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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 12, 2013

U.S. Environmental Protection Agency
Water Docket Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OECA-2009-0274

Re: NPDES Electronic Reporting Rule

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) is providing comments on the NPDES Electronic Reporting Rule; published for public comment in the July 30, 2013 *Federal Register*. The TCEQ appreciates the opportunity to provide comments on the NPDES Electronic Reporting Rule. The TCEQ supports the use of electronic reporting tools and has made great strides towards offering these tools to our regulated entities.

However, the TCEQ has significant concerns about EPA's basis for implementing this rule and the potential impacts to delegation authority. Additionally, the TCEQ is concerned about the feasibility of implementing the requirements of this rule, deadlines, funding sources, cost effectiveness, and dual reporting. The enclosed attachment discusses, in detail, these and other concerns and provides a number of recommendations. EPA should thoroughly consider the TCEQ's concerns and recommendations before adopting a final rule that would require electronic reporting and include significant consequences to the regulated community and authorized states, tribes, and territories for non-compliance.

If you have comments or questions concerning the enclosed comments, please contact Kimberly Wilson at (512) 239-4644 or by e-mail at Kim.Wilson@tceq.texas.gov.

Sincerely,

A handwritten signature in blue ink that reads "Zak Covar".

Zak Covar
Executive Director

For

Enclosure

COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY REGARDING THE PROPOSED NPDES ELECTRONIC REPORTING RULE

EPA DOCKET ID NO. EPA-HQ-OECA-2009-0274

Summary of Proposed Action

On July 30, 2013, the United States Environmental Protection Agency (EPA) published the proposed National Pollutant Discharge Elimination system (NPDES) Electronic Reporting Rule (e-Reporting) in the *Federal Register*. The rule proposes to replace certain paper based NPDES permitting and compliance monitoring reporting requirements with mandatory electronic reporting.

Comments

General Comments

Basis for the Proposed Rules

TCEQ's objections to the specific aspects of this rule are discussed in subsequent comments. However, on the whole, EPA has not adequately explained the basis for implementing this e-Reporting rule nor has EPA provided sufficient analysis of the feasibility and cost for many of the rule's provisions. Specifically, EPA has not provided an adequate basis, feasibility, nor accurate cost estimates for the two aspects of this rule that are most onerous and concerning: implementation timelines and the 90% usage rate.

EPA estimates that without the implementation timelines and usage rates proposed, it would take delegated programs several years to implement this rule, yet EPA establishes a one to two year implementation schedule. For TCEQ, longer implementation schedules are necessary due to the resources required to develop compliant e-Reporting systems, limited federal funding, and other programmatic responsibilities.

EPA has established a 90% usage rate in an attempt to prove this rule cost effective. However, EPA has not addressed the feasibility of a 90% usage rate. TCEQ provides empirical data in a subsequent comment that shows, based on our years of experience, that a 90% usage rate is infeasible.

EPA should not proceed with this e-Reporting rule without developing an adequate basis for implementing the rule – as a whole, and each specific aspect. EPA should also fully evaluate the feasibility and cost associated with implementation of any e-Reporting rule. An e-Reporting rule should not contain specific implementation timelines or usage rates.

Initial Recipient/Delegation Authority

This rule requires a delegated NPDES program to meet a 90% e-Reporting usage requirement to maintain initial recipient status. If that requirement is not met, the rule makes the EPA the initial recipient of data. By doing so, this rule essentially nullifies

NPDES delegation authority where an authorized program fails to meet e-Reporting usage requirements. The TCEQ is concerned that the proposed rule strips delegated programs of authority in violation of existing MOAs. The TCEQ's current MOA with EPA requires the TCEQ to incorporate any change in the NPDES program into regulations within one year of federal promulgation or two years if a state statute must first be enacted. However, the MOA does not require the TCEQ to forfeit its delegation authority should it miss this deadline. This is especially concerning, as the rule requires an ambitious 90% usage requirement.

Initial Recipient Designation for NPDES Delegated Programs

The proposed rule requires delegated programs to identify and request authorization for the NPDES data groups for which they wish to be designated as the initial recipient of NPDES electronically reported data. However, the TCEQ's current Memorandum of Agreement (MOA) with the EPA explicitly vests the TCEQ with the authority to receive NPDES data. No provision in the MOA requires the TCEQ to further explain why it should be the initial recipient of the data it may already receive. Requiring currently delegated programs to request authority for each NPDES data set they are already authorized to receive essentially nullifies the NPDES authority delegated under current MOAs. The rule should be revised to allow delegated programs, that 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.

Implementation

TCEQ strongly objects to the rule establishing federal standards for implementation schedules, usage requirements, the inclusion of specific permitting and reporting programs where inefficient, and waivers. TCEQ's previous comments address EPA's basis for establishing these requirements, and subsequent comments discuss our technical objections. Should EPA continue along this ill-advised path to promulgation, TCEQ suggests that a more reasonable approach would be to establish rules that require implementation of e-Reporting an e-Reporting Implementation Plan. The e-Reporting Implementation Plan would identify implementation schedules and usage rates and could also establish program level exemptions where implementation is inefficient or impracticable.

