Joint Comments on NPDES Partial Permit Program Authorization Request (EPA–R06–OW–2020–0608) from the Sierra Club, Lone Star Chapter and Additional Organizations

I. Introduction

The Sierra Club is the nation's oldest and largest conservation organization. The Lone Star Chapter is the Texas chapter of the Sierra Club and was incorporated in 1965. The Lone Star chapter has 30,000 members with an additional 150,000 supporters. We work to advocate for land and water conservation, clean energy and clean transportation, and appropriate regulation on oil and gas.

The Sierra Club's Lone Star Chapter and the additional undersigned organizations (collectively, Joint Commenters) submit the following comments raising concerns over the Texas Commission on Environmental Quality's (TCEQ's) request for partial National Pollutant Discharge Elimination System (NPDES) program authorization for oil and gas discharges. Collectively, Joint Commenters are concerned with meaningful opportunity for public participation in the process. Additionally, Joint Commenters are concerned by TCEQ's request because TCEQ has clearly not engaged in meaningful analysis over the implementation of an NPDES permit program under the Clean Water Act (CWA) regarding the permit program it already authorizes. Joint Commenters are also greatly concerned by a potential lack of authority and ongoing issues relating to the TPDES program's antidegradation regulations and water quality standards. And finally, Joint Commenters are concerned with the lack of transparent information about potential harms to endangered species.

The Sierra Club and undersigned organizations are opposed to this authorization, and we urge the Environmental Protection Agency to reject the application from TCEQ. The following sections describe the major issues with the application and the process as a whole, as well as some of the dangers of discharging produced water.

II. EPA and TCEQ Have Not Provided Sufficient Opportunity for Public Participation

A. EPA Has Not Provided Sufficient Opportunity for Public Comment

The Sierra Club respectfully requests that the Public Comment Period for the Partial Permit Program Authorization be extended. In addition to having a public comment period that overlaps with Federal and State holidays, at the time of publication in the Federal Register (and for days thereafter) there had been no set date for either a Public Meeting or Public Hearing regarding this application. Without adequate time to prepare potential stakeholders in and around the State of Texas (including the more than 30,000 members of the Sierra Club's Lone Star Chapter) for both forms of public engagement, the public involvement process becomes less meaningful, as stakeholders are less able to engage. Additionally, the COVID-19 pandemic exacerbates these burdens put on potential stakeholders.

EPA did not send a letter of completeness to TCEQ until November 12, 2020. EPA's letter acknowledges the submission of the partial program as October 12, 2020 despite the fact that clarification was made on November 5, 2020. 40 C.F.R. § 123.21(b)(1) reads in relevant part: "[i]f EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA."[1] While EPA has since argued that the clarification was not substantial, again we believe that the rules are clear and that the 90-day period should have begun in November, as opposed to October.

Moreover, because EPA did not send a letter of completeness until November 12, 2020, six days after clarification was made, it must be the case that such clarification made was material to the submission. 40 C.F.R. § 123.21(c) reads "[i]f the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission." The November 6, 2020, clarification clearly must have been a material change, as EPA waited until after receipt of such clarification to issue a letter of completeness and specifically notated the receipt of that clarification in the letter of completeness. Accordingly, the statutory review period must instead be counted from November 6, 2020, and the 90-day period should end instead on February 4, 2021.

---

[1] Letter of Completeness (Document ID EPA-R06-OW-2020-0608-0011)

Because regulations clearly provide for the 90-day period to have begun on November 6, 2020, EPA would not need TCEQ's approval to extend the 90-day period, as 40 C.F.R. § 123.21(d) is not triggered unless EPA wishes to extend the 90-day period beyond February 4, 2021.

Up until January 5, 2021, the public believed EPA to be scheduled to approve or disapprove of the program on the same day that comments are due, January 11, 2021. Now, EPA has, with TCEQ's agreement, postponed the decision date to January 19, 2021, with no extension of the comment period. Again, we believe that in the interests of proper notice and adequate time, both the comment period and the period for potential action by the EPA should be extended. The very purpose of having public comment periods is to allow for public input but also to require EPA to respond meaningfully to that public input.

Regulations at 40 C.F.R. § 123.61 clearly state, in relevant part, that EPA "shall approve or disapprove the program based on the requirements of this part and of CWA and taking into consideration all comments received." Without sufficient opportunity for meaningful public comment, and without adequate responses to comment, EPA would be acting contrary to regulation.

