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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 19, 2012

Ms. Vinh T. Nguyen
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail code: 4102M
Washington, DC 20460

Re: Fiscal Year 2013 Draft National Water Program Guidance

Dear Ms. Nguyen:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to respond to the U.S. Environmental Protection Agency's Fiscal Year 2013 Draft National Water Program Guidance. The TCEQ is very concerned with several of the specific issues addressed by this Guidance which are detailed in comments within the attached document. In particular:

- The TCEQ does not concur with EPA's position on the underlying science for climate change or reference to policies or strategies in this guidance document.
- EPA identifies FY 2013 National Water Program Priorities within this guidance document. Budget constraints are expected over the next year at both the national and state levels and states will have limited resources to address the significant goals which EPA has outlined in the 2013 guidance.

If you have comments or questions concerning the enclosed comments, please contact me at (512) 239-1321 or by e-mail at Loreal.Stepney@tceq.texas.gov or if by correspondence; include MC 158 in the letterhead address.

Sincerely,

A handwritten signature in black ink that reads "Loreal Stepney".

L'Oréal Stepney, P.E.
Deputy Director

Enclosure

Fiscal Year 2013 Draft National Program Manager's (NPM) Guidance Comments and Response to Comments Summary Template

Instructions

Comment from regions, state, tribe, or other stakeholder	Commenter (s)	Location in Draft Guidance	NPM Response	Action Taken in Final Guidance
Issue Area - <i>Divide comments into general issue areas: e.g. NAAQS, indoor air, etc. where appropriate)</i>				
<i>Include your comment.</i>	<i>Organization of Commenter (e.g., ECOS, New England Commissioners, Region X, etc.).</i>	<i>State the Section and page number the comment is referring to.</i>	<i>The response should include adequate discussion and details to support the decision to modify/retain the draft language. Note: If more than one commenter raises the same issue, please cross-reference the individual responses.</i>	<i>Specify changes made in response to comments and identify all locations in the final guidance (e.g., page numbers, sections, etc.).</i>

Template

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Issue Area:				
<i>General Comment:</i> EPA identifies FY 2013 National Water Program Priorities. Budget constraints are expected over the next year at both the national and state levels. States will have limited resources to address the significant goals which EPA has outlined in the 2013 guidance. TCEQ recommends that EPA consult with states to set local priorities which can be part of addressing the stated goals.	Texas Commission on Environmental Quality	n/a		

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<p>The TCEQ does not concur with EPA’s position on the underlying science for climate change or reference to policies or strategies in this guidance document.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Pages 3, 5, 11, 12, 23, 52, 61, 66, 76, 98, and 118 and the entire section entitled National Water Program and Climate Change p.121</p>		
<p>Priority water bodies identified by TCEQ programs within the Water Quality Planning Division via the Watershed Action Planning process can be translated to applicants via the NPS program’s annual Request For Grant Applications. The 319 program submits nitrogen and phosphorus load reductions associated with respective funded projects via EPA’s Grant Reporting Tracking System bi-annually.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Improving Watershed-Based Approaches p.11 App. A, p.3, WQ-26</p>		
<p><i>Improving Watershed-Based Approaches</i> TCEQ has concerns related to the expansion of the storm water program and resources that may be necessary to implement an expansion of the program and will follow future proposed EPA rulemaking and</p>	<p>Texas Commission on Environmental Quality</p>	<p>Page 11 (also pages 18 & 49)</p>		

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<p>initiatives closely. TCEQ believes the only appropriate way to consider any changes to this regulatory program should occur through rulemaking. Rulemaking would vet any established conditions and requirements to be included in storm water permits that have been vetted through the public participation and stakeholder process, rather than EPA's current practice of mandating permit conditions based on guidance documents and objecting on a case-by-case basis to state drafted permits based on EPA's difference in professional opinion.</p>				
<p><i>Regarding the sentence that includes "... nutrient criteria for at least one class of waterbodies by no later than."</i> The date was omitted.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Improving Watershed-Based Approaches p.11</p>		
<p>EPA intends to align source water conservation and protection with state priorities and specifically, it intends to integrate source water protection into the storm water program through Green Infrastructure (GI) requirements. TCEQ is of the opinion that the establishment of GI requirements should be performed at a local government level. TCEQ maintains that MS4 entities should be able to select the approach that best suits</p>	<p>Texas Commission on Environmental Quality</p>	<p>Green Infrastructure in Storm Water Programs p. 24</p>		