The e-Reporting Implementation Plan concept would preserve delegated programs' authority to implement the NPDES program. Further, this solution also provides the flexibility necessary to ensure that e-Reporting requirements are cost effective and efficient while also recognizing differences across the nation.

Timing of Implementation

The TCEQ strongly objects to the one to two year implementation schedule prescribed by the proposed rule. EPA gives no justification for requiring these specific timeframes other than a broad desire to implement the e-Reporting rule as quickly as possible in order to maximize expected benefits. EPA recognizes that, in the absence of this arbitrarily accelerated schedule, it would take about seven years for delegated programs to fully convert to an electronic reporting system. The currently proposed timeframes

are insufficient given the time and resources required to get an e-Reporting data transfer system established. Instead of realizing significant benefits sooner, the proposed timeframes will result in financial and administrative hardship. TCEQ recommends revising the rule to require each delegated program to develop their 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 will allow delegated programs to implement e-Reporting as NPDES permits are renewed, limiting the implementation burden of this rule to data reporting rather imposing an additional permitting burden. Imposing any implementation schedule shorter than five years requires delegated programs to modify existing permits to require e-Reporting. This additional permitting burden is a substantial, inefficient, and unnecessary.

Federal Funding Limitations

The e-Reporting regulatory initiative should be fully funded by EPA. In providing funding, EPA should recognize that federally delegated programs are tasked with *program implementation* while EPA is tasked with *federal oversight*. Program implementation often requires additional information or requirements beyond those necessary for *federal oversight*. Although EPA is developing and plans to make available a federal data reporting tool, that tool will not provide the complete functionality (immediately nor long-term) that TCEQ requires to implement the NPDES program in Texas. EPA's data reporting tool may be adequate for *federal oversight*, but – even with the advertised flexibility - it is highly unlikely to provide the complete functionality needed for delegated program implementation in the short timeframes prescribed.

Feasibility of 90% Usage

Comment

TCEQ strongly objects to a mandated 90% usage rate. This usage rate is not realistic for all data groups under the rule. EPA has not provided justification for imposing this rate of usage and has not shown that achieving this usage rate is feasible within the allotted timeframes. The rule does not look at factors affecting feasibility of the usage rate, such as internet access, degree of knowledge in computer skills, or other potential reasons regulated entities may be unable or unwilling to use e-Reporting. Additionally, while EPA indicates that a large part of the country has access to adequate technology, the rule fails to recognize that the financial burden of acquiring access to the required technology may make compliance infeasible. TCEQ has provided information (in the table, below) from our electronic reporting and permitting initiatives that demonstrates the proposed rule's impracticability.

The TCEQ recommends that the target percent usage requirement be removed from the rule. Delegated programs should identify usage rates through an e-Reporting Implementation Plan. Such an approach would more appropriately recognize delegated

program authority, delegated program technical challenges and workloads, and the technical challenges.

Additionally, any requirements for usage would need to be phased in over time. A phased approach allows delegated programs to develop and conduct outreach and establish customer services to support a successful e-Reporting program.

Information

TCEQ implemented “Net-DMR” as a voluntary NPDES self-reporting application in 2009. Currently, the e-Reporting rate is only 63% in Texas, after four years of implementation.

TCEQ developed a voluntary electronic permitting (e-Permitting) system for construction storm water and multi-sector general (MSGP) storm water permits (MSGP) in 2007. The TCEQ’s e-Permitting system for the Pesticide general permit was developed in 2012. The TCEQ’s e-Permitting programs include fee incentives in addition to an incentive of immediate permit coverage (versus 7 days for provisional coverage with paper applications). Along with these incentives, TCEQ has also conducted outreach and provides robust customer services to support e-Permitting. Despite these incentives and services, users have been slow to adopt electronic permitting. See Table 1 and Table 2 for Texas e-Permitting usage rates.

Table 1. e-Permitting Utilization for New and Renewal Notice of Intent (NOIs): FY 2011-FY 2013.

Permit/Registration	Reduced Fee	FY 2011	FY 2012	FY 2013
Construction	30%	64.9%	68.7%	72.9%
MSGP	50%	48.5%	52.1%	45.2%

Table 2. e-Permitting Utilization for Notice of Changes (NOCs) and Notice of Termination (NOTs): FY 2011-FY 2013

Permit/Registration	FY 2011	FY 2012	FY 2013
Construction NOC	Not Available	Not Available	45.1%
Construction NOT	58.7%	66.5%	72.2%
MSGP NOC	0%	24.4%	20.3%
MSGP NOT	31.9%	48.6%	36.2%

Cost Effectiveness of e-Reporting

E-Reporting tools will need to be developed for each individual general permit – at considerable time and expense. It is impractical to dedicate this level of effort and

funding to implement e-Reporting requirements for general permits that have very few authorizations. TCEQ strongly recommends that the rule be revised to only require the use of electronic applications for general permits that have a significant number of authorizations, as identified by delegated programs under an e-Reporting Implementation Plan.

E-Reporting for Certain General Permits

Delegated programs should have the flexibility to exclude general permits that include submittal and review of substantial amounts of technical data or narrative data (including maps). These types of permits are reviewed and processed more like individual permits than general permits. This is another aspect of the proposed rule that could be addressed by the use of e-Reporting Implementation Plan concepts.