B. TCEQ Was Made Aware of the Timeline Issue.

TCEQ held a stakeholder's meeting on December 10, 2020, during which TCEQ did not commit to work with EPA under 40 C.F.R. § 123.21 to extend the statutory review period. TCEQ subsequently agreed to extend the timeline for an EPA decision at some point over or after the winter holidays until January 19th. This overlap with winter holidays amidst the COVID-19 pandemic implicates lower levels of public participation. Once again, this makes the public comment period less reflective of potential public concern. TCEQ, as the agency responsible for the health and welfare of the waters of our state, should be inclined to make sure that the public comment period is extended as well.

III. TCEQ is Ineligible for Additional Permit Program Authorization Under the Clean Water Act

Under 33 U.S.C. § 1342(b) the Administrator shall approve a state program unless he determines adequate authority does not exist "(1) To issue permits which—(A) apply, and insure compliance with, any applicable requirements of sections 1311,

1312, 1316, 1317, and 1343 of this title." The administrator should disapprove the program if it is found that TCEQ does not have adequate authority to issue permits that comply with varying sections of the CWA, including the ability to implement and ensure compliance with water quality standards.

33 U.S.C. § 1312 specifically addresses that effluent limitations established under permits must be sufficient to meet water quality standards, protect wildlife, and recreational and designated uses. Additionally, antidegradation regulations are part of the water quality standards that TCEQ must be able to apply and ensure compliance with. TCEQ's proposed adoption of effluent limitations will ultimately not be sufficient to maintain Surface Water Quality Standards (SWQS), nor can they assure the protection of public water supplies or wildlife. Moreover, TCEQ's failure to ensure compliance with water quality standards makes them ineligible for authorization of an additional partial permit program.

A. TCEQ Lacks Authority to Apply and Insure Compliance with Antidegradation Regulations

TCEQ must remain in compliance with the Clean Water Act's requirement to implement water quality standards in order to be eligible for the program authorization they now seek.

33 U.S.C. § 1313(d)(4)(B) codifies the antidegradation policy of the Clean Water Act, which is implemented through the regulations at 40 C.F.R. § 131.12. These antidegradation regulations must be part of Surface Water Quality Standards. Because TCEQ regularly fails to apply and ensure compliance with antidegradation standards, TCEQ is ineligible for the authorization to permit any additional portion of the NPDES program. Additionally, TCEQ's antidegradation policy is presently inconsistent with federal regulations.

TCEQ and State law read that Tier 2 antidegradation is effectively the same as Tier 1 antidegradation, despite the fact that Tier 2 antidegradation prohibits *all* activities unless "lowering of water quality is necessary for important economic or social development."[2] The state defines "Degradation" as "a lowering of water quality by more than a de minimis extent," despite this being wholly inconsistent with federal

[2] 30 Tex. Admin. Code § 307.5(b)(2)

regulations.[3] Federal antidegradation regulations provide for no such “de minimis” amount of degradation, and only provide for any degradation of these Tier 2 waters where it is necessary for economic or social development.[4] TCEQ and the State have effectively avoided ensuring compliance with the Federal difference between Tier 1 and Tier 2 antidegradation analyses. This is failure to apply and ensure compliance with water quality standards. Such failure harms the waters of Texas, and makes TCEQ ineligible for this authorization.

B. Texas Surface Water Quality Standards (SWQS) Are Not Current

Texas’s Surface Water Quality Standards have long been piecemeal of different years’ standards. During the EPA’s review of the 2018 Standards, TCEQ was still using portions of standards from 1997, 2000, 2010, and 2014 for the Texas Pollutant Discharge Elimination System (TPDES) program.[5] By TCEQ’s own admission on its website, TCEQ regularly fails to implement updated water quality standards that are EPA approved, resulting in a situation where water quality standards are unpredictable.[6]

TCEQ does not presently have the authority to insure compliance with 33 U.S.C. § 1312 due to outdated and insufficiently protective surface water quality standards.

C. TCEQ Failed to Consider the Impacts of the Permit Program on Impaired Waters

TCEQ has failed to outlined how the proposed effluent limitations would affect impaired waters throughout the state, and especially those west of the 98th meridian. To the extent that the State of Texas has not completed total maximum daily loads (TMDLs) for all of its impacted waters, it would be inappropriate for it to take on additional duties or aspects of the program prior to the completion of those determinations. Agency resources should first be used to establish TMDLs prior to

---

[3] Id.

[4] 40 C.F.R. § 131.12(a)(2)

[5] 2018 Texas Surface Water Quality Standards, Texas Commission on Environmental Quality, Standards Acted on or Under Review, (https://www.tceq.texas.gov/waterquality/standards/2018-surface-water-quality-standards).