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their needs in their own development permits and storm water management programs (SWMP).				
<p><i>Fish and Shellfish Safe to Eat/Water Safe for Swimming</i> EPA identifies a focus on reduction in pathogens in water bodies as a primary focus. Specifically EPA indicates a desire to target reductions in CAFO, storm water, and industrial discharges beyond the typical domestic wastewater discharges. TCEQ has significant concerns based on recent experience in EPA Region 6 objections on TCEQ drafted TPDES permits that require end of pipe bacteria limitations at the in stream water quality standard level. In many situations bacteria discharges at industrial facilities are from non-human pathogen sources (e.g. wildlife) and are not controllable via available technology. TCEQ is further concerned in EPA's efforts to require numerical effluent limitations in storm water permits (MS4, etc.) based on aggregate loadings in TMDLs. TCEQ believes best management practices (BMPs) are appropriate controls in storm water permits.</p>	Texas Commission on Environmental Quality	Pages 34-37		
<i>Regarding SS-2: Percent of all Tier I (significant) public beaches that are</i>	Texas Commission on	Improve Beach		

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<p><i>monitored and managed under the BEACH Act program.</i> Percent of all Tier I (significant) public beaches that are monitored and managed under the BEACH Act program: The TCEQ is concerned that this mandatory program is being defunded and that EPA will expect other monitoring funds, especially Clean Water Act Section 106 funds, to make up the difference. TCEQ recommends that EPA not deplete 106 funds, which are fully programmed, and instead look to other federal sources and agencies to support beach monitoring.</p>	<p>Environmental Quality</p>	<p>Monitoring; Grant Program Resources page 37 App. A, p.2, SS-2</p>		
<p><i>Regarding Bullet 1: Integration of statistical survey and targeted monitoring designs to assess the condition of all water resources over time.</i> The TCEQ monitoring program has consistently participated in national efforts to develop statistical evaluations of waters at a national level. In the last several years this has represented a significant allocation of state resources for collecting this data in support of this overall effort. However, States will continue to have resource constraints that impact the development and implementation of statistical surveys and targeted monitoring designs to assess statewide water quality over</p>	<p>Texas Commission on Environmental Quality</p>	<p>Improve WQ Monitoring and Assessment p. 42</p>		

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<p>time. The TCEQ recommends that EPA support flexible approaches for implementing statistical monitoring designs that fit with the individual state programs. In addition, TCEQ recommends that EPA allow for these monitoring designs to be developed over the next 2-3 years</p>				
<p><i>Regarding the transmittal of water quality data and 2012 Integrated Report using WQX and ADB v2, respectively:</i> The TCEQ is committed to continuing data submittals through WQX. The EPA should remain mindful that any changes to reporting schema are often difficult and costly for states to implement, and as such, any changes to them should be optional. The TCEQ is also committed to submitting assessment results in an ADB compatible electronic format, and the state appreciates the flexibility afforded by not having to adopt the full ADB.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Improve WQ Monitoring and Assessment p. 43</p>		
<p><i>Implement TMDLs and Other Watershed Related Plans</i> The draft guidance indicates a willingness to translate TMDL waste load allocations into NPDES storm water permits and other approaches such as impervious cover. Imposing restrictions on impervious cover exceeds the authority of the NPDES</p>	<p>Texas Commission on Environmental Quality</p>	<p>Pages 44-45</p>		

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<p>program. TCEQ also has significant concerns in establishing numerical water quality based effluent limitations in storm water permits and believes utilizing best management practices and other approaches are more appropriate. EPA's approach to resolving concerns with previously approved TMDLs has been to object to draft TPDES permits, hindering progress in issuing more protective permits.</p>				
<p>The Guidance addresses the pace of developing TMDLs within an 8 – 13 year timeframe. The Section 106 Grant Guidance box also acknowledges that states are now addressing more difficult TMDLs. In addition, later portions of the NPM Guidance identify EPA's position that the input of stakeholders in the watershed is essential to success. The TCEQ recommends that EPA reconsider the use of an expected timeframe for development of TMDLs. Consideration should be given to the additional efforts and time necessary to address difficult pollutants and incorporate the positions of watershed stakeholders.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Implement TMDLs p. 45</p>		
<p><i>Reference to the updated 303(d) TMDL Program and the NPDES Stormwater Program guidance.</i> There are both</p>	<p>Texas Commission on Environmental</p>	<p>Implement TMDLs p. 45</p>		