Notification of Initial Recipient

Where delegated programs do not meet the 90% usage requirement, EPA would assume initial recipient status. EPA's assumption of initial recipient status requires notification to regulated entities. EPA proposes the use of Federal Register and web-site listings to accomplish notification. However; TCEQ believes this 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, many regulated entities 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 only Federal Register and website notification deprives those regulated entities of notice.

EPA should revise the rule to provide an adequate notification system that reaches all regulated entities – notice by registered mail. Notification should include direction on how regulated entities will submit information and should also address the additional reporting required by authorized programs. The EPA should also put into place a procedure through which an authorized program may request a temporary waiver from the stringent deadline to have 90% usage, especially for good cause (i.e., an authorized program that regulates a large number of facilities warranting temporary waivers or significant numbers of regulated entities failing to use e-Reporting).

Because EPA has assumed these limited notification systems would be utilized, the cost estimate for rule implementation is inaccurate and does not reflect the extensive cost burden of providing sufficient notice. 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.

Enforceability

The rule and preamble do not specify how regulators should initiate formal enforcement for noncompliance with the e-Reporting rule. It is unclear whether EPA plans to provide a policy with formal enforcement thresholds.

It is also unclear whether EPA has contemplated exceptions. For example, if a permittee changes environmental consultants, engineers, or third-party vendors to submit their

information electronically, will there be a grace period to allow time for the new subscriber authorization to be completed? A very common issue is that when these types of changes occur, the permittee is required to update their authorizations for e-Reporting, especially when there is delegation of the authority to sign/submit on the permittee's behalf. Depending on the federal CROMERR requirements, the timing in which permittees initiate their change requests and the amount of time it takes the delegated program/EPA to approve the final authorization may take several weeks or even months to complete. Thus, permittees may lose some freedom in being able to quickly change their reporting contractors. There is also concern that when these changes occur there is a potential for periodic noncompliance violations.

Changes to the federal enforcement protocol will also require subsequent changes in state policies, procedures, and related guidance. Depending on the magnitude of the changes to the delegated program requirements, there is a potential risk that the delegated program may not be able to comply with the changes within the timelines provided in this rule due to a state's individual regulatory and statutory timelines, processes, and constraints.

TCEQ is concerned that its initial recipient status may be jeopardized by the regulated community's willingness to use e-reporting. If a significant number of entities fail to comply with the e-reporting requirement, this will likely impact the delegated program's requirement to obtain, and then maintain, 90% usage resulting in a delegated program losing its initial recipient status. TCEQ could issue violations to regulated entities for non-compliance, but this shifts the focus of investigations from environmental protection to methods of submitting data.

Accessibility of Copy of Records (CORs)

The rule should define that accessibility to the originally reported records (aka Copy of Record) to both EPA and delegated program is required and/or retained in compliance with CROMERR. With the introduction of third party e-reporting systems, EPA and delegated programs will be required to access such information for compliance and enforcement purposes. In addition, there is a potential risk that third party providers may discontinue e-reporting services and thus inhibit the access of such original documentation. The rule should address document accessibility and the prevention of document loss from third party e-reporting applications.

Transparency

TCEQ recognizes that on December 3, 2013 EPA deployed a modernized version of the ECHO data system. The modernized ECHO builds upon and improves the functionality of the previous version of ECHO in addition to incorporating OTIS. To date, TCEQ has not conducted a complete review of the modernized ECHO data system to determine functionality. Until a complete review has been conducted, TCEQ highly encourages EPA to use this opportunity, under the proposed e-reporting rule, to make necessary improvements and alignments to the state/region compliance and management oversight tools under the OTIS data system and the public ECHO data systems. Each year, TCEQ has coordinated with EPA to make necessary quality assurance updates to reflect the delegated program's overall compliance status. Even when coordination and

updates were made to the source data system (ICIS-NPDES), the state's confidence level was very low that the final measures were accurately reflected in the OTIS oversight tools (e.g., SRF, Annual Data Verification, Dashboard, etc.)

Dual-Reporting Burden

TCEQ understands that if the designated NPDES regulator falls below the 90% reporting threshold for a program area, EPA will work with that regulator to improve its performance. However, in the occurrence that the 90% reporting requirement cannot be attained, EPA will begin requiring that regulated community to directly report to EPA in conjunction with reporting to the delegated program. TCEQ does not support this dual reporting scenario, as it would have a confusing and potentially costly impact to not only TCEQ and EPA, but the regulated community as well. TCEQ highly encourages EPA to work with delegated programs by providing additional assistance, funding, and/or outreach to the fullest extent possible before EPA exercises its authority to become the initial data recipient.

Additionally in the occurrence that dual reporting is required, there is a significant risk of impacting NPDES data and information integrity both in the delegated program and federal systems. For example, if a permittee submits an eNOI to both EPA and to the state at different instances and then the information is transmitted to ICIS-NPDES, there is a high potential of creating a duplicate record. Also, if a permittee reports DMRs electronically to both EPA and the state, there is very high potential that as the data is transmitted to ICIS-NPDES the DMR information will override existing information. These scenarios would require increased coordination with delegated programs to prevent duplication and overriding of existing information.

