



ENVIRONMENTAL PROTECTION AGENCY

[EPA-R06-OW-2020-0608; FRL-10017-34-Region 6]

Public Notice of State of Texas' Submittal to EPA of Request for Partial National Pollutant Discharge Elimination System (NPDES) Program Authorization for Oil and Gas Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; request for comment; notice of public hearing.

SUMMARY: The United States Environmental Protection Agency (EPA), Region 6 is requesting comments on and will hold a public hearing for the State of Texas' application for National Pollutant Discharge Elimination System (NPDES) authority for discharges from produced water, hydrostatic test water and gas plant effluent, hereafter referred to as oil and gas discharges, within the State of Texas ("application for NPDES oil and gas authorization" or "the application"). The Governor of Texas submitted the application for NPDES oil and gas authorization, seeking approval for the Texas Commission on Environmental Quality (TCEQ) to implement a major category partial NPDES program as provided for under the Clean Water Act (CWA or "the Act"). Today, the EPA is providing public notice of the State's submittal of the application for NPDES oil and gas authorization and of both a public hearing and public comment period on the State's submission. The EPA will either approve or disapprove the State's request for program authorization after considering all comments received. If approved, the NPDES authority for oil and gas discharges within the State of Texas will transfer from the EPA to the TCEQ upon the date of program approval.

DATES: Comments must be received on or before [insert date 45 days after date of publication in the *Federal Register*]. The EPA Region 6 will hold a virtual informational public meeting, followed by a virtual public hearing no sooner than 30 days after the date of this notice. Please refer to the "Public Participation" heading of the **SUPPLEMENTARY**

INFORMATION section for additional information on how to submit comments and for specifics regarding the date, times, and how to register for the public meeting and public hearing.

ADDRESSES: You may submit comments identified by Docket No. EPA-R06-OW-2020-0608 at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

To View and/or Obtain Copies of Documents. A copy of the application and related documents may be viewed or downloaded, at no cost, from the EPA Website at <https://www.epa.gov/publicnotices/notices-search/location/Texas> or <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Kilty Baskin, EPA Region 6 Office, NPDES/Wetland Review Section (R6 WD-PN), 214-665-7500, baskin.kilty@epa.gov.

SUPPLEMENTARY INFORMATION:

A. Public Participation

1. How Can I Get Copies of This Document and Other Related Information?

You may access this Federal Register Notice document electronically at the EPA's website, <https://www.epa.gov/publicnotices/notices-search/location/Texas> or <https://www.regulations.gov>.

2. *How and To Whom Do I Submit Comment?*

We encourage the public to submit comments electronically as described in the ADDRESSES Section of this notice, as there may be a delay in processing mail and hand deliveries will be accepted by appointment only due to public health concerns related to COVID-19.

Please submit your comments within the specified time period cited in the DATES section of this document. Comments received after the close of the comment period will be marked “late”. The EPA is not required to consider these late comments. All comments received by the EPA in accordance with this section by the ending date of the comment period and/or presented at the public hearing will be considered by the EPA before a final decision is made regarding program approval.

3. *How do I Participate in the Informational Public Meeting and/or Public Hearing?*

Informational Public Meeting: The informational public meeting will be held virtually and will include a technical overview of the State’s proposed NPDES oil and gas program, as well as an opportunity for questions and answers. The TCEQ will participate with the EPA during this meeting. Questions or comments made during the informational meeting will not be entered into the official record. Comments for the official record must be made in accordance with the public hearing procedures and/or submitted to the EPA as written comments before the end of the comment period. To register to attend the virtual public meeting, please refer to the online registration form available via links regarding the Texas Program Authorization notice at <https://www.epa.gov/publicnotices/notices-search/location/Texas>. The last day to pre-register for the public meeting will be 3 working days prior before the meeting date

Public Hearing: Please note that the EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA cannot hold in-person public meetings at this time. As a result, the public hearing will be held virtually.

The public hearing will be conducted in accordance with the provisions of 40 C.F.R. § 124.12, and will provide interested parties with the opportunity to give written and/or oral testimony into the official record.

