ENVIRONMENTAL PROTECTION AGENCY

[FRL–7857–5]

State Program Requirements; Approval of Revisions to the National Pollutant Discharge Elimination System (NPDES) Program; Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Approval of revisions to the Louisiana Pollutant Discharge Elimination System program.

SUMMARY: Pursuant to a request by the Environmental Protection Agency (EPA) and as required by 40 CFR 123.62, the State of Louisiana submitted a request for approval of revisions to the Louisiana Pollutant Discharge Elimination System (LPDES) program, which was originally approved on August 27, 1996. Through the submission of the revised program authorization documents, including a complete program description, a Memorandum of Agreement (MOA) with EPA Region 6, and an Attorney General's Statement, the Louisiana Department of Environmental Quality (LDEQ) seeks approval of the proposed revisions to the LPDES program. Today, EPA Region 6 is publishing notice of its approval of the revised LPDES program and is responding to comments received during the 30-day public notice period on the proposed revisions. EPA is approving the State's request based upon the requirements of 40 CFR part 123 after considering all comments received.

Pursuant to an October 9, 2001, petition from numerous environmental groups in Louisiana requesting EPA withdraw LDEQ's authorization to administer the LPDES program along with EPA program reviews of the water permitting and enforcement programs, EPA delineated seven performance measures for LDEQ in a letter dated February 14, 2003, from Tracy Mehan, former EPA Assistant Administrator for Water, and John Peter Suarez, former EPA Assistant Administrator for Enforcement and Compliance Assurance, to former Governor M. J. Foster. Former Governor Foster replied in a letter dated March 27, 2003, with the commitment of LDEQ and the State of Louisiana to complete the seven performance measures. With the submission of the revision to the LPDES program, LDEQ completed the last of the seven performance measures. Regional Administrator Richard Greene notified Governor Kathleen Blanco of the completion of the performance measures in a letter dated May 13, 2004. After evaluation of the comments and other information related to this **Federal Register** notice regarding the revision to the LPDES program authorization, EPA is denying the petition for EPA to withdraw LDEQ's authorization to administer the LPDES program.

Section 402 of the Clean Water Act (CWA) created the National Pollutant Discharge Elimination System (NPDES) program under which EPA may issue permits for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402(b) requires EPA to authorize a state to administer an equivalent state program, upon the Governor's request, provided the state has appropriate legal authority and a program sufficient to meet the Act's requirements. The regulatory requirements for state program approval are set forth in 40 CFR part 123. Today, EPA is announcing its final approval action on the revisions to the LPDES program, the Regional Administrator has notified the State, has signed the revised MOA, and is publishing notice of the action in the **Federal Register** along with responses to comments received.

Comments, Discussion, and EPA Responses

EPA received 12 comments on the revision to the LPDES program authorization documents. The comments received were from the Tulane Environmental Law Clinic representing the Louisiana Environmental Action Network, the Louisiana Audubon Council, the Gulf Restoration Network, the Association of Community Organizations for Reform Now, the Lake Pontchartrain Basin Foundation, CFACT, the Lake Maurepas Society, and the Concerned Citizens of Livingston Parish; American Electric Power; and The Dow Chemical Company. The comments and responses, in their entirety are listed below.

Comment 1: LDEQ has no right to judicial review of Administrative Law Judge (ALJ) decisions and thus ALJs can force LDEQ to issue permits the agency believes are illegal.

Discussion by Commenter: Louisiana law provides that in an adjudication by the Division of Administrative Law (DAL), the decision of the ALJ is final and ''the agency shall have no authority to override such a decision or order.'' In addition, La. R.S. 49:992(B)(3) states that ''no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this chapter''. This provision impairs LDEQ's ability to carry out the LPDES program properly because it cannot appeal an adverse decision. Consequently, LDEQ may be required to issue a permit that violates the CWA. In short, this regulation limits the authority of LDEQ, as the agency primarily responsible for administering the federal CWA within the state, to ensure that all permits it issues comply with the law, and instead places that burden on the public, who must intervene to object to a wrongfully issued permit.

Commenters assert that EPA's response is that La. R.S. 49:992(D)(2) allows LDEQ to be exempt from the DAL provisions ''if required by a federal mandate''. Accordingly, if EPA requires LDEQ to conduct or to render a final order in an adjudication proceeding as a condition of federal funding, LDEQ can conduct its adjudicatory hearings 'in house' rather than under the DAL. The Program Description further states that ''assuming [LDEQ] was to conduct adjudicatory hearings 'in house', it maintains the authority to do so.'' In that case, the decision of the hearing officer would become final unless the Secretary grants administrative review, in which case he would make the final decision.

Commenters believe that EPA's response does not clearly address the problem. To the best of our knowledge, EPA has not yet required ''as a condition of federal funding'' that LDEQ conduct in house adjudication proceedings. Until and unless EPA does so, La. R.S. 49:992(D)(2) will be inapplicable and thus irrelevant. Accordingly, to ensure that LDEQ has adequate authority to administer the NPDES program in Louisiana, EPA's approval must specifically provide that LDEQ conduct all adjudicatory hearings ''in house'' rather than under the DAL as a condition of federal funding.

EPA Response: The commenters are correct in stating that La. R.S. 49:992(B) precludes LDEQ from appealing an adverse decision in an adjudication by the DAL. However, EPA does not believe this restriction on the agency's power requires withdrawal of the State's authority to run the NPDES program. This issue arises only if a request for hearing is filed by the permit applicant within 30 days after he receives notice of LDEQ's issuance of the NPDES permit. If the hearing request is granted by the Secretary of LDEQ, an adjudicative hearing is held by an ALJ with DAL, an agency independent of LDEQ. The ALJ's decision concerning the permit appeal is final, and under State law, LDEQ cannot unilaterally revise an adverse decision or appeal it to State Court. Therefore, an ALJ could

order LDEQ to make revisions to a permit that LDEQ does not believe comport with the CWA.

