

ATTACHMENT 1

I. Summary of Proposed Action

On December 1, 2014, the U.S. Environmental Protection Agency (EPA) published in the *Federal Register* a supplemental notice to the proposed NPDES Electronic Reporting Rule.

II. Comments

The TCEQ appreciates the opportunity to comment on the supplemental notice to the proposed rule and offers the following comments. TCEQ also directs EPA's attention to the docket where TCEQ's initial comments were submitted on December 12, 2013.

A. Initial Recipient Designation for NPDES Delegated Programs

The proposed rule would require delegated programs to identify and request authorization for the National Pollutant Discharge Elimination System (NPDES) data groups for which they wish to be designated as the initial recipient of NPDES electronically reported data. Texas Commission on Environmental Quality (TCEQ) supports the "opt-out" process for authorized states, which would allow authorized states to be the initial recipient by default on the effective date of the rule unless the authorized state specifically notifies the Environmental Protection Agency (EPA) that it wishes EPA to be the initial recipient for a particular data group. TCEQ recommends that the rule be revised to allow delegated programs, which currently have NPDES authority, to be the initial recipient of NPDES data on the effective date of the rule without having to request such authority.

B. Notification of Initial Recipient

EPA proposes the use of the *Federal Register* and web-site listings to provide notification of initial recipient status for each NPDES program. TCEQ believes this method is insufficient because many regulated entities do not have adequate technology to access these notification systems (such as operators under the Construction General Permit). Similarly, regulated entities that are granted a temporary waiver from the proposed rule due to lack of access to adequate technology would not have access to these notification systems. Providing the information only via *Federal Register* and web-site listings would deprive those regulated entities of notice.

TCEQ recommends that EPA consider additional methods, such as providing notice to regulated entities by registered mail. Notification should include direction on how regulated entities are required to submit information and should also address the additional reporting required by authorized programs.

TCEQ also recommends that EPA re-evaluate its original cost estimates regarding notification, to more accurately reflect the extensive cost burden of providing sufficient notice to regulated entities. EPA should revise the cost estimate for the rule to reflect an accurate cost for providing sufficient notice, and factor this cost into the savings projected under this rule.

C. State Readiness Criteria

TCEQ appreciates EPA's clarification on the difference between Initial Recipient Status and State Readiness Criteria and how the 90% usage rate is intended to be used. To summarize the supplemental notice, EPA will require dual reporting, by issuing an Information Collection Request (ICR), if a regulated entity fails to submit data electronically and the following State Readiness Criteria factors are met: 1) the state has not met the 90% usage rate for that data group, 2) the state has a CROMMER compliant electronic reporting system, and 3) the state is the Initial Recipient. As stated in the supplemental notice, "EPA would use [this method] to determine when to "fill in the gaps" where NPDES-regulated entities are not yet fully reporting electronically".

TCEQ recommends that EPA remove the entire State Readiness Criteria and the associated dual reporting requirement from the rule. TCEQ contends that dual reporting is not necessary to "fill in the gaps" because there will not be any data gaps. If a permittee submits data via paper to the state, the data will be populated in state systems and transferred electronically from state systems to ICIS-NPDES in accordance with this rule. All required data will be populated in ICIS without data gaps.

Additionally, in the occurrence that EPA uses the State Readiness Criteria to initiate dual reporting, there is a significant risk of impacting NPDES data and information integrity both in the delegated program and federal systems. Although the information submitted electronically to EPA and via paper to states should be exactly the same, data entry errors can occur. If EPA uses its Clean Water Act (CWA) authority to issue an ICR, this would occur after the state has collected the information via paper and entered the data into the state system which would electronically be to ICIS. When the regulated entity submits the data electronically to EPA to comply with the ICR, there is a high potential that the newly submitted information will either override data submitted via the state or create a duplicate record. While EPA has made clear in the supplemental notice that the paper submission would be the copy of record, ICIS would not reflect the official copy of record. TCEQ recommends that EPA remove the dual reporting requirement given that EPA would be issuing an ICR for data that already exists in its database, collecting data that is not the official copy of record, and creating the potential for conflicting data.

In the event that EPA retains the State Readiness Criteria, TCEQ recommends no change to the State Readiness Criteria, as it was proposed in July 2013.