[6] Id.

commitment by the agency to establish a new and complex program. Furthermore, the agency should be prohibited from allowing any more discharges of pollutants (including produced water) into those waters listed as impaired until the TMDLs have been established,

For example, the Pecos River flows into the Amistad Reservoir and is connected to the Rio Grande, which eventually crosses the 98th meridian and flows east into the Gulf of Mexico. The Pecos River is situated entirely west of the 98th meridian, and as such, would be subject to the regulations of 40 C.F.R. § 435 Subpart E. Both segments of the Pecos River in Texas are listed on the most recent CWA 303(d) list of impaired waters.[7] The Lower Pecos River segment (TCEQ segment 2310) is impaired by the total dissolved solids in the water, and newly listed as of 2020. Its "5c" designation means that it has no current total maximum daily load (TMDL), likely because it is new to the impaired waters list and there is still evaluation to be done.[8] The Upper Pecos River segment (TCEQ segment 2311) is impaired by a depressed dissolved oxygen, and has been listed as an impaired water since 2006. Its "5b" designation means that "[a] review of the standards for one or more parameters will be conducted before a management strategy is selected, including the possible revision to the TSWQS."[9] The segment was first listed in 2006 and it is plainly unacceptable that the management strategy is still unclear after 14 years on the list.

Additional loading by potential discharges or land application of produced water that may be construed to have a beneficial use in West Texas could further degrade impaired waters. Due to the lack of knowledge of the chemical composition of produced water, the produced water discharges could further depress dissolved oxygen and would certainly further impair the water for total dissolved solids. Additionally, TCEQ has not even finished developing TMDLs for either segment, which means that additional loading to these segments could be done under the NPDES program administration that TCEQ proposes in a way that could be entirely contrary to law.

TCEQ does not presently have the authority to ensure compliance with §303(d) of the Clean Water Act because there are outstanding TDMLs for segments west of the 98th meridian, including the entirety of the Pecos River within Texas. Additionally, the

---

[7] 2020 Texas Integrated Report - Texas 303(d) List (Category 5) at 97-98.

[8] Id. at 1.

[9] Id. at 1.

onus is on TCEQ to have analyzed all of the impaired waters and their potential reactions to increased loads of untreated or partially-treated produced water being applied for beneficial use.

D. The Clean Water Act Requires Permitting Authority Provide Access to Judicial Review that is No More Limited than Article III Standing

In the Attorney General's Statement of Legal Authority, the Attorney General cites 40 C.F.R. §123.30.[10] 40 C.F.R. § 123.30 provides that "[s]tates that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is *the same as that available to obtain judicial review in federal court* of a federally-issued NPDES permit [see CWA § 509]. A State will not meet this standard if it *narrowly restricts the class of persons who may challenge the approval or denial of permits…*"[11]

The Attorney General also cites Sierra Club v. Tex. Comm'n on Envtl. Quality, in which the court expressly holds that appellants were "required to demonstrate that they were affected persons pursuant to Section 5.115 and fully participate in a contested case hearing before seeking judicial review of the merits".[12] The Attorney General further "agrees that it will not rely on or refer to the conclusion of an ALJ or the TCEQ that a person is not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings…"[13]

Generally, Article III standing is established by an"(1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury; and (3) likelihood that the injury would be redressed by a

---

[10] STATEMENT OF LEGAL AUTHORITY TO REGULATE OIL AND GAS DISCHARGES UNDER THE TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM (Document ID EPA-R06-OW-2020-0608-0004) at 12-13.

[11] 40 C.F.R. §123.30 (emphasis added)

[12] Sierra Club & Pub. Citizen v. Tex. Comm'n on Envtl. Quality, NO. 03-14-00130-CV, 8 (Tex. App. Mar. 31, 2016)

[13] STATEMENT OF LEGAL AUTHORITY TO REGULATE OIL AND GAS DISCHARGES UNDER THE TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM, Attachment C (Document ID EPA-R06-OW-2020-0608-0004) at 15

favorable judicial action."[14] Additionally, in terms of the injury, "aesthetic, conservational, and recreational" values may be considered.[15] Presently, under Texas law, it could be construed that only "affected persons" whom have exhausted their administrative remedies may seek judicial review in state court. In 2015, Texas SB 709 amended Texas Water Code 5.115 to add a new subsection a-1 that specifies factors that TCEQ should analyze in determining whether a person or party is an "affected person".[16]

TCEQ's narrowing of who qualifies as an "affected person" is done by excluding aesthetic, recreational, or environmental interests. By disallowing such interests from the scope of interests determining "affected person" status, the state has narrowed the access to judicial review so that it is less accessible than Article III standing permits. Moreover, the issue here is not whether the Attorney General *agrees* to rely on the conclusion of an ALJ or TCEQ in affected person status to oppose that person in a judicial proceeding, but rather the issue is that the conclusion of an ALJ or TCEQ could result in restricting access to judicial review more narrowly than Article III standing would otherwise permit. The Attorney General's agreement is not what 40 C.F.R. § 123.30 seeks to require, but rather it seeks to require adequate protection of Article III standing by state law.