Should a delegated program fail to meet all three of the State Readiness Criteria within the designated time period, the proposed rule requires regulated entities in that delegated program to report to both the delegated program and the EPA. If this occurs, and if required by permit, the regulated entity must submit hard-copy applications and reports to the delegated program while submitting electronic applications and reports to the EPA. The rule does not specify which set of records submitted by the regulated entity would constitute the official record for the purpose of resolving inconsistencies between or deficiencies occurring in the two sets of records. The rule should be revised to specify which set of records submitted by the regulated entity would constitute the official record (aka Copy of Record, per CROMERR) and the procedure through which delegated programs should notify the EPA of any subsequent changes made to the records to resolve inconsistencies and correct deficiencies.

The TCEQ implements many state-level programs and enforcement actions that incorporate requirements and penalties different from, or in addition to, NPDES requirements. Prior to granting authorization, the TCEQ evaluates the regulated entity according to these other requirements. In the event that a regulated entity is required to report to both the delegated program and the EPA due to failure by the delegated program to meet the State Readiness Criteria, the TCEQ is concerned about the possibility that the EPA may approve a regulated entity's authorization when the delegated program has denied the authorization due to violation of state-level program

requirements and enforcement actions. The rule should clarify whether or not EPA will take final action (issue or deny) on electronically submitted application forms. In the event that EPA takes final action on the application, EPA must ensure that the application complies with all state statutes, rules, and regulations prior to issuing authorization.

State Readiness Criteria

How much flexibility is EPA willing to consider in order for delegated programs to meet the State Readiness Criteria? One of the state readiness criteria for obtaining the initial recipient designation is that all of the state's e-Reporting tools meet the CROMERR requirements. Currently, there are delegated programs waiting on CROMERR approval due to a backlog of applications with EPA. The backlog must be addressed or EPA should allow a variance to delegated programs with pending CROMERR authorization applications.

The preamble states that the regulated entities must submit timely, accurate, complete, and nationally consistent NPDES data, but does not indicate the degree to which each of these criteria must be met.

CROMERR Rule

Under the proposed rule, delegated programs would be required to follow CROMERR when submitting e-reports and data. EPA has not explained whether the CROMERR rule would need to be re-opened to address the mandatory compliance. Therefore, the rule should address how the process of obtaining CROMERR approval may affect the feasibility of the required timeline.

Appeal Process

As currently proposed, the rule does not provide a process for delegated programs to appeal EPA determinations as to whether they have met the State Readiness Criteria and other determinations affecting their delegation or status as initial recipient. The rule should include a specific procedure and timeline describing how delegated programs may appeal such EPA decisions.

Preamble, Section I(A)(2) - (Summary of the Major Provisions)

The preamble states "States, tribes, and territories that are authorized to implement the NPDES Program are the sources of certain key information regarding regulated facilities" and "Under this regulation, NPDES permitting authorities are required to share this information electronically with EPA." TCEQ requests that EPA indicate if delegated programs will be required to provide all correspondence related to compliance determinations, such as information submitted to resolve a violation, phone logs, etc. in an electronic format.

Preamble, Section I(A)(3) - (Cost and Benefits)

The cost to permittees to become compliant with the e-Reporting requirement within the first year is shown as \$17,570,000 in the table. It is suggested that EPA provide clarification on the cost to permittees. For example, a small business which may not

have the resources to implement and train personnel on using e-Reporting tools may have higher costs than larger businesses. Likewise, permittees located in smaller communities that rely on dial-up internet could face a greater increase in the cost to travel to locations that have publicly available computers connected to broadband internet. In addition, once the e-Reporting tools have been developed, training/outreach for the regulated community on the use of these reporting tools will be needed. It is unclear whether or not the cost analysis includes these associated costs.

The preamble states “The proposed rule will also lighten the reporting burden currently placed on the states.” For many delegated programs, the new e-Reporting requirements will add a new aspect to program implementation - increased data management. Rather than decreasing the delegated programs’ reporting burden, the e-Reporting requirements may result in a corresponding shift in manpower and funding from traditional program implementation and compliance. Additionally, if all correspondence, documents, and reports between permittees and delegated programs must now be electronically reported to EPA, there is concern this may increase the state workload of ensuring data quality in the federal database.

Preamble, Section III(A) - (Purpose and Needs)

“EPA, states, tribes, and territories will use e-Reporting and 21st century information technology...” TCEQ requests that EPA consider network reliability and provide a provision in the event networks are down. Additionally, where permittees are required to submit annual reports, TCEQ encourages EPA to consider use of a template establishing minimum data requirements.

Preamble, Section III(B)(1) - (Why Require E-Reporting?)

EPA has not adequately explained the basis for implementing this e-Reporting rule. The preamble lists several significant benefits including:

“Saving permittees, states, tribes territories, and EPA time and money and freeing up resources to tackle the most serious water pollution problems; Improving water quality through a better basis for targeting of resources; improving facility compliance by creating a new awareness of a facility’s compliance status for the facility, the regulated community, the public, and across all levels of government; Empowering the public by improving transparency and accountability through the provision of more complete and accurate information about sources of water pollution in their communities; Improving EPA-state relationships by focusing on performance rather than on data quality or completeness issues; Improving the basis for decision-making by states and EPA due to more accurate, timely and complete information about the NPDES program; and Enabling EPA, states, tribes, and territories to better develop compliance monitoring approaches to target the most serious problems.”

