revise the Texas permit regulation to be consistent with part 70.

9. Comment 9—The State defines in the Texas permit regulation and also requests that the EPA define ''title I modification'' to include only prevention of significant deterioration, nonattainment, new source performance standard and section 112(g) modifications. The State does not propose to change their definition which was identified by EPA as a deficiency in the June 1995 Federal Register notice until this issue has been resolved definitively and is defined in the final part 70.

EPA Response—The EPA has proposed to define ''title I modification'' in the August 31, 1995, Operating Permits program and Federal Operating Permits program, proposed rule. The EPA proposed to define title I modification to mean any modification under part C and D of title I or sections 111(a)(4), 112(a)(5), or 112(g) of the Act and regulations promulgated pursuant to § 61.07 of part 61. If the definition of ''title I modification'' is finalized as proposed in the August 31, 1995, proposed rule, the State's definition of ''title I modification'' would be consistent with part 70. If the definition of ''title I modification'' is changed from that proposed in the August 31, 1995, proposed rule to include MNSR changes, the State must revise the Texas permit regulation to be consistent with part 70.

10. Comment 10—The State does not agree to revise section 122.138 of the Texas permit regulation as it relates to the application shield for significant modifications at this time. Instead, this section will be revised when part 70 becomes final and the issue is resolved definitively.

EPA Response—The EPA does not agree with this comment. For full approval, the Texas permit regulation must be revised with whatever is the final part 70 regulation, whether it be the existing July 21, 1992, regulation or a later version at the time a corrected program is submitted. However, EPA cannot approve a State program based on revisions to part 70 that have not been finalized.

11. Comment 11—The State provided comments on the permit revisions process. In regard to permit additions (section 122.215) and off-permit (section 122.215), TNRCC does not propose to change existing language in the Texas permit regulation to correct the identified deficiencies until part 70 becomes final and these issues are resolved definitively.

EPA Response—In order to receive full program approval, the State must

revise its rules to be consistent with part 70, in accordance with whatever is the final part 70 regulation, whether it be the existing July 21, 1992, regulation or a later version at the time a corrected program is submitted. However, EPA cannot approve a State program based on revisions to part 70 that have not been finalized.

12. Comment 12—The State proposes not to further define section 502(b)(10) as it relates to the operational flexibility provisions in section 122.221 of the Texas permit regulation.

EPA Response—In order to receive full program approval, the State must revise its rules to be consistent with part 70, in accordance with whatever is the final part 70 regulation, whether it be the existing July 21, 1992, regulation or a later version at the time a corrected program is submitted. However, EPA cannot approve a State program based on revisions to part 70 that have not been finalized.

13. Comment 13—The State disagrees with the EPA-identified deficiency that the public notification for an operating permit should include such information as the emission changes from any modification. The State believes section 122.153 of the Texas permit regulation does not include this requirement because its program should not be based on emission changes.

EPA Response—The EPA disagrees with this comment. The EPA specifies in 40 CFR 70.7(h)(2) the information that the public notice must include. For full program approval, the State must include the emissions change involved in any permit modification.

14. Comment 14—The State commented that fugitive emissions from units without applicable requirements need not be quantified in permit applications, especially if the source declares that it has major status.

EPA Response—The EPA agrees with a portion of the comment. On July 10, 1995, EPA released White Paper I from Lydia Wegman, Deputy Director for the Office of Air Quality Planning and Standards. A copy of this guidance document has been placed in the docket and is available for public review. Under section B.2. ''Required Emission Information and Source Descriptions'' of White Paper I, for fugitive emissions that are not subject to any applicable requirements, the source would be required to provide a general description of the emission units and their emissions in the application. However, fugitive emissions from units covered by an applicable requirement need to be quantified. For full approval, the Texas permit regulation must be revised to reflect this position.

15. *Comment 15*—The State commented that section 122.122 (relating to establishment of federally enforceable restrictions on potential to emit) of the Texas permit regulation serves as an acceptable certification process for grandfathered sites who choose to limit their potential to emit under the Operating Permit program. The State also has concerns regarding the January 25, 1995, guidance memorandum which, among other things, announced the availability of a two-year transition period during which a State could give sources additional options for seeking federally enforceable limitations on potential to emit. The time period allotted—January 25, 1995, through January 25, 1997—may not be adequate given the expected delay of the part 70 rule and approval of the Texas Operating Permits program. Therefore, the State requests EPA to extend the transition period for two years following interim approval of the Texas program.