E. TCEQ Failed to Consider the Impacts of the Permit Program on Communities West of the 98th Meridian.

Executive Order 12898 directs agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States…"[17] For the State of Texas, codification of the 98th Meridian Rule contained in 40 C.F.R. § 435 Subpart E would disproportionately affect Hispanic and Latino/a communities, as well as the Native American populations of Texas.

Texas's proposed adoption of 40 C.F.R. § 435, Subpart E is especially troubling given the proximity of major communities to the 98th meridian and the racial/ethnic

---

[14] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992)

[15] Serra Club v. Morton, 405 U.S. 727, 734 (1972).

[16] S.B. 709, 84 Reg., (Tex. 2015).

[17] Exec. Order 12,898, 59 Fed. Reg. 7629, (Feb. 16, 1994.)

composition of the affected communities. The City of San Antonio (the 2nd most populous city in Texas, and 7th most populous in the United States) sits slightly west of the 98th meridian at 29.4724°N 98.5251°W. The City of Austin (the 4th most populous city in Texas and the 11th most populous in the United States) is situated slightly east of the 98th meridian at 30.3039°N 97.7544°W. Under the current regulations at 40 C.F.R. § 435, Subpart E, the state could treat the environmental health of the City of San Antonio and the City of Austin (and their suburbs) entirely differently. Moreover, some major surface water connections cross the 98th meridian including the San Antonio River, Colorado River, Guadalupe River, and Rio Grande River.

Due to the adoption of the 98th meridian rule under 40 C.F.R. § 435 Subpart E, TCEQ's permitting scheme would likely disproportionately affect communities that are made up of a majority of Hispanic people, including the cities of San Antonio, El Paso, Laredo, McAllen, Del Rio, Edinburg, and Mission, and nearly every county along the Texas-Mexico border, as well as many counties in West/North Texas. TCEQ's failure to acknowledge or address the populations specifically affected by the proposed adoption of this rule shows that the impact on a specific racial and ethnic group was not considered at all.

TCEQ's failure to examine what other states have already done and evaluate practicability and necessity in our own state is unacceptable. TCEQ's application should be rejected until they adopt more stringent standards and clearly show that the proposed incorporation of merely EPA standards will not harm human health or the environment; and that neither would be, in effect, discriminatory.

IV. TCEQ's Request for Partial Permit Program Authorization Does Not Provide Insight on Required Endangered Species Act Consultation, and EPA has Not Undergone Consultation as Required by the Endangered Species Act

Section 7(a)(2) of the Endangered Species Act requires that all federal agencies "insure that any action authorized, funded, or carried out by such agency…" are not likely to jeopardize the continued existence of any threatened or endangered species or result in adverse modification of designated critical habitat.[18] EPA considers the authorization of such a program now. Here, there is no evidence that EPA has engaged with the United States Fish and Wildlife Service and the National Marine Fisheries Service to assure that these standards are sufficiently protective of wildlife.

---

[18] 16 U.S.C. § 1536(a)(2), Endangered Species Act § 7(a)(2)

Additionally, 33 U.S.C. § 1312 also specifically incorporates the needs for effluent limitation guidelines to protect a "balanced population of shellfish, fish and wildlife…" and guidelines "which can reasonably be expected to contribute to the attainment or maintenance of such water quality". This specifically requires robust biodiversity that is protected by water quality standards under the CWA.

While the proposed adoption by TCEQ includes exclusively portions of federal regulations, EPA must take action to authorize this program. The regulations as codified, adopted, and applied by the State of Texas are likely to jeopardize the continued existence of threatened and endangered species in Texas. Texas is home to a wealth of diverse wildlife, including many federally listed endangered and threatened species.

Of the listed species in the State of Texas, several of them occupy habitat west of the 98th meridian which would put them at even greater risk for increased discharges. Take for examples the endangered Pecos Gambusia (Gambusia nobilis), Big Bend Gambusia (Gambusia gaigei), and Leon Springs Pupfish (Cyprinodon bovinus). These three fish are all federally listed endangered species that are indigenous to the waters of west Texas. Their habitats being exclusive to west Texas raise gravely concerning issues with respect to increasing produced water discharges that need only show a "beneficial use".