This focus on electronic data collection would seem to suggest that e-Reporting will put even more of a focus on data shared between the EPA and states. Data quality will

become a major factor as these systems are implemented and adjusted based on real world use. Currently, there are issues at the federal level with the data stored in ICIS-NPDES not flowing completely into OTIS. Since implementation of the Annual Data Verification Process, TCEQ has noted that the information in ICIS-NPDES does not always get uploaded into OTIS, which is an issue that can only be corrected by EPA. Any deficiency in this data flow process would inhibit the decision-making process between delegated programs and EPA due to the lack of consistent, accurate data. If the universe of data is going to expand, both delegated programs and EPA will have to take on an extra workload of ensuring the data is correct in ALL data systems where the data is stored (i.e., state databases, ICIS-NPDES, and OTIS). Because this data will ultimately be presented to the public through ECHO and its other data publication websites, it is very important that EPA take efforts to synchronize the data exchange between its systems to ensure that all of the data that is housed in ICIS-NPDES transfers.

EPA does not adequately explain how the implementation of the proposed rule will allow EPA and delegated programs to better develop compliance monitoring approaches. Instead, the inflexible timeline would constrain delegated programs to gather and report only the required information in order to meet the prescribed deadlines. This allows little flexibility to develop new and innovative monitoring approaches, as the majority of resources will be devoted to using existing information gathering methods to report information within the timeline.

Preamble, Section III(B)(2) - (Feasibility of E-Reporting)

The third practical example described in the preamble for use of e-reporting is Industry Perspective: Integration with Environmental Management Systems. This type of environmental management software is rarely seen outside some large industrial facilities and required implementation may become more of a burden to smaller regulated entities than a benefit.

Preamble, Section III(C) - (Development of E-Reporting Tools)

TCEQ suggests including the regulated community in the tool development process in addition to delegated programs and third-party software vendors. TCEQ also encourages external stakeholder feedback and interaction during the course of e-Reporting tool development. Including stakeholders in the development of e-Reporting tools will ensure the tools are user-friendly while meeting the needs of all parties (permittees, EPA, and delegated programs).

Preamble, Section III(G) - (The National Environmental Information Exchange Network)

The preamble states “The National Environmental Information Exchange Network (“NEIEN”) supported by EPA uses eXtensible markup language (XML), web services, and common data standards to overcome system incompatibility, allowing partners to securely and automatically exchange environmental data. The preamble provides an example on the use of the exchange network for the protection of water quality, such as providing ambient water quality data. TCEQ requests clarification whether private

laboratories collecting water quality data on behalf of a permittee will be required to report the data directly to EPA or will it be required of the permittee.

Preamble, Section III(I) and 40 CFR §123.45 (Relation to the State Burden Reduction Initiative)

TCEQ recommends that EPA clarify whether the NPDES Noncompliance Report will retroactively review past non-compliances that occurred prior to its implementation (three years from final rule date).

Preamble, Section IV(D)(6) - (Facilities without NPDES Permits)

As stated in the preamble, the proposed rule does not apply to facilities that do not hold NPDES permits. However, the preamble identifies the following criteria for when information regarding non-NPDES permitted facilities would be required to submit information: if they 1) have been subject to a formal enforcement action, an administrative penalty order, or an informal enforcement action (if such action addressed significant noncompliance); 2) have been inspected; or 3) are industrial users located in cities without approved local pretreatment programs. The proposed rule requires facilities within these overly broad categories to electronically submit prescribed sets of information. The TCEQ's current MOA with EPA governs permits issued under the NPDES program and does not require review for non-NPDES permitted facilities. EPA oversteps 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 for non-NPDES facilities.

Preamble, Section IV(E)(1)(b) - (General Permit Reports)

The preamble contains a table detailing an estimate of the number of facilities covered by general permits. With the promulgation of the e-Reporting requirements, TCEQ requests that EPA indicate whether delegated programs will be required to inspect each type (including vessel general permits, pesticide applicators and other Industrial permit types) on a regular basis to ensure they are reporting as required.

Preamble, Section IV(E)(1)(d) - (Sewer Overflows and Bypass Reports)

The preamble states "EPA also solicits comment on whether these sewer overflow reports should be limited to sewer overflows at a threshold volume or include de minimis releases (minor volumes associated with routine operation and maintenance)." TCEQ requests that threshold amounts be specified by EPA prior to request for comment. Currently, in Texas, any unauthorized discharge must be reported regardless of volume which mirrors EPA's current requirement. Developing a threshold for e-Reporting purposes may result in a dual reporting requirement for regulated entities.

Preamble, Section IV(F)(B) - (What Data Would Be Required and Why From Authorized States, Tribes, and Territories?)

