COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY REGARDING THE PROPOSED NPDES APPLICATIONS AND PROGRAM UPDATES RULE

* NPDES APPLICATIONS AND PROGRAM UPDATES RULE EPA DOCKET ID NO. EPA-HQ-OW-2016-0145
* NPDES CHANGES TO APPLICATION FORMS AND INFORMATION COLLECTION REQUIREMENTS

EPA DOCKET ID NO. EPA-HQ-OW-2016-0146

# Summary of Proposed Action

On May 18, 2016, the United States Environmental Protection Agency (EPA) published the proposed National Pollutant Discharge Elimination System (NPDES) Application and Program Updates Rule (40 CFR Parts 122, 123, 124, et al.) in the *Federal Register* Volume 81, No. 96, Pages 31344-31374.

The rule proposes revisions to the NPDES regulations to eliminate regulatory and application form inconsistencies; improve permit documentation, transparency and oversight; clarify existing regulations; and remove outdated provisions. This proposal would make specific targeted changes to the existing regulations and would not reopen the regulations for other specific or comprehensive revision. These proposed regulatory changes cover 15 topics in the following major categories: permit applications; the water quality-based permitting process; permit objection, documentation and process efficiencies; the vessels exclusion; and the Clean Water Act (CWA) section 401 certification process. The EPA states that these revisions would further align NPDES regulations with statutory requirements from the 1987 CWA Amendments and more recent case law requirements.

## General Comments

#### Basis for the Proposed Rule

The TCEQ disagrees with EPA’s overall characterization that the rule is simply codifying currently established practices and does not result in new or increased workloads or require the collection of additional information.

The costs of the implementation of the proposed revisions seem to be understated, depending on the degree that changes in procedures are needed (e.g., expansion of fact sheets, new analytical procedures, etc.), and those costs could be significant. There would be upfront costs related to changing the TCEQ processes and document formats, as well as additional ongoing cost increases related to the additional time required to prepare the larger documents and additional detailed analyses.

This proposed rule, in the TCEQ’s opinion, establishes numerous conditions which will likely result in increased workloads and burden on NPDES permit writers as well as the requirement to collect new information in permit applications (resulting in impacts on regulated entities and permitting authorities). Specific areas where increased workloads or new information collection will be required are discussed below.

## Permit Application Requirements

#### NPDES Program Definitions Including: Pesticide Applications to Waters of the United States, and Whole Effluent Toxicity Definition (40 CFR 122.2)

*Pesticide Applications to Waters of the United States*

The TCEQ recommends that the EPA remove this definition. In 2013 (Docket Number: EPA-HQ-OW-2003-0063), the EPA removed the language that exempted the application of pesticides from NPDES permit requirements. Therefore, adding a definition to the rule will be unnecessary since the defined term is not used within the context of the rule.

Moreover, the pesticide general permit (PGP) is a legal, stand-alone, and enforceable document that complies with NPDES requirements. The terms “discharge”, “pesticide” and “discharge of a pollutant” are defined in the PGP. The rule terminology is inconsistent with the PGP and the 6th Circuit Court decision, both of which define and discuss pesticide discharges and not pesticide applications.

If the EPA proceeds with adding the definition, the TCEQ recommends that the definition be revised to be consistent with the 2009 court decision and the PGP as follows:

“Pesticide discharges to waters of the United States means the discharges of biological pesticides and chemical pesticides that leave a residue in water, from point sources to waters of the United States. In the context of this definition of pesticide discharges to waters of the U.S., this does not include agricultural stormwater discharges and return flows from irrigated agriculture, which are excluded by law (33 U.S.C. 1342(l)).”