EPA Response—The EPA will consider this request to extend the transition period for two years after interim approval for States such as Texas. However, this issue is not being addressed in this document. This issue will be addressed in EPA guidance and/or memorandum at a later date. The EPA is not addressing here whether section 122.122 of the Texas permit regulation is acceptable for purposes of limiting potential to emit other than during the transition period.

16. *Comment 16*—The State believes that the notice of emergency required in section 70.6(g)(3)(iv) is satisfied in the TNRCC General Rules, section 101.6 and therefore does not agree with EPA that there is a deficiency for full approval. Section 101.6 has two opportunities to submit information to the State. First, the occurrence of a major upset must be reported to the agency as soon as possible. If a company does not have all the information available at the time of the initial notification, then a second report is to be submitted within two weeks of the upset.

EPA Response—The EPA does not agree with this comment. The State's allowance of time for agency notification is inconsistent with the part 70 regulation. The part 70 regulation, at section 70.6(g)(3), requires the permittee to submit notice of the emergency to the permitting authority within two working days. For full approval, the Texas permit regulation must be consistent with part 70.

17. *Comment 17*—The State commented that the Texas Legislature convenes every two years and approves the TNRCC budget for two-year periods only. Therefore, the State is unable to provide a four year estimate of the permit program cost, as required in the June 1995 Federal Register notice for full approval, but will continue to provide budgetary information when it becomes available.

EPA Response—The EPA disagrees with this comment. Pursuant to 40 CFR 70.4(b)(8), the State must include in the fee demonstration an estimate of the permit program cost for the first four years after approval and a plan detailing how the State plans to cover these costs. The EPA is not requiring a budgetary allowance from the Legislature, but instead a projected estimate of the permit program cost.

18. *Comment 18*—The State provided in the October 3 letter a response to EPA regarding the requirements for interim authorization to clarify the ambiguity of section 122.145(e)—the ''interpretation shield''. The response is:

(a) Interpretations made pursuant to section 122.145(e) will be limited to whether and how a rule applies to a specific unit.

(b) The EPA has the ability to order TNRCC to reopen a permit in the event EPA guidance becomes available after a permit or revision is issued. Further, because each interpretation will be a provision of the permit, it will be subject to EPA review and veto during the EPA 45-day review period as provided by the revision section of the Texas regulation.

(c) The State will develop guidance documents to assure proper applicability determinations for each applicable requirement. All interpretations will be based on the most current information available, including guidance already received from EPA. The State will request EPA's input prior to the development of the guidance documents.

EPA Response—The EPA agrees with TNRCC's comments for interim approval issues. However, for full approval the State must revise the Texas permit regulation in accordance to the June 7, 1995, Federal Register notice.

C. Statutory Changes Enacted After the Submittal of the State Program

Significant changes to Texas laws were made by the Texas Legislature in 1995. These statutory changes raise issues of concern which the State must address before full approval for title V can be granted. The State has the obligation to address all the relevant, recently enacted laws and demonstrate how they meet title V and part 70.

This final agency action today does not waive the EPA's right to raise statutory concerns and any attendant

regulatory revisions the EPA deems necessary to the State and identify inconsistencies with those legislative changes which must be corrected for full approval. The EPA will present its position on the laws to TNRCC prior to the Texas 1997 legislative session, during TNRCC's corrective rulemaking process, and in its FRN proposing action on the State's submittal for full approval. Therefore, interested parties will have full opportunity to comment on the merits of the EPA's positions on the acceptability of the Texas 1995 laws (such as the Texas Senate Bill 14, ''Takings Impact Assessment,'' among others) for full title V program approval. The following is a specific discussion on the new audit and standing laws.