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the *Federal Register*. To register to attend or speak at the virtual public hearing, please refer to the online registration form available via links regarding the Texas Program Authorization notice at <https://www.epa.gov/publicnotices/notices-search/location/Texas> to register to speak at the virtual hearing. The last day to pre-register to speak at the hearing will be 3 working days prior before the hearing date. Prior to the hearing, EPA will post a general agenda for the hearing that will list pre-registered speakers in approximate order at the Texas Program Authorization Notice page accessible from: <https://www.epa.gov/publicnotices/notices-search/location/Texas>

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to rosborough.evelyn@epa.gov. The EPA also recommends submitting the text of your oral comments as written comments to the official docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing is posted online at <https://www.epa.gov/publicnotices/notices-search/location/Texas>. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Ms. Evelyn

Rosborough, 214-665- 7515, or email: rosborough.evelyn@epa.gov to determine if there are any updates. The EPA does not intend to publish a document in the *Federal Register* announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing at <https://www.epa.gov/publicnotices/notices-search/location/Texas>, and describe your needs one week before the date of the hearing. Please note that the EPA may not be able to arrange accommodations.

B. General Information

1. Does this action apply to me?

Entities potentially affected by this action include the regulated oil and gas community and citizens within the State of Texas. If authorized, the TCEQ will implement the NPDES permitting, compliance monitoring and enforcement program for oil and gas activities in Texas. The TCEQ's authority will apply on land within the State of Texas and extend 3.0 statute miles (1 statute mile equals 5280 feet) offshore into the Gulf of Mexico. The EPA retains jurisdiction for discharges more than 3 statute miles offshore in the Gulf of Mexico. Thus, CWA oil and gas exploration and production related discharges in these waters remain subject to the EPA's Outer Continental Shelf of the Gulf of Mexico General Permit (GMG290000). In addition, spills or releases of hydrocarbons subject to the Oil Pollution Act are not subject to the NPDES program. The EPA's authority to address releases of hydrocarbons to waters of the United States under the Oil Pollution Act cannot be delegated to states and TCEQ will continue to refer incidents to EPA as the regulatory authority for the Oil Pollution Act. The TCEQ NPDES program does not apply in areas of Indian country as defined in 18 USC 1151. The EPA retains jurisdiction over discharges in these areas. If you have any questions regarding the applicability of this action to a particular entity, please contact Ms. Kilty Baskin at 214-665-7500, baskin.kilty@epa.gov.

2. What action is the EPA taking?

The EPA is providing notice of the State of Texas' request for partial NPDES program

authorization for oil and gas discharges within the State. The Governor of Texas submitted the application for NPDES oil and gas authorization pursuant to Section 402(b) of the CWA, seeking approval for the TCEQ to implement a major category partial NPDES program under Section 402(n)(3) of the Act. In accordance with CWA section 402(b), 33 U.S.C. 1342(b), and NPDES regulations at 40 CFR part 123, the EPA shall approve a State's application for program approval unless adequate authority does not exist as required by the CWA.

3. What is the EPA's authority for taking this action?

CWA section 402 established the NPDES permitting program and gives the EPA authority to approve state NPDES programs. 33 U.S.C. 1342(b). CWA section 402(n)(3) authorizes the EPA to approve a Major Category Partial Permit Program covering administration of a major category of discharges if “(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and (B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).” 33 U.S.C. 1342(n)(3).

State Permit Program Approval: Section 402 of the CWA, 33 U.S.C. 1342, created the NPDES program under which the EPA may issue permits authorizing the point source discharge of pollutants to waters of the United States under conditions required by the Act. CWA Section 402(b), 33 U.S.C. 1342(b), provides that the EPA shall approve a State's request to administer its own permit program provided the State has appropriate legal authority and a state program that meets the Act's requirements. The regulatory requirements for state program submissions and for EPA state program approval are set forth in 40 CFR part 123 ([https:// www.ecfr.gov/](https://www.ecfr.gov/)).