Although EPA does not believe this situation to be ideal, there are additional safeguards in place to insure final issuance of an NPDES permit that meets all the requirements of the CWA. First of all, pursuant to La. R.S. 30:2050.21, any ''aggrieved person'' may appeal a final permit action to State District Court. ''Aggrieved person'' is defined by La. R.S. 30:2004(17) as any ''natural or juridical person who has a real and actual interest that is or may be adversely affected by a final action under this Subtitle.'' Thus, even though LDEQ cannot appeal an adverse NPDES permit decision by an ALJ, members of the general public, so long as they meet the broad definition of ''aggrieved person,'' may. The public's right to appeal is bolstered by the fact that any decision by an ALJ under these circumstances, that results in a major modification to an NPDES permit, requires LDEQ to prepare a new draft permit and notice it to the public for public comment. See Louisiana Administrative Code (LAC) 33:2903. Under LAC 33:3123, after the close of the public comment period, LDEQ must notify each person who has submitted written comments or requested notice of the final permit decision, and such notice must include reference to the procedures for appealing the decision.

Another safeguard to LDEQ's permit issuance process is EPA's oversight role. Under the MOA signed by LDEQ and EPA upon authorization of the LPDES program, if the terms of any permit, including any permit over which EPA has waived review, are affected in any way by administrative action, LDEQ must forward to EPA a copy of the administrative decision, along with a copy of the permit affected with any changes identified. EPA has the right to object to such a modified permit under Section 402(d)(2) of the CWA and 40 CFR 123.44. If EPA objects to such a permit and LDEQ fails to revise the permit to comply with EPA's objections, exclusive authority to issue the permit reverts to EPA pursuant to 40 CFR 123.44(h)(3).

As a result of the additional safeguards in place, EPA believes LDEQ's inability to appeal an adverse permitting decision of an ALJ does not undercut LDEQ's ability to implement an adequate LPDES program. However, EPA is aware of the fact that Acts 739 and 1332 of the 1999 Regular Session of the Louisiana legislature, which created the DAL and which precluded any agency of the State from seeking judicial review of a decision of a DAL ALJ, have been ruled unconstitutional by the 19th Judicial District Court in Louisiana. (See, Judge Janice C. Clark's judgment in *J. Robert Wooley, in his capacity as Commissioner of Insurance, State of Louisiana* v. *State Farm Fire and Casualty Insurance Company,* et al., Suit No. 502,311 (19th J.D.C. 3/15/04). The District Court's ruling is currently on appeal to the Louisiana Supreme Court, which heard oral argument on September 7, 2004, and has taken the matter under advisement. Should the Supreme Court's ruling on this matter indicate the need to revisit this issue, EPA will do so at that time.

Comment 2: The public receives no notice of hearings and thus has no opportunity to intervene.

Discussion by Commenter: An ''aggrieved person'' can request an adjudicatory hearing on a disputed issue of fact or law, which the Secretary may grant ''when equity and justice require''. An aggrieved person also has the right to intervene as a party in an adjudicatory hearing when the intervention ''is unlikely to unduly broaden the issues or to unduly impede the resolution of the matter under consideration.'' However, these provisions offer the public little protection because state law does not provide the public with any right to notification of a request for an adjudicatory hearing by permit applicants. Nor does state law provide the public with a right to notification of the results of such a hearing. Without notice, the public effectively never has an opportunity to intervene. Accordingly, to ensure adequate public participation in adjudicatory hearings, EPA's approval must be conditioned on LDEQ's agreement to provide a minimum of 30 days notice of adjudicatory hearings and settlements, including at a minimum, notice published in the public notices section of LDEQ's Web page (currently *http://www.deq.state.la.us/news/PubNotice*) and public notice list-serve.

EPA Response: CWA Section 402(b) and 40 CFR part 123 establish the minimum requirements for public participation in approved State NPDES programs. In regard to permit issuance, States seeking NPDES authorization must have authority sufficient ''to insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.'' In regard to enforcement, 40 CFR 123.27(d) requires States to provide for public participation in the State enforcement process in one of two ways: (A) The State must allow intervention as of right in any civil or administrative action to obtain enforcement remedies by any citizen with an interest that is or may be adversely affected; or (B) The State must investigate and provide written responses to all citizen complaints, not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation, and publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. EPA believes LDEQ is in compliance with the federal requirements for public participation in both permitting and enforcement.

Pursuant to LAC 33:IX.3113, LDEQ provides public notice of every draft permit prepared by the agency and of every notice of intent to deny a permit application. As required by both federal and State regulations, notice is provided by mailing a copy of the notice to persons on a mailing list that includes any person who requests in writing to be on the list and by publication of the notice in a daily or weekly newspaper within the area affected by the facility or activity. LDEQ also publishes notices of draft NPDES permits on its public Web site. The public notice on draft permits provides for a public comment period of at least 30 days, during which any interested person may submit written comments and/or request a public hearing. A public hearing is held anytime LDEQ finds, on the basis of requests, a significant degree of public interest in a draft permit, or at the agency's discretion whenever, for instance, a hearing might clarify one or more issues involved in the permit decision. LAC 33:IX.3115 & 3117.