On May 23, 1995, Texas enacted House Bill 2473, the Texas Environmental, Health, and Safety Audit Privilege Act (the Audit Privilege Act) creating an immunity from civil, administrative, and criminal penalties for environmental violations discovered through an audit as defined by the Act. The Audit Privilege Act also created a privilege for information associated with audits which prohibits their disclosure in administrative, civil, or criminal actions for violations of environmental law. The EPA has reviewed the Audit Privilege Act, in light of Clean Air Act requirements, title V delegation requirements set forth in 40 CFR Part 70, and guidelines for full title V approval issued jointly by the Office of Enforcement and Compliance Assurance and the Office of Air and Radiation dated April 5, 1996, entitled ''Effect of Audit/Immunity Privilege Laws on States' Ability to Enforce Title V Requirements'', referred to below as the ''Guidelines''. A copy of the document has been placed in the docket and is available for public review. The EPA is concerned that the Audit Privilege Act may extend penalty immunity to facilities which commit repeat violations and violations which may cause harm to human health and the environment, and makes no provision for recoupment of penalties for economic benefit. Section 113(e) of the Clean Air Act specifically enumerates these three factors (among others) for consideration in assessing civil penalties. To the extent that the Audit Privilege Act provides immunity from civil penalties that does not permit consideration of these factors, appropriate civil penalties cannot be assessed by a state. It is clear, pursuant to the Guidelines, that EPA should not approve state title V programs in states where civil penalty immunity is granted to violators without consideration of compliance history, harm or risk of harm, and economic benefit.

The EPA is also concerned that the Audit Privilege Act may prevent the State from obtaining appropriate criminal penalties. Evidence necessary to prove that a crime has been committed may be protected by privilege which may inhibit or prevent the State from assessing appropriate criminal penalties. The State must demonstrate that it has the ability to obtain appropriate criminal penalties where an audit report reveals evidence of prior criminal conduct on the part of managers or employees. Another problematic aspect of the Audit Privilege Act is the disparity between its provisions limiting disclosure of audit report information by employees and others, and the Clean Air Act Sections 113 and 322 which specifically protect whistleblowers from retaliation and provide awards for persons who furnish information that leads to a criminal conviction or civil penalty. The Texas Audit Privilege Act does not, by its terms, create or impose special sanctions on informants, but it asserts that a ''Party to a confidentiality agreement . . . who violates that agreement is liable for damages caused by the disclosure. . . '' In addition, sanctions are created with regard to government officials who disclose privileged information. Pursuant to the Guidelines, EPA is concerned that both of these provisions may have a negative impact on disclosures well beyond the intended reach of the privilege. Confidential informants are an important source of leads for state and federal enforcement programs.

The above analysis of the Audit Privilege Act is intended to be illustrative and does not preclude EPA from raising additional issues of concern. The analysis is solely limited to title V of the Act and does not relate to any other environmental program. As noted previously, all interested parties will have opportunity to comment on the acceptability of this law for full title V approval.

The Act authorizes States to implement title V Operating Permit programs in section 502(d). The statute also sets forth the minimum elements of a State permit program, including the requirement that the permitting authority have adequate authority to assure that sources comply with all applicable Act requirements, as well as authority to enforce permits, including recovering minimum civil penalties and appropriate criminal penalties, § 502(b)(5) (A) and (E). Pursuant to title V, EPA promulgated regulations specifying the minimum required elements of State Operating Permit programs, found at 40 CFR Part 70. These regulations explicitly require States to have certain enforcement authorities, including authority to seek injunctive relief to enjoin a violation, to bring suit to restrain persons where a facility is posing an imminent and substantial endangerment to public health or welfare, and suit to recover appropriate criminal and civil penalties. Section 113(e) of the Act sets forth penalty factors for EPA or a court to consider in assessing penalties for civil or criminal violations of the Act, factors which necessarily apply to penalties for violations of title V permits. The EPA is concerned about the potential impact of some State audit privilege and immunity laws on the ability of the States to enforce Federal requirements, including those under title V of the Act. Upon review and consideration of the statutory and regulatory provisions discussed above, EPA issued guidance on April 5, 1996, entitled ''Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements.'' This guidance outlines certain elements of the State audit immunity and privilege laws which, in EPA's view, may so hamper the State's ability to enforce as to render the Agency unable to delegate the title V Operating Permit program. The guidance is consistent with EPA's audit policy, ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations'' (60 FR 246, December 22, 1995).