#### Changes to Existing Application Requirements (40 CFR 122.21)

The TCEQ does not support some of the specific revisions to minimum NPDES application form requirements in 40 CFR 122.21. Specifically, the requirement to submit latitude/longitude metadata to the nearest second, requirement to submit NAICS codes in addition to SIC codes, the requirement for existing discharges to submit all data from the previous 4.5 years in applications, and the deletion of the term categorical industrial users. The TCEQ is currently in the process of implementing the recently adopted EPA Electronic Reporting Rule requirements, including developing information systems and other tools to implement this rule. During that rulemaking the EPA stated that all of the required data elements were required by existing federal regulations. Texas and other states specifically commented that the metadata for latitude and longitude were not required by federal regulations. The EPA conceded and replaced the metadata requirements with a requirement that latitude and longitude data be in decimal degrees and the WGS84 standard coordinate system. Requiring latitude and longitude to the nearest second in this rulemaking would be inconsistent with the decimal degrees requirement in the Electronic Reporting Rule. Requiring latitude and longitude metadata in this rulemaking would be inconsistent with the requirement to use WGS84 standard coordinate system in the Electronic Reporting Rule. Texas also commented in the Electronic Reporting Rule that requiring both NAICS and SIC codes was redundant and that only one should be required. EPA conceded and allowed either NAICS or SIC codes to be used but not both. Now through this rulemaking, EPA is attempting to add new data elements (longitude and latitude metadata) or change existing data elements (removing the option of using SIC Code). Establishing these requirements under this rulemaking will impact the TCEQ’s ongoing efforts to implement the Electronic Reporting Rule, thus the TCEQ objects to these new application form requirements. The TCEQ recommends that this rule be consistent with the Electronic Reporting Rule regarding latitude, longitude, SIC codes, and NAICS codes.

The TCEQ recommends that the EPA allow the existing flexibility to collect latitude and longitude coordinates in different formats (e.g., degrees, minutes, seconds and decimal degrees). The method of collection of this data should not be an application requirement. The state resources needed to revise application forms and database structures to capture this information would not be justified.

The TCEQ objects to the requirement for existing discharges to submit all effluent data from the previous 4.5 years of operation in renewal applications. The TCEQ issues permits under the Basin Permitting Program in rules established in 30 TAC §305.71 which requires discharges within specific water quality segments to include the same expiration date. This often results in TPDES permits being issued for terms less than five years, in some instances as few as two years. Furthermore, existing discharges frequently apply for amendments of existing permits to modify treatment units, increase permitted flows, adjust production, and other reasons which alter the quality of effluent discharges. Also, all existing discharge data is submitted to the TCEQ and subsequently to the EPA and is available in EPA’s ICIS database. The TCEQ recommends modifying the rule to not require re-submitting data that was provided in previous applications or does not represent current treatment level conditions.

The TCEQ agrees that the proposed rule should be revised to include the requirement to report NSCIUs in the NPDES applications in order to align this rule with the existing pretreatment regulations. However, the specific deletion of the term *categorical industrial users (CIUs)* from the existing rule has the potential to cause confusion to the publicly owned treatment works (POTWs) and consultants preparing the applications. As the EPA stated, all CIUs are considered a subset of the broader term “significant industrial users,” however it has been the TCEQ’s experience that even for POTWs with an approved pretreatment program this is not always clearly understood. In this case, it is better to be verbose in order to be clear and thus receive the required information from applicants. With the proposed language, applicants may not realize that CIUs must also be reported due to the deletion of the term “CIU” and the addition of the term “NSCIU”. The TCEQ requests that the EPA keep the term “CIU” and just add the term “NSCIU” to eliminate confusion. The TCEQ recommends that the final rule in 40 CFR 122.21(j)(6)(i) and (ii) include all terms SIUs, CIUs, and NSCIUs.

## Water Quality-Based Permitting Process

#### Antidegradation Reference (40 CFR 122.44 (d))

The TCEQ agrees that it appears that the proposed changes to antidegradation in the proposed rule are intended to line up with recent changes to the Water Quality Standards rule. It is not certain how, if at all, these rule changes will affect the TCEQ. It is our opinion that the TCEQ antidegradation procedures comply with federal requirements.

#### Dilution Allowances (40 CFR 122.44(d))

The TCEQ objects to the proposed revisions in 40 CFR 122.44(d) requiring any dilution allowance be supported by data or analyses quantifying or accounting for pollutants in the receiving stream.