The onus is on EPA to ensure TCEQ undergoes proper consultation with the United States Fish and Wildlife Service as well as the National Marine Fisheries Service to evaluate a comprehensive list of endangered species in Texas that would be threatened by increased discharges of produced water. Additionally EPA and TCEQ must be certain that the authorization of the program at hand will not have jeopardize the continued existence or adversely affect the critical habitat of these species.

V. The Sierra Club and Joint Commenters Oppose Permitting Any Discharges of Produced Water

The standards at 40 C.F.R. § 435 and 40 C.F.R. § 437 are more than a decade old and were promulgated prior to the widespread use of fracking in the United States. In May 2020, EPA published its Summary of Input on Oil and Gas Extraction

Wastewater Management Practices Under the Clean Water Act.[19] According to that Summary of Input, state agency representatives believe that "[i]f produced water could be treated to a level suitable for discharge" it would be beneficial. Under 40 C.F.R. § 435.50, the only requirement for produced water to be suitable for discharge west of the 98th meridian is that it meets the 35 mg/l oil and grease effluent limitation that was adopted 25 years ago. Therein lies a problem, as that water compared to present knowledge, is clearly not suitable for discharge by merely meeting that standard.

Consensus between NGOs and the academic community in that report was clear that EPA and the public lack data and knowledge of the composition of produced water. EPA has acknowledged "the large number of chemical compounds used in hydraulic fracturing" as well as "constituents naturally present in producing formations that are contained in the resulting produced water"[20] For example, EPA identified some 692 ingredients reported for additives, base fluids and proppants contained in more than 39,000 FracFocus disclosures provided by the Groundwater Protection Council.[21]

Some of these chemical cocktails may be proprietary, but it ought not excuse potential dischargers from disclosure where produced water is being discharged. Without knowledge of the chemical composition of produced water, there is also a major problem in being able to effectively treat the water. The concentration and prevalence of constituents within produced water varies greatly, depending on formation characteristics and the type and quantity of additives utilized by producers during well development. Current treatment programs and plants are not equipped to deal with the salinity of produced water. Discharge of produced water would likely irreparably damage surrounding land and water if discharged. Desalination technologies are unfeasibly expensive for implementation even in pretreatment or centralized treatment contexts; and without desalination, permitting discharge of produced water will cause environmental harm.

---

[19] Summary of Input on Oil and Gas Extraction Wastewater Management Practices Under the Clean Water Act, EPA-821-S19-001, (https://www.epa.gov/sites/production/files/2020-05/documents/oil-gas-final-report-2020.pdf) at 21.

[20] Id. at 28.

[21] Detailed Study of the Centralized Waste Treatment Point Source Category for Facilities Managing Oil and Gas Extraction Wastes, EPA-821-R-004, EPA 5-7 (May 2018), (https://www.epa.gov/sites/production/files/2018-05/documents/cwt-study_may-2018.pdf); FracFocus is a publicly accessible website managed by Groundwater Protection Council and the Interstate Oil and Gas Compact Commission where oil and gas production well operations can disclose information about ingredients used in hydraulic fracturing fluids at individual wells.

While exact components of produced water are unknown, EPA has determined that some pollutants of potential concern from an environmental or human health perspective in O&G wastewater discharged after treatment from centralized waste treatment facilities include TDS; halides (e.g., bromide, chloride, and iodide); metals; technologically enhanced naturally occurring radioactive materials (TENORM); and a wide range of poorly characterized chemicals in injected fluids including surfactants, biocides, wetting agents, scale inhibitors, and organic compounds.[22] These pollutants have been shown to degrade the quality of drinking water, impact human health, adversely affect agriculture irrigation and livestock watering, and have toxic impacts to aquatic biota and aquatic organisms.[23]

EPA approved analytical methods do not exist for many constituents found in produced water. In fact, some constituents, such as total dissolved solids, found in produced water can interfere with EPA approved analytical methods and can significantly affect the ability to detect and quantify the level of some analytes.[24]

In order to actually protect environmental health by discharge into surface water or by land use TCEQ needs to actually know what chemicals are in the produced water. To this end, EPA should require TCEQ to require disclosure of chemicals in order to be able to discharge, and TCEQ should subsequently develop specific standards similar to pollutant standards that safeguard against toxicity, radioactivity, and other potential dangers.