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<p>technical and policy challenges associated with these updated guidance documents. For example, disaggregation of TMDLs can be very difficult when there is not enough available data. The TCEQ recommends that a Best Management Practices-based program be retained to provide for flexibility in the program.</p>	<p>Quality</p>			
<p><i>Strengthen the NPDES Permit Program</i> The guidance indicates that EPA will revise the selection, commitment, and results calculation method for the high priority permits Program Activity Measure (PAM) and require states to select priority permits that have the greatest benefit to improve water quality. Specifics have not been provided in the guidance, however, TCEQ has concerns related to modification of this performance measure. EPA Region 6 has objected to a significant number of TCEQ drafted permits based on differences in professional judgment and interpretation of federal and state rules. Significant TCEQ resources are being spent on responding to EPA objections that are providing no environmental benefit. EPA's continued objections are resulting in an increase in priority permits (expired greater than 2 years</p>		<p><i>Pages 46-48 and Appendix A and C</i></p>		

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<p>without re-issuance). TCEQ has further concerns on complicating the selection methodology for priority permits that appear to require some type of analysis to identify permits that would have a significant environmental benefit from becoming reissued. TCEQ places a priority on all expired permits and believes complicating this process will detract from efforts to reissue expired permits.</p>				
<p><i>Pesticides.</i> The U.S. Sixth Circuit Court of Appeals ruled that NPDES permits are required for pesticide applications into, over or near waters of the U.S. by April 9, 2011. The Court later extended the deadline to October 31, 2011. EPA finalized their permit by the deadline. TCEQ issued a general permit on November 2, 2011, so that application can occur in compliance with the court order. TCEQ believes that this program is a significant expansion of the NPDES which is unnecessary because the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) already regulates pesticide applications.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Page 47</p>		
<p><i>Section 106 Grant Guidance to States and Interstate Agencies: Permits, Enforcement, and Compliance</i></p>	<p>Texas Commission on Environmental</p>	<p>Page 48</p>		

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<p>The guidance states that States are expected to ensure that storm water permits are reissued on a timely basis. TCEQ agrees that timely reissuance of storm water permits is critical and makes significant efforts to do so. TCEQ has encountered unnecessary delays in reissuing that last two general permits submitted to EPA Region. EPA objections are based on differences in professional judgment and opinion and over-interpretation of state/federal rules. Continuance of EPA's practice of objecting to TCEQ permits without an appropriate basis has the potential to negatively impact Texas.</p>	Quality			
<p><i>Strengthen the NPDES Permit Program</i> The guidance proposes to continue the current permit measure at the 90% goal level. Based on EPA Region 6 objecting to an unprecedented number of TCEQ permits, meeting this measure in the future will become challenging. TCEQ is expending significant resources in addressing EPA objections including revising permits and fact sheets multiple times in efforts to obtain EPA approval. TCEQ strongly suggests that EPA alter its approach in changing philosophy on an overall programmatic basis rather than</p>	Texas Commission on Environmental Quality	Page 50		

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objecting to these issues on a permit by permit basis.				
<p><i>Regarding the newly created measure: WQ-26. Number of states making strong progress toward reducing nitrogen and phosphorus pollution by setting priorities on a watershed or state-wide basis, establishing nutrient reduction targets, and continuing to make progress (and provide performance milestone information to EPA) on adoption of numeric nutrient criteria for at least one class of waters by no later than 2016.</i></p> <p>The term “strong progress” which will be the standard for measurement is vague. The TCEQ requests that EPA provide information on how this will be evaluated and allow states ample flexibility to develop plans and projects tailored to particular state needs and water quality conditions. The TCEQ recommends that EPA consider contribution from existing efforts made through the 319 program and watershed action planning as a demonstration of progress towards WQ-26. Additionally, TCEQ is concerned with the level of effort and regulatory impact of implementing portions of EPA’s reduction framework. For example, Texas has about 210 major watersheds (8-digit HUCs) that would be subject to this</p>	Texas Commission on Environmental Quality	Appendix C, Page 3		

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<p>process, and a large number of subwatersheds that would be targeted for management activities and potentially additional regulatory action. TCEQ requests a flexible approach so that the EPA framework can reasonably mesh with existing state water quality management programs.</p>				
<p><i>Regarding deleted measures WQ-1(b) and W-1(c):</i> Consolidating elements of these measures into a single measure (newly-created measure WQ-26) is more efficient. The revised language indicates consideration of criteria in forms other than total nitrogen and total phosphorus, which provides a more realistically attainable goal.</p>	<p>Texas Commission on Environmental Quality</p>	<p>Appendix C, Page 3</p>		
<p><i>Additional Guidance for Section 106 State and Interstate Grant Recipients</i> The guidance states “In particular, states should consider the relationship between point source dischargers and drinking water intakes in setting permit requirements ...” TCEQ currently has procedures established to restrict wastewater discharges (industrial and domestic) in relation to public water supply intakes. This statement in the guidance does not clearly outline EPA’s goal and TCEQ seeks clarification on the statement.</p>	<p>Texas Commission on Environmental Quality</p>	<p><i>Appendix D</i></p>		