The EPA’s discussion in the preamble indicates the rule revision will not result in collection of new data or impose a new burden; the TCEQ strongly disagrees with this position. The TCEQ calculates water quality-based effluent limitations and uses background receiving water data when that data is available and acceptable. The TCEQ uses background data to calculate whether water quality-based effluent limits are needed for total dissolved solids, chloride, and sulfate when such background data is included in the TCEQ’s “Procedures to Implement the Texas Surface Water Quality Standards”, RG-194. RG-194 also establishes background concentrations of certain toxic pollutants for specific segments that are used in calculating water quality-based effluent limitations. For all other water bodies, the TCEQ assumes a zero background concentration when calculating water quality-based effluent limitations because acceptable data is not available. The TCEQ argues these assumptions are appropriate based on lack of data along with the conservative assumptions and methodologies used in developing the Texas Surface Water Quality Standards themselves and the procedures to calculate water quality-based effluent limitations at critical low flows using conservative statistical methods. The preamble to the rule indicates that granting any dilution for use in calculating water quality-based effluent limitations must be supported by data or analysis quantifying or accounting for pollutants in receiving water bodies. The TCEQ is greatly concerned with this rule revision based on historically receiving a substantial number of the EPA objections on the TCEQ drafted TPDES permits based on the EPA’s interpretation of NPDES regulations. This rule could be interpreted to require reliable analytical data to be collected for every pollutant established in the Texas Surface Water Quality Standards in upstream receiving waters of discharges or some other complicated analysis conducted to justify the assumption of zero background concentrations. This would result in enormous cost and resource increases for both the TCEQ and regulated discharges and would likely significantly delay reissuance of permits in a timely manner. The TCEQ recommends revision to the rule that establishes conditions that background data will be used only when available and acceptable based on the permitting authority’s established procedures.

In addition, the proposed requirement that all mixing zone analyses and dilution allowances be supported by data regarding the presence of each pollutant in the receiving water could create a permitting bottleneck and greatly increase the time it takes to assign critical conditions to a permit application. Similarly, the suggestion that an analysis be potentially postponed to acquire data would delay permit processing. For some pollutants, there is no available background data and it is unclear how an assimilative capacity analysis would be done. Lastly, the proposal to default to assessing water quality standards at end-of-pipe if receiving water assimilative capacity cannot be accurately predicted could significantly change permit limitations and have a significant impact on the regulated community in Texas.

#### Reasonable Potential Determinations for New Dischargers (40 CFR 122.44(d))

The TCEQ objects to the rule revisions in 40 CFR 122.44(d) related to requiring the use of relevant qualitative or quantitative data, analysis or other information in conducting reasonable potential analysis for new discharges.

Application forms used by the TCEQ which have been approved by the EPA and currently contain all NPDES required elements include instructions for new discharges which do not have actual effluent to sample. For new discharges, analytical data from similar facilities, treatability studies, design information, or literature sources may be submitted when real effluent analytical data is not available. The TCEQ uses this estimated data to generally characterize pollutants in waste streams; however, this data may not be fully utilized when conducting reasonable potential analysis in developing water quality-based effluent limitations. Even though facilities may be similar in terms of processes used, products produced, and treatment systems employed, quality of effluent may vary significantly based on a variety of factors, including: raw water source, production levels, efficiency of treatment processes, and how waste streams are managed (*e.g.*, commingled prior to treatment, etc.), among other factors. Using this estimated data to conduct reasonable potential analysis and then potentially setting water quality-based permit limitations may not be appropriate in various circumstances. Removing water quality-based effluent limitations in new permits when actual data indicate limitations are not necessary requires a permittee to submit a major amendment to an application, requiring full public notice including adjacent and downstream landowners, and being subjected to contested case hearings. This results in significant costs and workload for regulated entities and an increase workload for the TCEQ to process additional applications. Furthermore, removing water quality-based effluent limitations is subject to the EPA’s Anti-backsliding Policy, and the TCEQ has received numerous objections on TCEQ-drafted TPDES permits in similar circumstances when attempting to remove water quality-based effluent limitations in permits. The TCEQ recommends not amending 40 CFR 122.44(d).

Regarding the Note to Paragraph (k)(4) in §122.44, the TCEQ is concerned that citing specific guidance manuals in the rules may result in a legal interpretation that the contents of guidance manuals are regulatory requirements. Unlike rules, revisions to guidance manuals do not necessarily go through rigorous public review and comment. If the contents of guidance manuals are interpreted as regulatory requirements, revisions to these manuals could effectively change regulatory requirements outside of the rulemaking process. The TCEQ recommends removing the Note to Paragraph (k)(4) in the rules.

#### Best Management Practices (40 CFR 122.44(k))

Refer to the best management practice specific documentation language objection listed under the Fact Sheet Requirements (40 CFR 124.56).

#### Design Flow for Publicly Owned Treatment Works (40 CFR 122.45(b))

The TCEQ supports flexibility in using flows other than design flows for Publicly Owned Treatment Works (POTWs) when calculating water quality-based effluent limitations (40 CFR 122.45(b)).