LDEQ chose to provide for public participation in enforcement matters in accordance with the second method allowed by 40 CFR 123.27(d). The State investigates and provides written responses to citizen complaints, and does not oppose intervention by any citizen in adjudicatory hearings held at the request of the respondent regarding any disputed issue of material fact or law arising from a compliance order or penalty assessment. Such adjudicatory hearings are held by an ALJ with the DAL. LDEQ also publishes notice of each proposed settlement of a State enforcement action on its public Web site at least 45 days prior to final action on the proposed settlement, and, as a condition to settlement, requires respondents to publish notice of the proposed settlement in a newspaper of general circulation in the parish in which the violations occurred at least 45 days prior to final action.

Although LDEQ does not provide specific notice to the public of the request for an adjudicatory hearing by the applicant in regard to permit issuance or by the respondent in regard to an enforcement action, neither the CWA nor implementing federal regulations require it to do so. However, it is easy enough for persons interested in a particular permit or enforcement matter (the existence of which is widely publicized by LDEQ) to find out if a hearing has been requested, granted or scheduled by contacting the Legal Affairs Division at LDEQ or the DAL.

Comment 3: Timely permit issuance requires consistent additional funding.

Discussion by Commenter: Allowing facilities to operate without a valid discharge permit is a violation of the CWA Section 301(a). Even so, Louisiana regulations currently authorize a facility that submits an application at least 180 days before the permit expires to continue operating until LDEQ can reissue the permit. The 2002 Audit revealed that ''these continuations may result in DEQ not reissuing permits for several years.'' As of January 2001, 54% of major water permits and 10% of minor water permits were expired.

The Revised MOA requires that LDEQ reissue all expiring permits ''as close as possible to their expiration dates,'' and that LDEQ may not modify any continued permit. However, the problem remains that many facilities are illegally discharging into the waters of Louisiana without a permit. These facilities may be subject to an enforcement action for these violations. Thus, both the regulated community and the public have an interest in ensuring that LDEQ issue permits before they expire.

LDEQ revised its LPDES Permit Issuance Strategy (''Permit Issuance Strategy'') on April 30, 2003. It provided $1.49 million in federal grant money for the 2003 fiscal year to pay for EPA contract support to assist with permit issuance. According to the report, as of May 1, 2003, 244 major facilities exist in Louisiana, and 95 of those permits are backlogged. The plan reports LDEQ will have no major permit backlog by the end of 2005. Of the 1637 minor facilities in Louisiana, 869 are operating under a current permit—332 are expired but continued, and 446 have unknown status. LDEQ projects it will have a minor permit backlog of 9.5% by the end of 2005. EPA considers a level of less than 10% expired permits to be indicative of a well-maintained program. Further, in a July 30, 2003, letter to Region 6, LDEQ reported that it had met or exceeded performance measures for permit issuance from January 1 through July 30 of 2003. This is excellent progress. However, LDEQ must reach a point where it can handle its permitting workload without relying on federal grants. Without a long-term budgetary solution, LDEQ will once again have a backlog.

EPA's approval must therefore be conditioned on assurance of adequate funding of LPDES, for example, (1) a program of permit fees adequate to cover the program's administration or (2) the Governor's adherence to a specific and signed commitment to seek a specific minimum level of funding for LPDES that EPA concludes, based on analysis in the record, is adequate for a well-maintained program.

EPA Response: LDEQ's LPDES program receives the bulk of it's funding (83%) from the States' Environmental Trust Fund. The Environmental Trust Fund receives it funding from permit fees and administrative penalties. Thirteen percent of funds that support the LPDES program are from the Federal 106 Grant Program. The commentor notes that LDEQ has made excellent progress for permit issuance from January 1 through July 30 of 2003, and further states that LDEQ must reach a point where it can handle its permitting workload without relying on federal grants. In the first quarter of calendar year 2003, EPA and LDEQ agreed that in order to document that the State had the capabilities to administer the LPDES program, that LDEQ would issue 35 major and provide coverage for 300 minor individual permits for calendar year 2003. All work on the permits was to be completed by LDEQ staff. Contractor drafted permits were not included in the count. For calendar year 2003, LDEQ drafted and issued 36 major permits and provided coverage for 382 individual minor facilities. Coverage for 236 of the minor permits were provided by individual permits and the remaining permits (186) were provided coverage under general permits. All of this was completed without contractor support.

In calendar year 2004, LDEQ continues to make excellent progress in its permit issuance. As of August 2004, LDEQ has a major individual permit universe of 254 permits of which 84% are current and a minor permit universe of 6042 (individual and non-storm water general permits) of which 92% are current. LDEQ's overall backlog rate for individual majors, minors, and non-storm water general permits for August is 8%. Only one state in Region 6 has a better overall permit issuance rate. LDEQ has committed to issuing 60 individual major and 300 individual minor permits for calendar year 2004. Of the 28 major permits and 303 minor permits issued so far in calendar year 2004, six major permits and 39 minor permits were written by a contractor.

Comment 4: EPA must ensure that LDEQ regularly inspects permitted facilities.

Discussion by Commenter: La. R.S. 30:2012 provides that ''[e]very permit shall as a matter of law be conditioned upon the right of the secretary or his representative to make an annual monitoring inspection and, when appropriate, an exigent inspection of the facility operating thereunder.'' However, the 2002 Audit found that LDEQ failed to inspect 4 percent of permitted major facilities in fiscal year 2000 and 2001, as well as 31% of minor permitted facilities.

