

ENVIRONMENTAL PROTECTION AGENCY

[EPA-R06-OW-2020-0608; FRL-10019-98-Region 6]

Approval of the Application by the State of Texas for Partial National Pollutant Discharge Elimination System (NPDES) Program Authorization for Oil and Gas Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On January 15, 2021, the Regional Administrator for the United States Environmental Protection Agency (EPA), Region 6 approved the request of the State of Texas' for Partial National Pollutant Discharge Elimination System (NPDES) program authorization 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. On October 12, 2020, 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 approval of the State's submittal of the application for NPDES oil and gas authorization.

DATES: Pursuant to 40 CFR Part 123.61(c), the Partial NPDES Program of the State of Texas was approved and became effective January 15, 2021.

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/npdes-permits>.

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. 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. As of January 15, 2021, authority to implement the NPDES permitting, compliance monitoring and enforcement program for oil and gas activities in Texas transferred from the EPA to the TCEQ. The TCEQ's authority applies on land within the State of Texas and extends 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 is not subject to the NPDES program and therefore cannot be delegated to states. The 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 U.S.C. 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 approval 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/>).

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 Part 123.61. After the close of the public comment period, the EPA determines 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.

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 was 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 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, the EPA retained 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 was attached as Attachment A to the State's application.

In accordance with 40 CFR Part 123.21, the State's application included the following 5 elements: (1) A letter from the Governor requesting program approval; (2) A complete program description, as required by 40 CFR Part 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 Part 123.23; (4) A Memorandum of Agreement (MOA) with the Regional Administrator as required by 40 CFR Part 123.24; and (5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures.

A complete program description was included as Attachment E to the State's submission. The program description was 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, was 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 certified 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 concerning the TPDES program and a MOA Addendum to address oil and gas discharges was 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 the TCEQ Operating Policies and Procedures, were included as Attachment F to the State's submission. Please note that the TCEQ adopted by reference the EPA's Oil and Gas Effluent Limitation Guidelines (40 CFR Part 435).

On November 5, 2020, the TCEQ submitted revised language to Attachment E – Chapter 3 Enforcement Program Description for clarification purposes. The revised language did not affect substantive changes to the State's program submission and was not a material change under 40 CFR Part 123.12(c). The revised language clarified that the 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 constituted a complete package under 40 CFR Part 123.21, and a letter of completeness was sent to the State on November 12, 2020. Pursuant to 40 CFR Part 123.21, within 90 days of the EPA's receipt of the State's complete program submission, or by January 11, 2021, the EPA was required to 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. However, pursuant to 40 CFR Part 123.21 (d), the EPA and the State agreed via email dated January 5, 2021, to extend the 90-day statutory review period deadline from January 11, 2021 to January 19, 2021 to allow the EPA additional time to consider and respond to all public comments.

Public notice of the application: On November 27, 2020, the EPA published notice of the State's application for NPDES program authorization for oil and gas discharges within the State and opened a 45-day comment period as required by 40 CFR Part 123.61(a), which ended on January 11, 2021 (85 FR 76076).

Public notice of the State's application was also published in the following newspapers:

Dallas Morning News

Houston Chronicles

El Paso Herald

El Paso Time

Austin Times

Public Participation Process:

The EPA held a public meeting and public hearing regarding the State's application virtually via Adobe Connect on January 5, 2021. The EPA deviated from its typical hearing approach because of the President's national emergency declaration due to the COVID-19 pandemic. Because of the current Center for Disease Control and Prevention recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA could not hold in-person public meetings/public hearings. The public meeting included an overview of federal and state NPDES program requirements, the state program approval and submittal process (in accordance with 40 CFR Part 123), and the general elements of Texas' proposed program for administration of the NPDES program for oil and gas discharges (including the roles and responsibilities of the EPA and the TCEQ). The public hearing provided interested parties the opportunity to provide oral testimony for the official record. There were 52 attendees at the public meeting and 35 attendees at the public hearing. Two individuals presented oral testimony at the public hearing and 156 written comments were received by EPA prior to the close of the comment period.

Summary of Comments Received:

In addition to the oral testimony at the public hearing, the EPA received 156 comments on the State of Texas' request for NPDES program authorization for oil and gas discharges. Comments were received from the following entities:

The Texas Alliance of Energy Producers

Environmental Defense Fund

The Sierra Club, Lone Star Chapter

Bay Coastal Watch Association

Audubon Texas

Pioneer Natural Resources, USA, Inc.

Texas Independent Producers and Royalty Owners Association

The American Exploration and Production Council (AXPC)

Citizens of the local communities

EPA received 156 written comments. Of those 156 comments, approximately 130 were very similar in nature, expressing concern with the State's request to implement the NPDES oil and gas program in the State and requesting an extension of the 45-day public comment period. Commenters in opposition to EPA's approval of the State program expressed various concerns, including TCEQ's ties to the oil and gas industry, the lack of current understanding as to the composition of produced waters, and the need for updated effluent limitations guidelines related to oil and gas discharges. At least one commenter acknowledged that the State's program likely met the minimum requirements for authorization under the CWA and 40 CFR Part 123, but expressed concern that the EPA retain sufficient oversight over permit review and issuance to ensure compliance with the CWA.

The EPA received 6 comments in support of the State's request for program authorization. These commenters asserted, among other things, that TCEQ has extensive experience with writing NPDES permits for a wide range of discharges, that the requirement to incorporate applicable effluent limitations guidelines into discharge permits will not change with the transfer of NPDES permitting authority from EPA to TCEQ, and that TCEQ is the agency most knowledgeable with regard to the quality of State water bodies and the permit requirements needed to protect those water bodies.

All comments received by the EPA were considered by the agency in making its final decision to approve Texas' request for program authorization. Copies of all comments received and EPA's written responses to those comments are available at <https://www.epa.gov/npdes-permits> .

Additional information about the State's request for partial NPDES program authorization, including a copy of the State's application and supporting documents, is available at www.regulations.gov Docket No. EPA-R06-2020-0608, or at EPA's Region 6 webpage <https://www.epa.gov/npdes-permits>. Documents from the public meeting and a transcript of the public hearing are available at the webpage.

On December 17, 2020, the EPA held a virtual tribal consultation conference to notify affected Tribes of the opportunity for formal and informal consultation, as well as the availability of EPA staff for informal discussions through-out the public participation process. The federally-recognized Texas Tribes that were represented included: the Alabama-Coushatta Tribes of Texas and the Kickapoo Traditional Tribe of Texas. The Ysleta del Sur Pueblo was not in attendance. The EPA did not receive any comments from the Tribes during the 45-day public comment period on the State of Texas's request for NPDES program authorization for oil and gas discharges within the State or a request to initiate formal consultation. Therefore, the EPA concluded that a formal tribal consultation was not required.

Authority: This action is taken under the authority of section 402(b) of the Clean Water Act as amended, 33 U.S.C. §1342(b). Pursuant to 40 CFR 123.61(c), I hereby provide public notice of the EPA's final action approving the State of Texas' request for NPDES program authorization for discharges of produced water, hydrostatic test water, and gas plant effluent, otherwise known as oil and gas discharges, within the State.

Dated: January 15, 2021.

Kenley McQueen,

Regional Administrator, Region 6.