Currently, the TCEQ uses permitted flows for establishing both technology-based and water quality-based effluent limitations for POTWs. The TCEQ supports this revision to NPDES rules, provided they are adopted as proposed and provide flexibility (*i.e.*, optional) in using other flows (such as 2-year high daily average reported flows) when calculating water quality-based effluent limitations. For industrial facilities, reasonable potential analysis for toxics is conducted using actual rather than permitted flows, and this same methodology may be appropriate for POTWs where using full permitted flows may result in overestimation of impacts on receiving streams. However, the TCEQ is concerned that with providing this flexibility, the EPA may interpret this regulation after adoption as requiring actual flows be used when establishing mass-based limitations in POTW permits. POTWs are typically permitted at flows well above actual flows, which allow service areas to expand as communities grow. Requiring a POTW to meet mass-based effluent limitations based on actual flows would likely result in non-compliance with mass-based limitations even though the POTW is meeting concentration based limitations. The TCEQ requests the rules be clear that permitting authorities have the option to use alternative flows for POTWs and that alternative flows not be mandated.

## Permit Objection, Documentation and Process Efficiencies

#### Objection to Administratively Continued Permits (40 CFR 123.44)

The TCEQ is opposed to the revised rulemaking in 40 CFR 123.44 related to the EPA designating administratively continued permits which have not been drafted/proposed for the EPA review within two or five years as proposed permits which then provides the EPA with authority to object to the existing permit.

The TCEQ strives to issue all TPDES permits in a timely manner. The TCEQ works cooperatively with the EPA to ensure the percent of permits current for the TPDES universe exceeds the 90% EPA Program Activity Measure (PAM) and to specifically address priority permits (which are permits expired and administratively continued for two years or greater) under the EPA Priority Permits PAM. When the TCEQ assumed the TPDES program in 1998, the vast majority of the EPA NPDES permits in Texas were expired and administratively continued for significant periods of time, many well over the two to five year time frame EPA is contemplating in this rulemaking. The EPA designating a permit that has been expired for two or five years and not drafted/proposed for the EPA review as a proposed permit allowing the EPA to object to conditions in the existing permit would result in increased workload for the EPA, the TCEQ, and regulated entities. The TPDES permits that fall into the category of being administratively continued for two to five years are complex application or permits involving significant technical, policy, and legal issues, such as a facility that is in the bankruptcy process or involved in a contested case.

Furthermore, the TCEQ objects to the revisions in 40 CFR 123.44(k)(3)(i) related to the EPA reinstating an objection on a proposed permit if the permit is not reissued within 180 days following the EPA completion of review of the proposed/draft permit. Various issues beyond the TCEQ’s control could result in a permit not being reissued within this proposed 180 day time frame, such as contested case hearings, public meeting requests, and other factors. The TCEQ recommends eliminating this new 180 day requirement.

The EPA assuming exclusive permitting authority for a permit in this situation would result in both the TCEQ and the EPA having to issue separate permits that may contain different and contradictory permit conditions. The TCEQ does not support this rule revision and recommends expired and administratively continued permits continue to be addressed within the Priority Permits PAM. The EPA specifically is seeking comment on the time frame to designated administratively continued permits as proposed permits, the TCEQ would recommend a five-year versus the two-year time frame if this rulemaking is adopted.

#### Public Notice Requirements (40 CFR 124.10(c))

The TCEQ recommends that the EPA clarify that the Director has the discretion to choose the appropriate notice method.

As proposed a state authorized program could provide public notice of NPDES classified major facilities and general permits on its web site rather than through traditional means of newspaper publication. Texas statutes currently mandate newspaper publication for all categories of individual permits (minor and major classified facilities) as well as for general permits. The TCEQ supports this flexibility and recommends that web-based noticing be an optional requirement and not mandated.

The proposed rules require the final permit, fact sheet, and response to comments (if applicable) to remain on the state’s web site for the duration of the permit term. Requiring this would result in increased costs and workload related to scanning and uploading these documents. The documents are publicly available through Freedom of Information Act request or by visiting the TCEQ Central File Room. Additionally, certain data elements from issued permits are available via the TCEQ online web queries and via the EPA’s ECHO. The TCEQ is opposed to the requirement to post the final permit, fact sheet, and response to comments on the state’s website.

The EPA is finalizing the Phase II Municipal Separate Storm Sewer System (MS4) Remand Rule. Therefore, the TCEQ requests that the EPA ensures that the two rules be carefully reviewed for consistency in regards to the public notice requirements for each individual notice of intent (application) for authorization under the Phase II MS4 General Permit issued by states or the EPA.