Section 5.3 of the Program Description requires regional Surveillance Division personnel to conduct routine inspections of permitted major and minor discharges via unannounced visits in accordance with the NPDES Compliance Inspections Manual and LDEQ Standard Operating Procedure (SOP) #1108. It also lists six factors that determine the frequency of inspections. These factors are (a) facility compliance history; (b) facility location; (c) potential environmental impact; (d) operational practices being steady or seasonal; (e) grant or funding commitments made by LDEQ; and (f) any other relevant environmental, health, or enforcement factors. In addition, the Revised MOA requires the Louisiana Compliance Monitoring Strategy be submitted to EPA annually, and it will list major and minor permittees to be subject of state compliance inspections. This is a good improvement. However, inspections are essential to proper enforcement of the CWA, and thus EPA oversight is crucial to ensuring that LDEQ is conducting inspections properly and in a timely manner.

EPA Response: EPA does not believe that the regulations define, with no flexibility, a precise number or type of inspections that must occur. Rather, the regulations in 40 CFR 123.26(e)(5) require States to show that they have ''procedures and ability'' to inspect all major dischargers and all Class I sludge management facilities, where applicable. Thus, the regulations require a showing of capacity and a commitment to a level-of-effort for inspections, reserving discretion to the two sovereign governments to decide what number of inspections to undertake, and the identity of the facilities to be inspected. These judgments are matters of enforcement discretion, and under this discretion, EPA and LDEQ have agreed, and

included commitments in the Annual Performance Partnership Grant Agreement, that LDEQ will inspect 90% of the Major, 92–500 Minor, and Significant Minor facilities annually. It was also agreed that the significant minor definition would be determined and agreed upon, by EPA and LDEQ, prior to the beginning of each inspection year. For the current inspection year, beginning 7/1/04, the significant minor universe has been determined to represent the Total Environmental Solutions, Incorporated (TESI) facilities included in the Consent Decree (approximately 172 facilities).

There is not a specific targeting strategy utilized in selecting the facilities to be included in the 90%, because the number represents the majority of the facilities in the universe, and because LDEQ considers the 90% to be a hedge on perfection, due to the fact that the intent is to inspect 100%. Based on evaluation of data for the last inspection year, beginning 7/1/03 and ending 6/30/04, EPA determined that LDEQ conducted inspections at 98% of the Major and 92–500 Minor facilities. In the future, because of national priorities, the percentage may be reduced, and at that time, factors for selection will be considered, such as environmental harm, location, and compliance history. In addition to meeting and exceeding the commitments agreed in the Annual Performance Partnership Grant Agreement, LDEQ has also conducted inspections at nearly 3,000 facilities, covered by Minor or General Permits, during each of the last three inspection years. LDEQ plans to inspect all of the general permit sewage treatment plants every 3 years. Currently, there are more than 4000 of these facilities. LDEQ has also implemented a Regional Circuit Rider Approach, which results in the issuance of a Notice of Deficiency (NOD) accompanied by an Expedited Penalty Agreement of up to $3,000 for minor violations. Noncompliance with the NOD will result in a referral to Enforcement for further action.

Although EPA believes that LDEQ is currently conducting inspections properly and in a timely manner, EPA, as part of its oversight role, will continue to monitor the state's inspection program through oversight audits and review of information submitted by LDEQ.

Comment 5: Neither Region 6 nor LDEQ has established a timeframe for completing enforcement actions.

Discussion by Commenter: The LPDES Program Description provides that the Surveillance Division is responsible for referring inspections or investigations that result in findings of areas of concern to the enforcement division within 30 working days. However, LDEQ has not established a mandated timeframe for completing enforcement actions, or for obtaining the information it needs to bring an enforcement action. This process alone can take weeks, months or years. Although every enforcement action presents its own facts and circumstances, LDEQ should establish a definitive timeframe for bringing enforcement actions. In the past, as many as 80% of water enforcement actions were entered over 150 days after the violation occurred.

EPA's approval must therefore be conditioned on LDEQ's adherence to a written schedule (and reporting obligation) that will show by 2008 that at least 80% of LDEQ's water enforcement actions are brought within (1) 60 days of an inspection uncovering violations and (2) 150 days of a violation.

EPA Response: Section I.C. of the MOA indicates that the state has primary responsibility for implementing the LPDES program in accordance with the MOA, specified sections of the CWA, applicable state legal authority, applicable requirements of 40 CFR, applicable federal regulations, the Multi-Media/Multi-year Enforcement Memorandum of Understanding and the annual Performance Partnership Grant. LDEQ has the primary responsibility to establish LPDES program priorities with consideration of EPA Region 6 and national NPDES goals, and objectives. The Enforcement Response Guide (ERG), included in the referenced Enforcement Actions SOP #1215, is consistent with the EPA ERG and provides a guide to be used for selecting the most appropriate response or set of responses to instances of noncompliance.

The annual Performance Partnership Grant referenced in the MOA establishes timeframes for responses to specific activities/commitments. This agreement requires that the state identify and initiate enforcement action for majors, 92–500 minors and significant minors with inspection deficiencies within 90 days of the date which enforcement receives the inspection report. It also specifies that LDEQ identify and initiate enforcement actions for identified violations for the same classes of facilities within 90 days of receipt of the Discharge Monitoring Report (DMR). Based on the facility reviews conducted during the most recent EPA site visit, and review of information received at EPA during the year, it has been determined that in the majority of the instances, where the inspection noted areas of concern, actions were issued within an average of 20 days. It was also noted that in many of the instances where a warning letter was issued as the initial action, there was a follow-up enforcement order issued within 60 days, escalating that initial action. Instances of significant non-compliance are addressed within the timeframes established in the oversight guidance. Isolated instances of non-compliance may not merit a formal enforcement action when the violation occurs. However, when these isolated instances are combined with inspection violations or other instances of non-compliance, action may be warranted in accordance with the ERG. For example, an isolated violation, which occurs in January, may not merit a Formal Enforcement Action until detection of a subsequent violation and/or inspection deficiency, which perhaps occurs in May.