The preamble states “Rather than establish different timeliness criteria for different types of data, EPA proposes that the required NPDES data be provided by the states, tribes, and territories to EPA within 30 days of the date of permit issuance, date of inspection, date of violation determination, date of enforcement action, or date of receipt of the information electronically (or non- electronically under a temporary waiver) from the permittee, as applicable.” A 30-day time frame may not be practical for all delegated programs, as this timeline may not allow for proper development of violation determinations and supporting documentation, as well as take into consideration the large universe of regulated entities that the TCEQ must inspect annually. While a 30-day timeline to submit the information may be feasible in some situations, the TCEQ requests that the rule be revised in such a way that takes into account a state’s established protocol for finalizing inspections, violation determinations and enforcement actions.

Preamble, Section IV(G)(3) - (Relationship Between Enforcement and Proposed Regulatory Changes to 40 CFR 123.45)

The preamble states that the “Enforcement policy remains under the discretion of EPA and the permitting authority and outside the scope of this proposed rule” and “any revisions to enforcement response guidelines would be accomplished via update to existing guidance and policy, such as EMS.” TCEQ encourages EPA to openly work with delegated programs when updating enforcement response guidelines by allowing for some flexibility that takes into consideration the local laws, regulations, and policies to which these entities are bound.

Preamble, Section IV(G)(6)(a) and 40 CFR §123.45(a)(2) - (Component 1 – Revise and Simplify the Existing System of Violations Classification)

The preamble states that “...the distinction between major and non-major regulated entities would be eliminated as it relates to 40 CFR 123.45.” TCEQ believes that the elimination of site classification (major/non-major) will have a significant impact on delegated programs that goes beyond the intent of the rule by potentially increasing compliance and enforcement activities. Eliminating the major/non-major designation essentially eliminates the focus of Significant Non-Compliance on those facilities that potentially discharge the most pollutants. Potential impacts that extend beyond this draft rule include (but are not limited to) annual investigation schedules, permitting fees, penalty calculations, and compliance history publications (e.g. OTIS, ECHO, etc.). Additionally by removing the major/non-major designation, the required TCEQ compliance and enforcement oversight may increase as much as four times the present workload. TCEQ does not support this concept and encourages EPA to keep the current major/non-major designation system.

Preamble, Section V(C) (Last Bullet Item) – (Monthly Average Effluent Violations)

Regarding the question as to whether noncompliance reporting of permit effluent limits should be limited to monthly average violations - TCEQ supports the concept of including significant exceedances of non-monthly average limitations (such as maximums or single grabs) in the SNC criteria, as these types of violations may have an acute negative impact on human health or the environment.

Preamble, Section V(D)(3) - (Industrial Users)

The TCEQ does not support expanding the requirement for electronic reporting to all industrial users (IUs) located in municipalities without an approved pretreatment program. The definition of an IU is “any source of nondomestic discharge” which would mean that the rule would require commercial entities, such as convenience stores, automotive shops, gas stations, etc. The TCEQ believes that the resources required to identify the IUs that would be required to report and to effectively implement the reporting requirements would be very significant. The impact on the IUs would also be significant.

Preamble, Section IV(D)(5) - (Major and Nonmajor Designations)

TCEQ has significant concerns with not recognizing the distinctions between NPDES sites defined as major or non-major. It would have significant applicability in regards to many other parts of the NPDES process including site classification, annual billing, inspection planning, violations categorization, enforcement penalty assessments, and so on. TCEQ requests that the major and non-major sites classification remain part of the NPDES process.

40 CFR Subpart B (E-Reporting of NPDES Information from NPDES-Regulated Facilities) and Preamble, Section IV.E (E-Reporting by NPDES Regulated Entities)

§ 127.11 Types of data to be reported electronically

The proposed rule will increase the universe of data submitted to EPA for regulated entities authorized under state issued general permits. For example, much of the pretreatment program data required in Appendix A is not presently submitted to EPA. That data is submitted to the TCEQ, but in a consolidated report format. Under the proposed rules, that data will have to be reported individually. By changing the reporting mechanism, EPA is increasing reporting burdens.

Additionally, if EPA is designated the initial recipient of certain types of compliance information, such as sanitary sewer overflow reports, the regulated community may have the burden of double-reporting. Currently, each sanitary sewer overflow report received by TCEQ is reviewed to determine potential impact to human health and the environment and a decision is made whether or not an on-site investigation needs to be conducted. If EPA is the initial recipient of these reports, there must be a mechanism in place that allows TCEQ to also receive the information at the same time in order for TCEQ to carry out its function to protect human health and the environment. Otherwise,

the regulated community may potentially have to submit these reports to both EPA and the state.

EPA proposes a third-party commercial software provider concept, which could allow companies the opportunity to provide e-Reporting services to their clients. EPA provides a comparison of this concept to similar vendors that provide tax information to the Internal Revenue Service. EPA should consider the variability in the amount and format of data that each state requires. It is also unclear how the third-party vendor concept would be put into practice. The level of state and EPA involvement with these companies may need to be significant to ensure that the reporting requirements are met. There may also be issues with delegated programs not being able to access timely information if it is being submitted through a third-party vendor, especially if a regulated entity has difficulties in paying their third-party vendor.