Regarding the Note to paragraph (c)(2)(iv) of §122.10, the TCEQ is concerned that this note will establish a new authority for the EPA to object to the adequacy of the method of notice used by the state. The TCEQ recommends removing this note from the rule.

#### Fact Sheet Requirements (40 CFR 124.56)

The TCEQ does not support certain aspects to the minimum fact sheet requirement revisions proposed in 40 CFR 124.56.

The TCEQ disputes the EPA’s statement in the rule preamble that rule revisions in this section will reduce permit writer workload. The proposed revisions will definitely increase workload, as the EPA is proposing required new documentation in fact sheets to support permit development. The TCEQ is concerned with the requirement to include a reasonable potential analysis for all narrative water quality standards, with specific concerns related to color and nutrients. These fact sheet rationales are new requirements and will likely result in the requirement to collect new information from applicants and conduct additional analyses.

The following proposed rule changes all increase workload:

1. The requirement to develop fact sheet rationale related to best management practices (BMP) in permits is a new requirement.
2. The requirement to list all pollutants analyzed related to reasonable potential analysis will effectively require inclusion of all application effluent data, already available in the administrative record.
3. The requirement to include all ambient data used in dilution analysis and, when data is not available, to provide justification is a new requirement. The TCEQ is also concerned with potential EPA objections to the permitting authority’s rationale as to why ambient data is not available.
4. The requirement to re-justify effluent monitoring locations, monitoring frequencies, sample types, and test methods are all new requirements.
5. For general permit fact sheets, the TCEQ is concerned with conducting reasonable potential analysis for toxic pollutants. General permits are developed with minimum technology-based effluent limitations for the categories of discharges authorized in the general permit, water quality-based effluent limitations are compared to these technology-based limitations, and the more restrictive limitation is proposed in the general permit. Performing some type of reasonable potential analysis for general permit development outside of the above described process is not justified.

The TCEQ recommends eliminating all of the fact sheet rule revisions described above.

Additionally, the EPA is proposing to revise the rule to require specific documentation in the fact sheets developed to support an individual or general permits. Specifically, for individual permits, the EPA is proposing to require that the fact sheets include an explanation of *any* BMPs pursuant to 40 CFR 122.44(k).

For individual permits, the TCEQ objects to including the term “any” in the final rule, since this will be overly burdensome on permit writers preparing the fact sheets for individual Phase I (large) MS4 permits, which are already very detailed. The fact sheets for these permits already include many details on how the MS4 entity is complying or intends to comply with each minimum control measure required by the individual permit. The fact sheet includes an overview and many of the most notable BMPs but it does not list any and every single BMP. The BMPs are included in the individual MS4’s stormwater management program (SWMP) that is available to the public for viewing and comment. In addition, the BMPs can be revised, new BMPs can be added, and other BMPs can be deleted and replaced with more effective BMPs, during the permit term.

For general permits, the TCEQ objects to including any and every single BMP required by the Phase II (small) MS4 general permit since this type of general permit is not similar to other general permits. Across the country, states have different types of Phase II MS4 general permits, some are prescriptive and others are not and rely on the details of each BMP to be included in the actual SWMP for each small MS4. As mentioned in a previous comment above, the EPA is currently finalizing the Phase II MS4 Remand Rule where the states will have the option to select if they want to develop a prescriptive MS4 general permit that includes all required BMPs or a less prescriptive permit that will only include general requirements and the specific BMPs will be in the actual SWMP. Therefore, the TCEQ requests that the EPA ensures that the two rules be carefully reviewed for consistency.

## Vessels Exclusion……CWA Section 401 Certification Process

#### Vessels Exclusion (40 CFR 122.3(a))

The TCEQ is not opposed to the revision to 40 CFR 122.3(a) related to vessel exclusions but seeks clarification related to NPDES authorized states that do not regulate vessels via individual or general permits.

After the TCEQ received authority for the TPDES program in 1998, the EPA modified the vessel exclusion regulations, which resulted in the EPA issuing a national NPDES general permit regulating the discharge from certain vessels. The TCEQ has never adopted these rule revisions by reference and does not issue permits (individual or general) for the discharges from vessels. The TCEQ does not intend to adopt this rule revision by reference and accordingly does not intend to issue permits authorizing discharges from vessels. The TCEQ seeks the EPA’s concurrence that there is no need to adopt this rule by reference into Texas regulations, nor assume authority of the EPA’s vessel general permit.