Comment 6: LDEQ must collect the penalties it assesses.

Discussion by Commenter: The 2002 audit revealed that LDEQ had not collected nearly $4.5 million, equaling 75% of the monetary penalties assessed in 1999, 2000, and 2001 fiscal years. SOP #1215 provides that an enforcement action may be made executory ''if violations continue after issuance of a final enforcement action, or if a final penalty action is not paid.'' It further provides that ''the Legal Division has a goal that all enforcement cases should be brought to final resolution within 12 months of the Legal Division's acceptance of the case.'' However, neither the Revised MOA, the Program Documents, nor SOP #1215 provide assurances that LDEQ will pursue the penalties they have assessed, much less recover them. Proper inspection, timely enforcement and aggressive penalty collection motivate industry to comply with the CWA. If any of these elements are lacking, the deterrent effect of penalty assessment is lost.

EPA's approval must therefore be conditioned on LDEQ's adherence to a written schedule (and reporting obligation) that will show by 2008 that at least 80% of LDEQ's water penalty assessments are collected within 60 days of becoming final and collectable.

EPA Response: LDEQ maintains that the data presented in the 2002 legislative audit is not an accurate representation of the actual figures. The audit's figures include several categories of monies not actually owed to LDEQ. For instance, the difference between the cash component in finalized settlement agreements and the appealed penalty assessments, which are associated with

the settlements, are not owed to LDEQ. Penalty assessments under appeal are not considered final enforcement actions and thus are not owed to LDEQ, until the appeal process has been completed. LDEQ maintains that removing monies not actually owed to LDEQ from the ''uncollected penalties'' calculation would significantly lower the uncollected amount for all media.

Regardless of what the actual figures are, LDEQ has committed to aggressively pursue collection of all penalty dollars, including, if necessary, going to court to obtain judgment for those penalties that remain unpaid after a reasonable period of time. As a result, EPA does not believe it is necessary to require LDEQ's adherence to the written schedule suggested by the commenter. However, as a part of its statutorily mandated oversight of the LPDES program, EPA will continue to monitor LDEQ's enforcement program, including its assessment and collection of penalties, for consistency with the CWA and other applicable federal regulations, guidance and policies.

Comment 7: LDEQ must provide accurate and accessible information on compliance status.

Discussion by Commenter: For several years, LDEQ has failed to keep sufficient records as to self-monitoring reports, has maintained inaccurate compliance status information, and has lost or misfiled important documents. In addition, in its 2003 mid-year review of LDEQ, the EPA noted that ''the Electronic Document Management System (EDMS) remains problematic for public retrieval and review of LPDES permits and supporting materials. The database contains voluminous amounts of information and the poor indexing of materials and files containing misfiled information makes the system difficult for the public to use.'' During the review, EPA noted that ''the EDMS was too cumbersome to complete the file review because documents were not correctly indexed.''

Revised MOA IV.B.1 requires LDEQ to conduct ''timely and substantive reviews and keep complete records of all written materials relating to the compliance status of LPDES permittees.'' Required records include Compliance Schedule Reports, DMRs, Compliance Inspection Reports, and any other report required by the permit. Revised MOA IV.B.1.a further requires LDEQ to operate a system to determine if the self-monitoring reports are submitted, submitted reports are timely, complete and accurate, and that permit conditions are met.

In order to meet these requirements, LDEQ has prepared SOP #1453 governing the Permit Compliance System (PCS), which is a national database of NPDES information. The goals of this system are to ensure the accuracy, timeliness and completeness of all submissions. Improved accuracy, timeliness and completeness of submissions are vitally important. However, LDEQ must also ensure that the public is able to access this information. Importantly, LDEQ has committed to enter data which it deems appropriate, and that the decision will be made without public input. Therefore, citizens may be deprived of important data regarding the compliance of industrial and municipal facilities.

To improve public access, LDEQ should promptly allow online access to information. EPA's approval must therefore be conditioned on (1) LDEQ's immediate inclusion of full copies of current and future DMRs and other records of compliance in its electronic, searchable (currently ''EDMS'') records management system, (2) LDEQ's inclusion of WENDB data elements; (3) LDEQ's adherence to a schedule for providing online public access to CWA compliance records by August 2005.

EPA Response: During the most recent Enforcement Program Review which was conducted June 2004, EPA staff noted significant improvements in the process for utilizing the EDMS at LDEQ. It appears that the continuous analysis and revisions being made to the system have been beneficial. LDEQ has enhanced the indexing system which provides more descriptive information for the documents in the system. While attempting to locate documents in the system, it was noted that documents included an additional description, which was helpful in the identification process. The percent of documents located during this review was found to have improved by 46% for minor facilities and 38% for major facilities from the March 2003 review. There were no documents found to be imaged under the incorrect identification number for the files included in the search. Because of the fact that DMRs are produced on a type of paper that does not scan well, those documents are maintained as paper records in files onsite. These documents were readily available and were found to be filed under the correct record numbers. The program documents require only that the state maintain adequate public files for each permittee at the central office and must be accessible to EPA and the public. Instructions for the various request options for access to public records are available on the LDEQ Web page (*publicrecords@la.gov*).

Under the Program MOA, LDEQ is committed to enter all permit related and enforcement WENDB data into the National PCS for all Major, 92–500 Minor and Significant Minor facilities. Significant Minors are identified as those minor facilities mutually agreed upon by both EPA and LDEQ and identified in the Annual State Program Performance Partnership Grant.