Decision Process: Pursuant to 40 CFR § 123.61(b), the EPA must approve or disapprove Texas' application for NPDES oil and gas authorization within 90 days of receipt of a complete program submission, unless this review period is extended by mutual agreement between the EPA and the State pursuant to 40 CFR 123.21(d). Under CWA § 402(b) and 40 CFR part 123, the State must show, among other things that it has the authority to issue permits that comply with the Act,

authority to impose civil and criminal penalties for permit violations, and authority to ensure that the public is given notice and an opportunity for a hearing on each proposed permit. Once the State's request for program approval is declared complete, the CWA and its implementing regulations require the EPA to provide notice of the State's application and allow a comment period of at least 45 days during which the public may express their views on the proposed State program. The EPA's public notice of the application must also provide notice of a public hearing to be held no less than 30 days after publication of the notice. See 40 CFR 123.61.

After the close of the public comment period, the EPA will determine whether to approve or disapprove the State's application based on the requirements of section 402(b) of the CWA and 40 CFR part 123. If the EPA approves the State's program, the Regional Administrator of EPA Region 6 will so notify the State and sign the proposed Memorandum of Agreement between the EPA and the TCEQ (MOA). If approved, notice of the approval will be published in the *Federal Register* and, as of the date of program approval, the EPA will suspend issuance of NPDES permits for oil and gas discharges in Texas. If the EPA disapproves Texas' application for NPDES oil and gas authorization, the State will be notified of the reasons for disapproval and of any revisions or modifications to the program that are necessary to obtain approval. The EPA will not make a final decision on whether to approval or disapprove Texas' application until after: (1) consideration of all public comments provided during the public comment period, including those submitted at the public hearing, and the preparation of a responsiveness summary and (2) completion of government to government tribal consultations, as requested, with federally recognized tribes in Texas.

Summary of the State's Application/Proposed Program: By letter dated October 9, 2020, and received by the EPA on October 12, 2020, the Governor of the State of Texas submitted a request for NPDES program authorization for oil and gas discharges in Texas. The request is for approval of a Major Category Partial Permit Program under CWA section 402(n)(3) covering administration of a major category of discharges within the State. The State's NPDES oil and gas

program, if approved, would be administered by the TCEQ. The TCEQ currently implements an approved partial NPDES permitting program, the Texas Pollutant Discharge Elimination System (TPDES) program, for discharges to waters of the State in accordance with Clean Water Act § 402(n)(3). However, when TCEQ was granted authority by the EPA in 1998 to administer the NPDES program for discharges under its jurisdiction, oil and gas discharges were regulated by the Railroad Commission of Texas (RRC) and thus were not included as part of the approved TPDES program. As a result, EPA is the permitting authority for oil and gas discharges in Texas. In 2019, House Bill 2771, 86th Texas Legislature, amended Texas Water Code § 26.131 to transfer jurisdiction of discharges of produced water, hydrostatic test water, and gas plant effluent into water in the state from the RRC to the TCEQ upon NPDES program authorization from the EPA for such discharges. A copy of Texas Water Code § 26.131 is attached as Attachment A to the State's application.

In accordance with 40 CFR 123.21, the State's application includes the following 5 elements: (1) A letter from the Governor requesting program approval; (2) A complete program description, as required by 40 CFR 123.22, describing how the State intends to carry out its responsibilities under the Act and its implementing regulations; (3) An Attorney General's statement as required by 40 CFR 123.23; (4) A Memorandum of Agreement (MOA) with the Regional Administrator as required by 40 CFR 123.24; and (5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures.

A complete program description is included as Attachment E to the State's submission. The program description is divided into four (4) chapters:

- Overview of the TCEQ, as required by 40 CFR 123.22(a) and (b);
- Oil and Gas Permitting Program Description, as required by 40 CFR 123.22(c), (d) and (g);
- Oil and Gas Enforcement Program Description, as required by 40 CFR 123.22(d), (e) and (g); and

- Program Costs and Funding Description, as required by 40 CFR 123.22(b)(1)-(3).