D. Participation Rate for the State Readiness Criteria

As discussed above, TCEQ recommends that the State Readiness Criteria be removed from the rule. If removed, the participation rate would no longer be a factor. However, if EPA chooses to retain the State Readiness Criteria, TCEQ recommends that EPA allow states to identify a phased participation rate in their own e-Reporting Implementation Plans .

E. Use of ICRs

TCEQ recommends that the State Readiness Criteria and dual reporting be removed from the rule, as discussed above. However, if EPA retains these aspects of the rule, TCEQ recommends that when EPA issues an ICR, the ICR should require the permittee to submit all future data to the state electronically. Requiring all future data to be submitted electronically eliminates the duplicate effort by the permittee and the potential for conflicting data. The permittee should submit future data to the state, not to EPA. This would remove the complications with dual reporting discussed above. Additionally, TCEQ recommends that EPA administer a CWA ICR to regulated entities only after all State and Federal outreach efforts have been exhausted.

F. Timing of Implementation

The TCEQ strongly objects to the one to two year implementation schedule prescribed by the proposed rule. TCEQ supports revising the rule to require each delegated program to develop its own e-Reporting Implementation Plans with interim implementation deadlines. EPA should allow for plans to be developed and submitted for review/approval within one year of the effective date of the rule, with a five year implementation schedule. A five year implementation schedule would allow delegated programs to implement e-Reporting as NPDES permits are renewed, limiting the implementation burden of this rule to data reporting rather than imposing an additional permitting burden.

G. Facilities without NPDES Permits

TCEQ contends that EPA would be overstepping its authority by requiring delegated programs to report information related to non-NPDES facilities. This submittal should not be included under the proposed rule because these facilities do not fall within the jurisdiction of the NPDES program. The rule should be revised to remove the requirement for authorized delegated programs to submit information, including compliance and inspection information, for non-NPDES facilities.

However, for information collected by EPA, through its own compliance and enforcement activities, TCEQ supports masking information from non-permitted facilities. TCEQ recommends that this apply to all non-permitted facilities and not just to CAFOs.

In the event that EPA proceeds with the requirement that states provide information on non-permitted facilities, TCEQ recommends that EPA adjust the timing of collecting this data from states – states should designate this in individual state Implementation Plans. The timing proposed by EPA for this initiative (*i.e.*, one year after the effective date of the rule) coincides with the workload imposed on states to implement phase 1 (if the original implementation schedule remains unchanged).

H. Economic Analysis

TCEQ developed estimates of the costs associated with upgrades to existing e-permit applications to collect additional data elements, developing e-permitting applications for permit types that were not already developed, updating existing databases to create additional data entry fields for existing programs, updating an existing database to add two program types (pretreatment and biosolids) with all required data entry fields, updating existing compliance and monitoring electronic applications to collect additional data elements, developing compliance and monitoring electronic applications for report types that were not already developed, updating existing compliance and monitoring databases to create additional data entry fields for existing programs, and creating data flows from TCEQ databases to ICIS-NPDES. Based on these projections, TCEQ anticipates that it will take at least \$4,590,106 to implement this rule.

I. Waivers

TCEQ supports automatic waivers for counties where only a small fraction of the population has sufficient broadband internet availability. TCEQ recommends that these automatic waivers be initially active for two years or until the next permit renewal or amendment, whichever occurs later. They

could then be re-evaluated during each subsequent permit renewal or amendment. This approach would provide the following benefits: allow every permittee at least two years but not more than five years, stagger the workload based on permit cycles, combine the waiver review process with the permitting process for efficiency, use permit requirements to either acknowledge a waiver or require electronic reporting, and improve enforceability by including waiver approval/electronic reporting in permit language.

TCEQ supports permanent waivers for religious entities where electronic reporting would not be consistent with the entities religious beliefs. TCEQ recommends that EPA allow states the flexibility to issue waivers for a variety of reasons. States should be allowed to determine the reasons for issuing a waiver. Waivers should be allowed for entire program types where it is not cost effective to develop electronic reporting. For example, program types with very few regulated entities.

J. Biosolids Annual Report Implementation

Although the supplemental notice notes that only eight states are authorized to implement the biosolids program, those delegated states would need sufficient time to develop sludge-specific electronic reporting tools and update databases to collect the required information on Appendix A. Just because there are few states impacted does not correlate to less time and money needed by a given state for implementation. TCEQ opposes the two-phase implementation schedule – each state should be allowed to develop its own implementation plan. If EPA retains this schedule, the biosolids annual report should remain in phase 2.