Comment 8: LDEQ must provide public notice for all permit applications it receives.

Discussion by Commenter: LDEQ should issue public notices for *all* permit applications it receives, not just for major facilities and general permits. This enables citizens to be informed of all the sources of pollution in their area and gives them an opportunity to provide input during the permitting process.

EPA Response: LDEQ meets or exceeds EPA's public participation requirements in its permitting program. LDEQ must demonstrate to EPA that it can carry out the NPDES program and that state requirements are at least as stringent as the federal requirements. LAC 33:IX.2415.C.2 was patterned after the federal regulations. Federal regulations require that draft major permits undergo public noticing in a newspaper and go through a comment period. Louisiana regulations are further interpreted to extend this requirement to include minor permits, making Louisiana regulations more stringent than the federal requirements. In addition, the Program Description and LDEQ SOPs include requirements for issuing public notice in a newspaper for both major and minor individual draft permits.

Comment 9: EPA must take prompt action if LDEQ fails to abide by the Revised MOA or the Program Description.

Discussion by Commenter: We acknowledge that LDEQ has made significant improvements in its administration of the LPDES. We also believe that LDEQ's current Secretary and Deputy Secretary have demonstrated a sincere desire to run a professional, well-maintained program. Nonetheless, each of the problems discussed above has existed since 1996, when EPA first authorized Louisiana to administer the LPDES program. The citizens of Louisiana are therefore being asked to wait for LDEQ to catch up, while facilities continue to operate with expired permits, to violate their effluent limits, and to illegally impair the waters of the State of Louisiana. Given the pervasive nature of these problems and the significant efforts required to remedy them, the EPA should exercise

strong oversight over LPDES until LDEQ has demonstrated that it has the regulatory and legal structure and funding necessary to administer the program in full compliance with the CWA and has established a track record of running a well-maintained program.

EPA Response: It is the intent of EPA to take prompt action if LDEQ does not meet its commitments in the MOA. EPA will continue its oversight and review of the LDEQ water permitting and enforcement programs at the mid-year and end-of-year reviews of the Performance Partnership Grant program. Twice each year, EPA reviews the commitments made by LDEQ and the progress on those commitments in the water permitting and enforcement programs. If EPA determines that adequate progress is not being made in the water program, in line with the LDEQ program commitments and the MOA, EPA will work with LDEQ on appropriate actions to correct noted deficiencies.

Comment 10: III.D. Permit Reissuance: This section contains language that reads ''in no event will permits that have been administratively continued beyond their expiration date be modified.'' American Electric Power (AEP) requests that EPA clarify that this language is only applicable to ''major modifications'', and is not applicable to ''minor modifications'' as defined in 40 CFR 124.5 and 122.63 (specifically applicable to NPDES permits).

Discussion by Commenter: AEP contends that in some cases the state may not process a permit application within the prescribed processing period (minimum of 180 days prior to the expiration date of the permit). AEP believes the permittee (applicant) should be allowed to have minor modifications accommodated by the permitting authority without having to re-apply and/or re-initiate the public participation process via re-noticing of the application. As such, AEP recommends that the draft language be modified to ''in no event will permits that have been administratively continued beyond their expiration date be allowed to incorporate major modifications without formal modification of the application and re-initiation of the public participation process. Upon consent of the permittee, the Director may allow minor modifications to these permits.''

EPA Response: 40 CFR 122.46 and LAC 33:IX. 2365 state that the effective term of a permit shall not exceed five years and shall not be extended by modification beyond the five year period. LAC 33:IX. 2321, and 40 CFR 122.6 list two causes to administratively extend a permit beyond its expiration date, (1) the permittee has submitted a timely and complete application prior to the expiration date of the permit and (2) through no fault of the permittee the permitting authority has not reissued the permit. Permits continued in this manner remain fully effective and enforceable. To modify a permit that has been administratively continued would, in affect, be extending the permit beyond the specified period.

Comment 11: It should be made clear that information appropriately declared ''proprietary'' by the permittee cannot be released to the public.

Discussion by Commenter: Section II.A.5 reads as follows: LDEQ will remain in compliance with federal right to know statutes and Louisiana public records law, while protecting sensitive information. Material containing security procedures, criminal intelligence information pertaining to terrorist-related activity, or threat or vulnerability assessments created, collected, or obtained in the prevention of terrorist-related activity, including but not limited to physical security information, proprietary information, operational plans, and the analysis of such information, or internal security information is not required to be disclosed under an exemption in the Louisiana Public Records Law (La. R.S. 44:3.1)

Although the exempted material is not regarded as public record, there is no prohibition from releasing the material. LDEQ will consider the merits of each request on a case-by-case basis while striving to achieve balance between the public's right to know, security issues, and applicable federal and state statutes.

The next to the last paragraph of this section as referenced above, describes several types of information that might be collected by the agency but are not *required* to be disclosed. The listing of information includes ''proprietary information''. The next paragraph states that though the above mentioned material is not regarded as public record, it can be released at the discretion of the LDEQ.

EPA Response: The commenter is correct that information properly claimed as proprietary by the permittee will not be released to the public, provided the Secretary of LDEQ makes the determination that confidentiality is necessary to ''[p]rotect trade secrets, proprietary secrets and information, and commercial or financial information.'' La. R.S. 30:2030. However, La. R.S. 30:2074(D)(7) and LAC 33:IX.2323 specify that no claim of confidentiality will be accepted for certain categories of information associated with LPDES permit applicants or permittees, including all information required by the permit application, the permit itself, and any effluent or discharge data.