The effluent limitation guidelines at 40 C.F.R. § 437 have also been found to be insufficiently protective by other states. The Commonwealth of Pennsylvania, for example, is situated wholly east of the 98th meridian and subject to 40 C.F.R. § 437 regulations. The Commonwealth found EPA effluent limitations to be insufficient to protect the environment, and requires discharges to meet at least the following additional standards: "The discharge may not contain more than 500 mg/L of TDS as a monthly average. The discharge may not contain more than 250 mg/L of total chlorides as a monthly average. The discharge may not contain more than 10 mg/L of total barium as a monthly average. The discharge may not contain more than 10 mg/L of

---

[22] Detailed Study of the Centralized Waste Treatment Point Source Category for Facilities Managing Oil and Gas Extraction Wastes EPA-821-R-18-004, EPA 9-1 (May 2018), https://www.epa.gov/sites/production/files/2018-05/documents/cwt-study_may-2018.pdf.

[23] Id.

[24] Id. at 1-3.

total strontium as a monthly average."[25] Pennsylvania addressed the salinity of produced water by addressing chlorides in addition to addressing barium, strontium, and total dissolved solids. Pennsylvania's more stringent standards are significantly closer to those standards that would actually protect human health and the environment. Additionally, TCEQ has not addressed the potential concerns of chlorides, barium, strontium, and TDS specifically. Without addressing and considering additional specific effluent standards in a regulatory scheme, especially those laid out by the Commonwealth of Pennsylvania, TCEQ cannot effectively protect human health or the environment.

VI. TCEQ Fails to Assure it Will Have Sufficient Staff and Resources, Including for Compliance and Enforcement Activities

In its submittal, TCEQ makes a case for having sufficient financial resources and personnel to run the authorized program.[26] The Chapter points out correctly that TCEQ receives funding for water issues from three main sources: federal funds, general revenues and GR-dedicated fees that flow into the Water Resource Management Account 0153, which is a dedicated account held at the Texas Comptroller of Public Accounts, and can only be used for TCEQ-related water activities. We do not dispute this information, or the level of funding that has been dedicated to TCEQ for water activities, including a special provision during the 2019 legislative session which made specific allocations available for TCEQ to hire up to 9 additional staff (3 at headquarters and 6 in field offices) to help run the program.

Joint Commenters also point out a few realities not discussed in the application which raise concerns about the ability of the agency to run, and enforce the new program in the long-term.

As an example, on Page 4-2, TCEQ provides a table that estimates the annual funding allocated to run the existing TPDES program as $17.3 million, the majority of which comes from funding allocated by the Legislature from Account 0153. We would note that this total "do[es] not include estimates pertaining to the implementation of the permitting and enforcement oversight of oil and gas permits."[27] Instead, TCEQ lists the cost of nine additional employees authorized by the Legislature in 2019 as the total

---

[25] 25 Pa. Code. §95.10(b)(3)

[26] Program Costs and Funding Description (Document ID EPA-R06-OW-2020-0608-0009)

[27] Id. at 4-2.

cost of the oil and gas authority as the total cost of the new program, listed as $576,642. The vast majority of this cost is for salaries and benefits, with a nominal amount of roughly $50,000 for other operating expenses. Indeed, TCEQ somewhat self-servingly estimates that the total cost of the program is exactly the amount provided by the legislature in 2019 through Article VI Rider 30 to cover both permitting and enforcement.[28]

These are large assumptions. First of all, the legislature has frequently failed to provide sufficient resources to the water programs at TCEQ, and has failed to make major changes in permit fees and the Consolidated Water Quality Fee to keep up with Texas's growth in population and industrial growth. As an example, in this document, the TCEQ fails to reveal that through a rider in its budget, the legislature has limited the maximum fees that TCEQ is able to charge on a water permit. Thus in 2019, the Legislature did raise the maximum permit fee to $5000 from $2000 but ignored recommendations to raise the permit fee to $10,000 as a maximum fee. Again, in its Legislative Appropriations Request, despite the need of the programs, TCEQ has failed to request an increase in the maximum level of the permit fee in Rider 18, as recommended by several recent reports. More generally, TCEQ has failed to make fundamental changes to its annual fees, and as they noted, their maximum Consolidated Water Quality Fees are limited to inflation increases, meaning large dischargers with significant toxic and other dischargers of pollutants have an upper limit on their annual fee.

We would also note that the assumption that $576,642 is sufficient is based only on what the Legislature was willing to provide TCEQ in 2019, and is not based on any data about the number of permits, expected enforcement and compliance efforts. Instead, we believe TCEQ should be required to provide additional detail on the number of permits assumed, what level of inspections/compliance and enforcement activities would be expected with only 9 employees to run the entire oil and gas program. Indeed, the "extra" money provided to TCEQ makes no provision for data collection, upgrade to software, the need for vehicles or other equipment for inspectors or other "soft" costs. TCEQ application is not sufficient to assure the program can be sufficiently run.