A Statement of Legal Authority, signed by the Texas Attorney General, is included as Attachment C to the State's submission. The Statement of Legal Authority outlines the TCEQ's legal authority to regulate the discharge of produced water, hydrostatic test water, and gas plant effluent into water in the state resulting from oil and gas activities upon NPDES program authorization from the EPA. The Statement of Legal authority notes that when House Bill 2771 became effective, the term "produced water" was not defined in State rules or statutes. For the purposes of the TCEQ's implementation of amended Tex. Water Code § 26.131, the TCEQ defined the term "produced water" in 30 Tex. Admin. Code § 305.541(b) as "all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435." Through the Statement of Legal Authority, the Texas Attorney General certifies that amended Tex. Water Code § 26.131, in conjunction with the definition of produced water in 30 Tex. Admin. Code § 305.541(b) and the TCEQ's existing authority to issue permits for the discharge of pollutants into water in the state in Tex. Water Code § 26.121, provides the TCEQ with authority to issue TPDES permits for the discharge of all oil and gas wastewater into water in the State in Texas.

The MOA between the TCEQ and the EPA Region 6 concerning the TPDES program and a MOA Addendum to address oil and gas discharges are included as Attachment D to the State's submission. The MOA Addendum recognizes that one of the most important goals for transferring NPDES program authority to Texas for oil and gas discharge permitting, compliance monitoring and enforcement is to promote and facilitate the expeditious transformation of federal NPDES and state permits into one TPDES permit. The MOA Addendum describes in detail the permitting, compliance monitoring and enforcement authority that will transfer to the TCEQ on the date of program authorization. Upon authorization, jurisdiction for EPA issued oil and gas permits and primary enforcement authority for oil and gas discharges within the State will be

transferred to the TCEQ, with certain limited exceptions. The MOA Addendum describes in detail those exceptions, i.e., permits and enforcement actions for which the EPA will initially retain jurisdiction, such as permits for which appeals are pending or enforcement actions that are currently ongoing. The MOA Addendum also details the actions that will trigger transfer of jurisdiction for those permits and enforcement actions to TCEQ, for example resolution of the permit appeal or resolution of the ongoing enforcement action.

Copies of all applicable State statutes and regulations, as well as TCEQ Operating Policies and Procedures, are included as Attachment F to the State's submission. Please note that TCEQ adopted by reference EPA's Oil and Gas Effluent Limitation Guidelines (40 Code of Federal Regulations (CFR) Part 435).

On November 5, 2020, the TCEQ submitted revised language to Attachment E – Ch 3 Enforcement Program Description for clarification purposes. The revised language does not affect substantive changes to the State's program submission. The revised language clarifies that TCEQ's existing spill response program has been evaluated and determined to be adequate for the inclusion of wastewater spills from oil and gas operations subject to the NPDES program. Upon the EPA's approval of the State's request for NPDES authority for oil and gas discharges, primary enforcement authority for such spills and releases will transfer to the TCEQ. Spills or releases of hydrocarbons subject to the Oil Pollution Act are not subject to the NPDES program. The EPA's authority to address releases of hydrocarbons to waters of the United States under the Oil Pollution Act cannot be delegated to states and the TCEQ will continue to refer incidents to the EPA as the regulatory authority for the Oil Pollution Act.

The EPA determined that the State's October 12, 2020 program submission, including the November 5, 2020 clarification, constituted a complete package under 40 CFR 123.21, and a letter of completeness was sent to the State on November 12, 2020. Pursuant to 40 CFR 123.21, within 90 days of the EPA's receipt of the State's complete program submission, or by January 11, 2021, the EPA must approve or disapprove the program based on the requirements of CWA §

402(b) and 40 CFR part 123 and taking into consideration all comments received, unless this review period is extended by mutual agreement between the EPA and the State pursuant to 40 CFR 123.21(d).

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, 33 U.S.C. 1342. I hereby provide public notice of the application by the State of Texas for approval to administer the NPDES program for discharges from oil and gas activities within the State, in accordance with 40 CFR 123.61.

Dated: November 19, 2020.

David Gray,
Acting Regional Administrator, Region 6.

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