Comment 12: There should be no reason, other than those currently in the regulations, to limit the ability to modify a permit that is legally active. This restriction on the permitting agency (LDEQ) is beyond the authority given the EPA in either statute or promulgated regulations. It can only result in hardship on the permit holder with no environmental benefit.

Discussion by Commenter: Section III.D. reads as follows: All expiring permits shall be reissued as close as possible to their expiration dates. In no event will permits which have been administratively continued beyond an expiration date be modified. The LDEQ may use the flexibility allowed in EPA's Permitting for Environmental Results Initiative (August 15, 2003) to account for and to prioritize these facilities that remain in the backlog. LDEQ plans to utilize the approved Permit Issuance Strategy as its guide for permit issuance, and will update/revise the strategy yearly to reflect ongoing permit issuance goals.

This section prohibits modification of a permit that has been administratively continued beyond its expiration date. It has been our experience that permits may be administratively extended for some time. Awaiting the often lengthy time necessary for a complete re-issuance of an expired permit but continued permit when a modification is needed could result in substantial conflict with business timing or our ability to continue compliant operations under changing conditions. The relevant section of Louisiana Title 33 Section 309 reads: C. If the applicant submits a timely and complete application pursuant to LAC 33:IX.309.A, and the department, through no fault of the applicant, fails to act on the application on or before the expiration date of the existing permit, the permittee shall continue to operate the facility under the terms and conditions of the expired permit which shall remain in effect until final action on the application is taken by the department. If the application is denied or the terms of the new permit contested, the expired permit shall remain in effect until the appeal process has been completed and a final decision rendered unless the secretary finds that an emergency exists which requires that immediate action be taken and in such case any appeal or request for review shall not suspend the implementation of the action ordered.

Permits continued under this Section remain fully effective and enforceable.

EPA Response: 40 CFR 122.46 and LAC 33:IX. 2365 state that the effective term of a permit shall not exceed five years and shall not be extended by modification beyond the five year period. LAC 33:IX. 2321, and 40 CFR 122.6 list two causes to administratively extend a permit beyond its expiration date, (1) the permittee has submitted a timely and complete application prior to the expiration date of the permit and (2) through no fault of the permittee the permitting authority has not reissued the permit. Permits continued in this manner remain fully effective and enforceable. To modify a permit that has been administratively continued would, in affect, be extending the permit beyond the specified period.

Petition To Withdraw LPDES Program

On October 9, 2001, a petition for withdrawal of the CWA NPDES program authorization for the State of Louisiana was filed by the Tulane Environmental Law Clinic on behalf of the Louisiana Environmental Action Network, Louisiana Audubon Council, Gulf Coast Restoration Network, Association of Community Organizations for Reform Now, Lake Pontchartrain Basin Foundation, CFACT, Lake Maurepas Society, Concerned Citizens of Livingston Parish, St. John Citizens for Environmental Justice, Louisiana Communities United and Concerned Citizens of Iberville Parish. Supplements to the October 9, 2001, petition were filed on December 19, 2001, February 22, 2002, and September 17, 2002.

The petition, as supplemented (''the Petition''), alleges that the State of Louisiana is not administering the LPDES program in accordance with the CWA, 40 CFR part 123 or the MOA signed by EPA and LDEQ upon program authorization. Specifically, the Petition alleges:

(1) Deficiencies in the States's permitting program, including insufficient statutes and regulations to ensure meaningful public participation, lax procedures for identifying point sources and a large backlog of expired permits;

(2) Deficiencies in the State's compliance monitoring system, including insufficient record keeping regarding self-monitoring reports, inaccurate and inaccessible information on compliance status, inadequate compliance inspections and inadequate guidance to the regulated community;

(3) Deficiencies in the State's enforcement program, including failure to timely identify NPDES violations, failure to bring enforcement actions sufficient to deter future violations, failure to issue timely enforcement actions, failure to assess and collect penalties, improper use of beneficial environmental projects (BEPs) and failure to comply with the requirements for public participation in the enforcement process;

(4) Deficiencies in the State's records management; and

(5) Deficiencies in the State's legal authority, including an inability to appeal permits altered by the administrative review process and a failure to promulgate new authorities necessary to comply with the requirements of NPDES authorization.

Based on these allegations, the Petition requests that EPA initiate formal proceedings to withdraw the LPDES program under Section 402(c)(3) of the CWA and 40 CFR 123.64(b), including a public hearing as provided for under those sections.

In response to the Petition and in accordance with 40 CFR 123.64(b), EPA staff conducted an informal investigation of the allegations in the Petition to determine whether cause exists to commence withdrawal proceedings. EPA's informal investigation included on-site reviews of LPDES files, interviews with LDEQ management and staff, and an evaluation by EPA staff of information and data concerning program implementation provided in writing to EPA by LDEQ. The data collected as a result of the informal investigation supplemented the large body of information already in EPA's possession as a result of EPA's ongoing statutory oversight responsibilities with respect to the LPDES program. Simultaneous with EPA's informal investigation under 40 CFR 123.64(b), former Governor M.J. Foster, Jr. convened a special Governor's Task Force to review the administration of the LPDES program, also in response to citizens' concerns.