Section 502(b)(6) of the Act requires an approvable State title V program to include an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review under applicable law. The EPA interprets the statute to require, at a minimum, that States provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. *See* 59 FR 31183 (June 17, 1994). In the 1993 program submittal, Texas included an Attorney General (AG) Opinion which set forth State laws and court decisions and certified that Texas State laws on standing were no narrower than the Federal ones under Article III. Since the time of the submittal in November 1993, the Texas State Legislature met in January 1995 and adopted revisions to the existing standing law (Senate Bill 1546, an Act relating to persons affected by matters in hearings before the Texas Natural Resource Conservation

Commission). The bill was enacted on June 16, 1995, and became effective September 1, 1995.

On the bill's face, it does not impact standing in a title V permitting decision. This is because the bill applies only to those State administrative actions requiring an evidentiary hearing. The bill on its face does not apply to State administrative actions subject to a legislative hearing (presentation of comments with no right to cross-examination). Title V permit decisions are only required to be subject to a legislative hearing. Nevertheless, since there had been a change which could possibly impact the judicial review of title V permit decisions, EPA required the State to provide an Attorney General Opinion setting forth all laws and court decisions issued since the 1993 Opinion and recertifying that State laws on standing were still no narrower than the Federal ones.

This Opinion was submitted on May 6, 1996. In addition, EPA required the General Counsel and the Executive Director to submit a letter committing to implementing a permitting process that provides for a standing test no narrower than the Federal one. The letter also describes in greater detail the public participation process which is outlined in sections 122.150 to 122.155 and sections 122.310 to 122.316 of Regulation XII. This letter was submitted on May 6, 1996.

The EPA received on March 18, 1996, a Petition to Reopen the Comment Period for Texas Application for Delegation of title V Programs under the CAA. The Petition was submitted on behalf of the Sierra Club, the Environmental Defense Fund, Galveston-Houston Area Smog Prevention, and Clean Water Action. The Request to Reopen was specifically on the standing issue. The Petitioners requested EPA to require that a new certification be submitted by the Texas Attorney General. The Opinion should address the legislation passed in 1995 and all court opinions issued since the 1993 Attorney General's Opinion. The EPA was urged to obtain an explanation from the Attorney General's (AG) office of its actual positions and to obtain a written commitment from the AG to take a position in future TNRCC appeals that the Federal test be used. They also asked EPA to require TNRCC to promulgate rules that define the term ''person who may be affected'' (the term used in the Texas title V regulations for a person who may request a hearing and therefore has the right to appeal a title V permit decision). They also asked that the rules explain how and when TNRCC will give public notice, how and when TNRCC will respond to comments, and how and when TNRCC will provide new notice and an opportunity for comments when the application or proposed permit is changed significantly because of public input.

The EPA believes that the above concerns of the Petitioners have already been addressed by EPA's requiring a revised Attorney General's Opinion and the TNRCC letter. Although EPA did not request the State to address the above issues in exactly the same manner as requested by Petitioners, EPA does believe that all the concerns have been addressed satisfactorily. Therefore, it is EPA's position that the Petition to Reopen the Standing Issue has been rendered moot.

A Motion to Deny the Petition was filed April 9, 1996, on behalf of the Texas title V Planning Committee. Movants pleaded that the comment period of 120 days should be sufficient and that it has been over five months since that lengthy comment period ended. They also disagree that any of the information is new and that reopening of the comment period would be prejudicial to the commenters that prepared and submitted their comments under the October 5, 1995, deadline. Nevertheless, if EPA decides to consider the Petitioners' allegations either officially or unofficially, they ask that they be notified and provided an opportunity to respond to the merits of the Petition. The EPA again believes that the Motion to Deny the Petition has been rendered moot by EPA's earlier actions of requiring a revised AG Opinion and a TNRCC letter.

Both Petitioner and Movant will have the opportunity to provide their comments on the merits of EPA's positions on the laws enacted in the 1995 legislative session during the 1997 legislative session, the TNRCC's corrective rulemaking public comment period, and EPA's comment period on the corrective Texas title V program submittal.

Petitioners raised another issue of concern but did not specifically request a reopening of the comment period on it. The issue concerned TNRCC's laws and procedures governing public availability of emissions data. This area will be reviewed by EPA during the State's rulemaking process, and EPA will determine if rule revisions and/or a Program Implementation Agreement specific to confidentiality are necessary for full approval.