§ 127.15 Temporary Waivers from e-Reporting

The rule does not adequately identify temporary waiver constraints or how and when a waiver may be approved, denied, or renewed. The proposed requirements for granting waivers to the e-reporting requirements only takes into consideration the location of a facility with regard to its identification as being under-served for broadband internet access. The rule does not look at other factors, such as a facility's access to a computer, degree of knowledge in computer skills, religious, or other potential reasons regulated entities may be unable or unwilling to use e-Reporting. Delegated programs should have broad flexibility and discretion in establishing criteria for granting waivers. TCEQ recommends that EPA establish that flexibility in the rule by allowing delegated programs to establish criteria through an e-Reporting Implementation Plan.

The rule appears to place the burden of reviewing, approving, and monitoring waiver requests upon the regulatory authority, not the designated initial recipient. TCEQ recommends the rule be revised to make it clear that the designated initial recipient of electronic information should also be the entity responsible for the waiver requests.

Additionally, EPA should update the cost analysis for this rule to reflect the resources needed for authorized delegated programs to review and approve/deny waivers.

40 CFR, Subpart C – Responsibilities of EPA and States, Tribes, and Territories Authorized to Implement the NPDES Program and 40 CFR Part 127, Appendix A

The proposed rule sets forth the minimum specific data elements that delegated programs are required to submit to EPA under the concept that "...having this minimum set of federally required NPDES data would ensure that the appropriate linkages are made between the data for permitting, compliance monitoring, violations and enforcement."

This concept may be more complicated than realized when put into practice. TCEQ utilizes its own data system for compliance and enforcement information and it is not seamlessly aligned with ICIS-NPDES to electronically flow each proposed required data element because of business rule constraints with the federal system. For instance, violations issued by TCEQ typically use citations from state laws and regulations and

tend to be very specific to the rule. ICIS-NPDES does not always allow for this type of specificity, nor does ICIS-NPDES allow for multiple violations of the same general nature on the same day (e.g., multiple operations and maintenance violations for different parts of the rules), thus inhibiting appropriate linkages. Another example is TCEQ does not identify parameter-specific effluent violations as does ICIS-NPDES and thus to electronically transmit related enforcement actions (and affiliated violations) is not possible without an expansive enhancement to the existing state system.

There appear to be several options for delegated programs with regard to compliance with the proposed rule: 1) Delegated programs would need to alter their existing data systems to ensure all required data elements are being captured in a way that will conform to the business rules of ICIS-NPDES; 2) EPA would need to alter the federal data system to provide some flexibility in the business rules so that data elements could be transferred more easily from state systems; or 3) a combination of Options 1 and 2. Regardless of the option taken, development and implementation of these database connections initially will have extensive financial impacts on delegated programs. Most delegated programs do not currently have a system in place that allows the automatic transfer of electronic data from the state to federal system. This process would first need to be established. With the help of federal funding, TCEQ is in the final stages of implementing such a system; however, due to the differences between the state and federal system, all data elements being transferred may not contain the specificity required in the rule. Thus, future revisions to the state's data system or the data transfer coding may be necessary.

Another option would be for delegated programs to use ICIS-NPDES as their primary permitting and compliance monitoring data system; however, this would severely constrain some delegated programs in the amount and type of data being stored.

TCEQ encourages EPA to carefully evaluate each of the data elements in Appendix A to ensure they are truly essential to the implementation and oversight of the respective NPDES program. In addition, TCEQ strongly encourages EPA to actively work with delegated programs to provide additional funding assistance and technical support for development and implementation of state to federal data system connections.

§ 127.23 Requirements regarding timeliness, accuracy, completeness, and national consistency

The proposed rule defines timely submittal as “the required data is to be submitted to EPA within 30 days of the completed activity...” In all instances, this may not be sufficient time for delegated programs to report all compliance monitoring information. TCEQ requests that the rule be revised in such a way that takes into account a state's established protocol for finalizing inspections, violation determinations and enforcement actions.

Appendix A to Part 127, Table 2 (Required NPDES Data)

New required data elements

The data elements in Appendix A should be limited to data required by existing Federal regulations. TCEQ has identified the following list of data elements that are included in

the proposed rule that are not required by existing Federal regulations. TCEQ recommends that these data elements be removed from the proposed rule.

- Facility Site Source Map Scale Number
- Facility Site Horizontal Accuracy Measure
- Facility Site Horizontal Collection Method
- Facility Site Horizontal Reference Datum
- Facility Site Reference Point
- Permitted Feature Source Map Scale Number
- Permitted Feature Horizontal Accuracy Measure
- Permitted Feature Horizontal Collection Method
- Permitted Feature Horizontal Reference Datum
- Permitted Feature Reference Point
- NAICS Codes

Questionable significant toward regulatory oversight

Although the following data elements are required by Federal regulations, TCEQ encourages EPA to reconsider whether these data elements are necessary to implement the program. Data elements that are not necessary should be removed from e-Reporting and Federal regulations.