Both the multi-stakeholder Task Force created by Governor Foster, and EPA, through performance of its general oversight duties and through its informal investigation, found weaknesses in LDEQ's operation of the LPDES program. The Governor's Task Force shared its findings in recommendations to the Governor for improvements in the State program. EPA worked directly with LDEQ in the development of a list of seven performance measures aimed at addressing both EPA's and the citizens' concerns. These seven performance measures, which were forwarded to Governor Foster in a February 14, 2003, letter from EPA Assistant Administrators for the Office of Water and the Office of Enforcement and Compliance Assurance, identified specific actions to be performed by LDEQ within specified time frames in the areas of NPDES permitting and enforcement. The actions included drafting and issuing a specified number of permits, improving public access to LDEQ files, clarifying certain requirements under LDEQ's Penalty rule and its BEP rule, clarifying and implementing procedures in regard to LDEQ's unilateral enforcement actions, revising all LPDES program authorization documents and providing a legal opinion from LDEQ counsel and the Louisiana Attorney General's Office regarding the State's ability to enforce penalties against municipalities. Further discussion of the Performance Measures and the various changes made to the LPDES program can be found in EPA's **Federal Register** notice of the revised LPDES program authorization documents, 69 FR 50199, August 13, 2004.

By letter dated May 12, 2004, EPA Regional Administrator Richard Greene informed the Governor of Louisiana that LDEQ had successfully completed all seven performance measures. EPA is greatly encouraged by the timely completion of these performance measures and by the State of Louisiana's renewed commitment to making its NPDES program as strong and effective as any in the Country. In June, 2004, EPA staff performed a follow-up review of LDEQ's administration of the LPDES program in order to assess LDEQ's implementation of the processes and procedures outlined in the revised LPDES program authorization documents. As a result of that review, EPA staff determined that LDEQ was implementing the changes agreed to as a result of the performance measures and that the agency's administration of the LPDES program showed marked improvement.

EPA has concluded our informal investigation of the allegations in the Petition and determined that cause does not exist to initiate program withdrawal proceedings. The criteria for responding to citizens' petitions for withdrawal of state NPDES programs are set out in 40 CFR 123.63. These criteria relate generally to the State's legal authorities, program administration and enforcement activities (see 40 CFR 123.63(a)(1)–(3)), as well as other components. Those criteria are general in nature and vest EPA with discretion in deciding whether cause exists to commence proceedings to withdraw a state's NPDES authority. For example, 40 CFR 123.63(a)(3) states that the

Administrator may withdraw program approval when the state's enforcement program fails to comply with the requirements of 40 CFR part 123, including (i) failure to act on permit or other program violations, (ii) failure to seek and collect adequate penalties, and (iii) failure to inspect and monitor regulated facilities. However, Federal regulations do not specify with any precision the number of times a state must, for instance, fail to act on permit or other program violations before NPDES authority should be withdrawn. Rather, the CWA and the regulations vest EPA with substantial discretion to determine whether a State is failing to meet minimum federal requirements. The structure of the CWA provides for primary NPDES authority to rest with the states, and Congress intended for EPA to exercise its oversight capacity in furtherance of appropriate State regulations of point source discharges under Section 402(b). With no bright line separating an insufficient program from a sufficient one, EPA must use its discretion to determine if the particular actions or inactions of an NPDES authorized state fall within a range of what EPA considers acceptable under the CWA and 40 CFR part 123.

In certain areas identified in the Petition, EPA concluded that improvements were warranted in the State's administration of the program. These areas related primarily to recordkeeping, data management and compliance and enforcement. The State has made substantial improvements in these areas. EPA is continuing to work with Louisiana, as EPA works with all State NPDES permitting authorities, to achieve ever greater levels of environmental protection. However, as the program now stands, EPA has concluded that the LPDES program is within the range of NPDES program practices required under the CWA and 40 CFR part 123, so that withdrawal proceedings are not an appropriate response.[1]

Thus, EPA has determined that cause does not exist to commence formal withdrawal proceedings under 40 CFR 123.64(b). EPA will continue to monitor the State's program, both through routine oversight procedures, as well as through special national initiatives such as the Permitting for Environmental Results (PER) program. If any additional concerns are noted in the State's LPDES program as a result of this oversight, they will be addressed at that time.

FOR FURTHER INFORMATION CONTACT: Ms. Diane Smith, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665–7191, or via e-mail to the following address: *smith.diane@epa.gov*.

Conclusion

After evaluation of the comments and other information related to this **Federal Register** notice regarding the revision to the LPDES program authorization, I hereby provide public notice of the approval for the State of Louisiana to administer, in accordance with 40 CFR part 123, the LPDES program and denial of the petition for EPA to withdraw LDEQ's authorization to administer the LPDES program.

Dated: December 28, 2004.

Richard E. Greene,

Regional Administrator, EPA Region 6.

[FR Doc. 05–178 Filed 1–4–05; 8:45 am]

BILLING CODE 6560–50–P

[1] EPA's record for this decision contains a ''Crosswalk'' between the specific allegations in the Petition and EPA's findings in regard to each allegation. To receive a copy of this Crosswalk, please contact Cathy Gilmore at (214) 665–6766 or Renea Ryland at (214) 665–2130.

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

December 22, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 7, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1072.

Title: Digital Channel Election Form: Third Round Election, FCC Form 386.

Form Number: FCC Form 386.

Type of Review: Extension of a currently approved collection

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 85.

Estimated Time per Response: 2–5 hours.

Frequency of Response: One-time reporting requirement.

Total Annual Burden: 173 hours.

Total Annual Cost: $86,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On September 7, 2004, the FCC released the Report and Order, In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03–15, FCC 04–192, which implements several steps necessary for the continued progress of the conversion of the nation's television system from analog to digital (DTV) technology. The Order established the timing and procedures necessary to determine the post-transition core channels on which digital stations will operate, to be specified in a new Table of Allotments to be issued by the Commission. The Order implements a multi-step channel election process which starts with licensees/permittees filing certain pre-election certifications on FCC Form 381. Television broadcast licensees and permittees that have not received a tentative channel designation by the third round in the channel election process will use FCC Form 386 to make