D. Final Action

The EPA is promulgating source category-limited interim approval of the Operating Permits program submitted by the State on September 17, 1993, and supplemental submittals on October 28, 1993, and November 12, 1993. The submittals have been reviewed for adequacy to meet the requirements of 40 CFR part 70. The results of this review are included in the updated technical support document, which will be available in the docket in the locations noted above. The submittal has adequately addressed all 11 elements required for interim approval as discussed in part 70. However, there are inconsistencies between the submittal and the part 70 regulations which have been generally discussed in this notice and are described in greater detail in the June 7, 1995, notice. These inconsistencies involve the Texas permit regulation and program implementation particularly with regard to applicability, permit application requirements, and permit issuance and revisions. It is essential that all the inconsistencies specifically identified in the June 7, 1995, notice be remedied by the State prior to EPA granting full approval of the State's Operating Permits program.

The part 70 revisions are projected to be promulgated in the fall of 1996. These revisions may in some respects be used as the criteria for granting full approval and may require the State to make regulatory and statutory changes.

The scope of the Texas part 70 program approved in this notice applies to all part 70 sources (as defined in the approved program) within the State of Texas, except any sources of air pollution over which an indian tribe has jurisdiction. *See,* e.g., 59 FR 55813, 55815–55818 (November 9, 1994). The term ''indian tribe'' is defined under the Act as ''any indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to indians because of their status as indians.'' *See* section 302(r) of the CAA; *see also* 59 FR 43956, 43962 (August 25, 1994); 58 FR 54364 (October 21, 1993).

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Therefore, EPA is also promulgating approval under section 112(l)(5) and 40 CFR 63.91 of the State's program for receiving delegation of

section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

This interim approval, which may not be renewed, extends until July 27, 1998. During this interim approval period, the State of Texas is protected from sanctions, and EPA is not obligated to promulgate, administer, and enforce a Federal Operating Permits program in the State of Texas. Permits issued under a program with source category-limited interim approval have full standing with respect to part 70, and the one year time period for submittal of permit applications by subject sources begins upon the effective date of this interim approval. The State's transition schedule requires the State to take final action on applications for 400 sites each of the first two years, 1,000 sites the third year, and 600 sites each of the last two years.

If Texas fails to submit a complete corrective program for full approval by January 26, 1998, EPA will start an 18-month clock for mandatory sanctions. If Texas then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will apply sanctions as required by section 502(d)(2) of the Act, which will remain in effect until EPA determines that the State of Texas has corrected the deficiency by submitting a complete corrective program.

If EPA disapproves Texas' complete corrective program, EPA will apply sanctions as required by section 502(d)(2) on the date 18 months after the effective date of the disapproval, unless prior to that date Texas has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval.

In addition, discretionary sanctions may be applied where warranted any time after the expiration of an interim approval period if the State of Texas has not timely submitted a complete corrective program or EPA has disapproved its submitted corrective program. Moreover, if EPA has not granted full approval to the Texas program by the expiration of this interim approval and that expiration occurs after November 15, 1995, EPA must promulgate, administer, and enforce a Federal permits program for the State of Texas upon interim approval expiration.

III. Administrative Requirements

A. Docket

Copies of the State's submittal, other information relied upon for the final source category-limited interim approval, including the 27 public comment letters received and reviewed by EPA on the proposal, and information referenced in this notice, are contained in docket number OPP–7–9–1 maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this final source category-limited interim approval. The docket is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address Operating Permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: June 13, 1996.

Jane N. Saginaw,

Regional Administrator (6RA).

Part 70, title 40 of the Code of Federal Regulations, is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by adding the entry for the State of Texas in alphabetical order to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Texas

(a) The TNRCC submitted its Operating Permits program on September 17, 1993, and supplemental submittals on October 28, 1993, and November 12, 1993, for approval. Source category-limited interim approval is effective on July 25, 1996. Interim approval will expire July 27, 1998. The scope of the approval of the Texas part 70 program excludes all sources of air pollution over which an Indian Tribe has jurisdiction.

(b) (Reserved)

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[FR Doc. 96–16126 Filed 6–24–96; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 271

[FRL–5524–9]

Final Authorization of State Hazardous Waste Management Program: Nebraska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: Nebraska has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act of 1976 as amended (hereinafter RCRA). Nebraska's revisions consist of provisions contained in rules promulgated between July 1, 1985 and June 30, 1990, otherwise known as Non-