Construction and Industrial Stormwater Information on NPDES Permit Application, Notice of Intent, or Waiver Request

- Total Area of the Site (Note: TCEQ only collects the acreage of the area that will be disturbed for the Construction GP)
- Total Activity Area (Note: TCEQ only collects the acreage of the area that will be disturbed for the Construction GP)
- Current Total Impervious Area
- Post-Construction Total Impervious Area
- Proposed Best Management Practices for Industrial Activities and Stormwater
- Post-Construction Best Management Practices for Industrial Activities and Stormwater Discharges
- Soil and Fill Material Description
- Runoff Coefficient of the Site

Municipal Separate Storm Sewer System (MS4) Information on NPDES Permit Application or Notice of Intent

- MS4 Maintenance of BMPs

TCEQ has the concerns as noted below related to the following data elements required in Appendix A:

Narrative Condition and Permit Schedules

The following data elements should not be applicable to industrial stormwater dischargers because these types of discharges are intermittent and variable in nature:

- Description- A unique code description is not required by 40 CFR 122.47.
- Narrative Condition Number – A ‘Narrative Condition Number’ is not required by 40 CFR 122.47.
- Actual date
- Report received Date
- Event

Cooling Water Intake Information on NPDES Permit Application or Notice of Intent

The proposed rule requires reporting of the ‘Maximum Through-Screen Velocity.’ This appears inconsistent with the requirements in 40 CFR §125.86.

Data that must be submitted electronically includes cooling water intake information (CWA Section 316(b)) for individual NPDES permits. The purpose of CWA Section 316(b) is to require the ‘location, design, construction, and capacity of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact (AEI).’ Application requirements for cooling water intake data, which are specified in 40 CFR §125.86(b)(2), include only a maximum design intake velocity of 0.5 feet per second. ‘Design intake velocity’ is defined in 40 CFR §125.83 as ‘the value assigned (during the design of a cooling water intake structure) to the average speed at which intake water passes through the open area of the intake screen (or other device) against which organisms might be impinged or through which they might be entrained.’

Pretreatment program on NPDES Permit Application or Notice of Intent

The EPA should clarify its intent for including *truck transportation* in the data description for these data elements. For example, the data description for SIU Name lists: ‘The name of each SIU that is discharging (including truck transportation) to this POTW.’

Compliance Monitoring Activity (AFO/CAFO Inspections)

The data element for ‘Did Facility Make a No Discharge Certification’ should be removed from the proposed rule since the requirement for no discharge certifications was vacated in federal rules.

Compliance Monitoring Activity (Data Elements Specific to Pretreatment Program Annual Reports and SIU Periodic Compliance Reports in Municipalities without an Approved Pretreatment Program)

The semi-annual reports currently submitted to TCEQ by CIUs located in municipalities without an approved local pretreatment program do not contain all of the data elements EPA proposes to collect for NPDES Data Group 8. The ability for the program area to collect all of the data will require significant staff resources to create a reporting template, revise the reporting guidance document for CIUs, and to educate the affected CIUs on the additional data that will need to be provided. The program area will need additional resources to provide the technical assistance and to review, evaluate, and facilitate CIUs to make corrections for all of the reports submitted.

The pretreatment regulations require that the POTW report if they experienced pass through, interference, or other problems. The regulations do not require that they report why the problem occurred. The POTW is required to identify the source(s) of the problem and enforce as applicable. Reporting these types of problems and sources is not easily done with an indicator, often times it requires a narrative explanation. This information is requested and reviewed during pretreatment audits and pretreatment compliance inspections.

- POTW Discharge Contamination Indicator
- POTW Biosolids Contamination Indicator

The pretreatment regulations allow options for the updated list of IUs: either a list that includes their names and addresses or a list of deletions and additions keyed to a previously submitted list. The initial list is submitted when the POTW's pretreatment program is approved. Then with the annual report the POTW only submits a list of the names of the regulated IUs and any deletions and additions – such as addresses and wastewater flows. It is unnecessary and duplicative for the POTW to submit their entire inventory with addresses with each annual report. This information is requested and reviewed during pretreatment audits and pretreatment compliance inspections.

- IU Address, City, State, and Zip Code
- IU Process Wastewater Flow Rate
- Type of SIU Process Wastewater Flow
- SIU Non-Process Wastewater Flow Rate
- Type of SIU Non-Process Wastewater Flow Rate

The pretreatment annual report requirements only require that the POTW provide a summary of the status of IU compliance over the reporting period and the summary of the compliance and enforcement activities conducted by the POTW during the reporting period. The rules do not require this level of information to be submitted with the annual report. In some cases, an IU will not be the cause of a problem; it might be another source or a combination of various sources. In addition, sometimes it is very difficult to pinpoint if an IU was the source of the problem, sometimes it is due to wastewater operation issues.

- IU POTW Discharge Contamination Indicator
- IU POTW Biosolids Discharge Contamination Indicator

This information should not be required to be submitted annually with the annual pretreatment report. When the pretreatment program is approved, the POTW is required to include their budget and a resolution to fund the pretreatment program as needed. The TCEQ verifies the budget used and if the funding is adequate to implement and enforce the requirements of the pretreatment program during pretreatment audits and pretreatment compliance inspections.

- Control Authority Budget Resources

Violation

The minimum set of violation data includes Violation Code. TCEQ requests that EPA ensure that all applicable violation codes are provided to authorized programs with definitions, especially those that are not currently outlined in the Compliance Monitoring Strategy.

Sanitary Sewer Overflows

The minimum set of compliance monitoring activity data for Sewer Overflows Inspections and Audits includes Sewer Overflow Longitude and Latitude. TCEQ does not currently request or record this data.