K. Why Require E-Reporting from Regulated Entities?

In the proposal preamble, EPA noted that this rulemaking was initiated following efforts to draft an ICIS–NPDES Policy Statement. The purpose of the policy statement was to "specify required data to be entered or otherwise made available by the states to EPA, and the timing considerations for such data entry requirements." The proposed rule expands that purpose by regulating the format in which states obtain data from regulated entities.

EPA should recognize that federally delegated programs are tasked with program implementation while EPA is tasked with federal oversight. Federal oversight allows EPA to prescribe what data must be transmitted from states to EPA, and the method of transmittal from states to EPA. This is exactly the purpose of the draft ICIS-NPDES Policy Statement. However, EPA oversteps into program implementation by prescribing the format in which states are required to obtain data from regulated entities. TCEQ's current Memorandum of Agreement (MOA) with the EPA explicitly vests the TCEQ with the authority to implement the NPDES program and receive NPDES data. This delegation of

authority gives TCEQ the right to determine the format (paper or electronic) in which to receive data from regulated entities. The format for collecting the data is a program implementation decision and does not impact EPA's federal oversight. EPA has not adequately explained why regulating states' data collection method is necessary to fulfill its federal oversight responsibility. Instead, the supplemental notice identifies the following benefits of the proposed rule:

The proposed rule would allow improvements to be made to the transparency and usefulness of information about regulated entities and permitting, compliance, and enforcement activities in each state through the use of available technology to electronically report facility, discharge, monitoring, compliance, and enforcement data; and providing more complete, accurate, and timely data to the public. Improving public access to this timely and complete information would help inform and empower communities.... The proposed rule, in conjunction with EPA's current public data access tools, would provide a more complete and easily accessible set of facility, permit, compliance, and enforcement data to the public. This would provide a powerful incentive for government and regulated entities to maintain and improve their performance. This can elevate the importance of compliance information and environmental performance within regulated entities and provide an opportunity for them to quickly address any noncompliance. This can also improve access to permit and compliance and enforcement action data in emergency situations."

Each of these benefits can be realized if EPA establishes the data elements that must be transmitted from states to EPA and the method of transmittal from states to EPA. None of these benefits are dependent upon the data collection method used by the state.

In the supplemental notice, EPA states that "The proposed rule does not change the well-established relationship between EPA and authorized state, tribal, and territorial programs as these authorized programs will continue to be the lead in all aspects of the NPDES program including permitting, inspections, compliance determinations, and enforcement actions." Unfortunately, the proposed rule does change the relationship by limiting a state's ability to lead in all aspects of the program. Currently, EPA's relationship with authorized states, tribes, and territories is about "what to regulate" not "how to regulate". The proposed rule changes this relationship by mandating how states, tribes, and territories collect data from regulated entities. Furthermore the proposed rule infringes upon the relationship between states and regulated entities. EPA and the public can enjoy the same benefits without regulating the data collection methods used by states.

As for the benefits to states, TCEQ recognizes that collecting data electronically from regulated entities is more efficient. In fact TCEQ has developed an electronic reporting tool (STEERS) which allows electronic submittal of permit applications (epermits) and discharge monitoring reports (NetDMR). TCEQ incentivizes the use of these tools by reducing application fees. This effort has resulted in an epermits participation rate of 70% for the construction storm water program, which makes up the largest number of facilities. TCEQ requests that it be allowed to continue these efforts without EPA mandating this transition through regulatory mechanisms.

TCEQ recommends that the e-Reporting rule be limited to establishing the minimum data elements that delegated states must transmit to EPA and the method of transmittal from delegated states to EPA. If EPA chooses to proceed with regulating the data collection method used by states, EPA should explain why regulating the data collection method used by states is necessary to achieve the stated benefits and to conduct its federal oversight responsibility. TCEQ encourages EPA to continue working with the states through the NPDES eReporting Technical Workgroup to identify only those data elements that are necessary for federal oversight.

TCEQ would also like to re-emphasize its comments provided in the December 12, 2013, letter (Attachment 2 to this correspondence) concerning the issue of information not uploading from ICIS-NPDES into OTIS (now ECHO) and the additional workload that will be required by state and federal staff to ensure data integrity.