In addition, we expect a debate at the Legislature about providing potential incentives to oil and gas operators that treat wastewater to certain levels, which could make the economics of produced wastewater discharge more favorable, and therefore

---

[28] Id.

more likely. We are concerned that should such legislative action take place, the number of permits, and compliance and enforcement activity will be much greater, and yet there is no provision in this application to suggest how TCEQ would have sufficient resources to increase the number of permit writers or inspectors.

We would also note that the funding amounts make no mention of the current economic and public health crisis, and how that may impact revenues. Indeed this week, the Texas Comptroller of Public Accounts is scheduled to release the latest Biennial Revenue Estimates that will be used to determine the amount of money that the Legislature can allocate in state funds over the next two years as the Legislature determines the FY 2022 and 2023 budgets for TCEQ and every other agency. TCEQ makes assumptions about the existing $17.375 million and additional $576,642 being available every year going forward for the program, but reports suggest that legislative cuts are likely over the next few years.

VII. Texas Has Failed to Demonstrate That it Can Adequately Administer Produced Water Within its NPDES Program.

EPA must ensure that Texas has met and utilized the authorities required by the nine specified criteria required for authorization of a state permit program under Section 402(b) of the Clean Water Act.[29] The proposed state program must meet these specified requirements for the EPA Administrator to approve the proposal. Under CWA § 402(b) and 40 C.F.R. § 123, the State must show, among other things, that it has the authority to issue and revoke 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. Under this program, "[t]he state must demonstrate that it will apply the effluent limitations and the Amendments' other requirements in the permits it grants and that it will monitor and enforce the terms of those permits."[30] While Texas assures EPA that it has the "adequate authority" for TCEQ to "regulate wastewater discharges into water in the state from facilities associated with the exploration, development, and production of [oil and gas facilities]", there is ample evidence that TCEQ lacks both a history of enforcement and the agency capacity to do so.[31]

---

[29] 33 U.S.C. § 1342(b)(1-9)

[30] Save the Bay, Inc. v. Adm'r of Envtl. Prot. Agency, 556 F.2d 1282, 1285 (5th Cir. 1977)

[31] STATEMENT OF LEGAL AUTHORITY TO REGULATE OIL AND GAS DISCHARGES UNDER THE TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

A. Texas is Not Equipped to Administer and Enforce This Program.

In recent years, TCEQ has failed to meet its existing environmental obligations. Between 2008 and 2018, Texas cut funding for pollution-control programs at the TCEQ by 35 percent despite the overall state budget growing by 41 percent.[32] Funding for the TCEQ's pollution-control operations decreased from $578 million in fiscal 2008 to $374 million in fiscal 2018 when adjusted for inflation.[33] The agency's pollution-prevention program had its budget cut 70 percent from $6 million in fiscal 2008 to $1.8 million in fiscal 2018.[34] The agency's waste-assessment and planning program had its budget reduced from $16.4 million to $6.4 million, a 61 percent decline.[35] In addition to program budget cuts, staffing at the TCEQ declined by nine percent.[36] As discussed in Section VI, TCEQ does not have sufficient staff nor resources to adequately manage an additional water pollution program, let alone a novel program with no existing standards established for safe uses.

B. Texas has a Disastrous Environmental Enforcement Record

TCEQ has failed to adequately manage its existing programs. TCEQ's lax enforcement policy has led to Texas having the highest incidences of wastewater violations in the country, with roughly half of its 269 industrial facilities violating their wastewater permits.[37] Of these facilities, 35 percent had repeated clean water violations during the 21-month study period.[38] Texas companies are the biggest offenders in the nation when it comes to releasing pollution into the state's

---

[32] Perla Trevizo, Texas among top states in country to cut funds to environmental agencies, Houston Chronicle (Dec. 5, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-among-top-states-in-country-to-cut-funds-to-14882992.php

[33] Id.

[34] Id.

[35] Id.

[36] Id.

[37] Naveena Sadasivam, Dirtying the Waters: Texas Ranks First in Violating Water Pollution Rules, Texas Observer (Mar. 15, 2018), https://www.texasobserver.org/dirtying-the-waters-texas-ranks-first-in-violating-water-rules/.

[38] Kiah Collier, Report: Major Texas industrial facilities rank first nationally in illegal water pollution, Texas Tribune (Mar. 15, 2018), https://www.texastribune.org/2018/03/15/report-texas-industrial-facilities-rank-first-illegal-water-pollution/.

waterways.[39] Lack of enforcement is not confined to water violations, as TCEQ is also primarily in charge of enforcing clean air rules within the state but only issued fines in less than three percent of the cases in 2019 in which companies polluted above permitted limits.[40] Evidence points to an agency-wide lack of enforcement for illegal discharges and permit violations. Furthermore, under current state law, the maximum fine that TCEQ can levy against industry for violating their water permits is just $25,000 per day, per violation, though many polluters are able to negotiate this fine down and combine multiple permit violations resulting from single incidents down to one violation.[41]

With industrial facilities like refineries and petrochemical plants already skirting illegal discharge penalties by TCEQ for air and wastewater violations, granting further authorization to the State over produced water, an oil and gas industry byproduct, is unlikely to ensure adequate enforcement and protection of the environment and human health.[42]

C. EPA Should Audit the Existing Authorized NPDES Programs in Texas to Ensure Compliance Prior to Additional Authorization

Prior to authorizing Texas to manage yet another aspect of the NPDES program, EPA should audit the existing status of the NPDES components already administered by Texas. Given the novelty and complexity of produced water uses, EPA must ensure that Texas' existing programs comply with the standards required for authorization from EPA, given the resources and agency capacity that will be required to administer this program.

Federal regulations authorize the EPA to withdraw any such previously authorized NPDES program when a state operates its program in violation of the Clean Water Act.[43] Factors that demonstrate a state's non-compliant operation of a

---

[39] Id.

[40] Naveena Sadasivam, One Texas-Size Loophole is Letting Lone Star Polluters Off the Hook, Texas Observer (Oct. 14, 2020), https://www.texasobserver.org/texas-pollution-loophole/.

[41] Penalty Policy Effective April 1, 2014, TCEQ 2 (Apr. 2014), https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg253/penaltypolicy2014.pdf.

[42] Id.; Naveena Sadasivam, Too Big To Fine, Too Small To Fight Back, Texas Observer (Feb. 21, 2018), https://www.texasobserver.org/too-big-to-fine-too-small-to-fight-back/.

[43] 40 C.F.R. § 123.63(a).

permitting program include but are not limited to the following: failure to exercise control over activities required to be regulated; failure to act on violations of permits or other program requirements, failure to seek adequate enforcement penalties or to collect administrative fines when imposed; and failure to inspect and monitor activities subject to regulation.[44]

We request that EPA audit the existing NPDES program administered by Texas due to the numerous and repeated violations impacting Texas waters throughout the state, prior to authorizing TCEQ to manage produced water treatment and uses within Texas under the NPDES program. The TCEQ has a history of failing to act on permit violations and enforce penalties on polluters, as discussed previously. This, in addition to the agency's decreased staff and budget, indicate that TCEQ will struggle to adequately establish and administer a novel and complex program. An audit of the existing program will safeguard Texas waters by establishing that the state and agency are complying with the requirements of the Clean Water Act, prior to placing an additional burden on an agency with increasingly limited capacity.

VIII. Conclusion

Joint Commenters formally request that EPA and TCEQ further extend the Statutory Review Period to fit what the period should be as calculated from November 5, 2020, which would be February 4, 2021. Additionally, the Public Comment Period should be reopened and extended to provide additional opportunity and access to public participation in light of the COVID-19 pandemic and the winter holidays.

The concerns raised in the preceding sections raise serious questions regarding equity, danger to health and wildlife, water quality, and eligibility of TCEQ to administer an additional part of the NPDES program. In addition, given limits on TCEQ's budget, and the dire fiscal picture for the upcoming legislative session, we have serious concerns about the adequacy of TCEQ's permit and enforcement staff to take on this additional authority. Without resolving these issues that are directly related to TCEQ's ability to insure enforcement and compliance with the Clean Water Act, TCEQ should not be authorized to permit the discharges it now seeks authority over. TCEQ must address the issues of environmental justice relating to communities west of the 98th meridian. TCEQ needs wholly updated water quality standards prior to being eligible for further authorization. Additionally, state law may prevent adequate access to judicial review under the Clean Water Act.

---

[44] Id.

For the foregoing reasons, Joint Commenters urge EPA Region 6 to reject TCEQ's application for authorization to administer a partial NPDES permit program.

Alex R. Ortiz
Water Resources Specialist
Sierra Club Lone Star Chapter

Rebecca McCreary
Associate Attorney
Sierra Club Environmental Law Program

Cyrus Reed
Interim Chapter Director and Conservation Director
Sierra Club Lone Star Chapter

Luke Metzger
Executive Director
Environment Texas

Annalisa Peace
Executive Director
Greater Edwards Aquifer Alliance

Nadia C. Samman
Legal Chair
Eco-SCI

Melissa A. Troutman
Research & Policy Analyst
Earthworks

David Foster
Texas Director
Clean Water Action