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August 2, 2016

Office of Wastewater Management
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, 4203M
Washington, DC 20460

Via regulations.gov:

Docket ID No. EPA-HQ-OW-2016-0145

Re: National Pollutant Discharge Elimination System (NPDES) Application and Program Updates

The Association of Clean Water Administrators (ACWA, hereafter also referred to as the “states”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act (CWA), including the National Pollutant Discharge Elimination System (NPDES) program and related compliance and enforcement activities. Forty-six states have been authorized to directly implement the NPDES program and two others are exploring the authorization process. ACWA appreciates the opportunity to comment on the proposed rulemaking for the *National Pollutant Discharge Elimination System Application and Program Updates* (hereafter referred to as the NPDES Updates Rule).¹

In general, ACWA supports the Environmental Protection Agency (EPA) periodically updating and modernizing the federal NPDES regulations to eliminate application form inconsistencies, improve transparency, and remove outdated provisions. States also support EPA's efforts to provide NPDES permit writers with improved tools and to provide the public with opportunities for public participation in permitting actions. States acknowledge that some of the proposed provisions will accomplish the above goals. However, ACWA also believes several of the provisions articulated in this proposal would undermine historical flexibilities and create new challenges for states, including increasing state administrative burden. Likewise, ACWA is disappointed EPA did not take full advantage of the numerous opportunities ACWA provided to have in-depth conversations about a number of the provisions in this proposed rule. We believe the proposed rule likely could have been improved by a very deliberate, comprehensive, and collaborative discussion process.

¹ NPDES Application and Program Updates, Proposed Rule, 81 Fed. Reg. 31344-31374 (May 18, 2016).

General Observations

The NPDES program has achieved significant reductions in pollutant loads since it was established by the Clean Water Act (CWA) in 1972, and has resulted in substantial improvement to the water quality, even as the number of permitted facilities has greatly increased and federal investment in the program has remained steady or declined. Over the last four decades the number of sources requiring permits has increased from 50,000 to over 700,000.² Along with this growth, EPA continues to refine the rules by updating effluent guidelines aimed at removing greater amounts of pollution to achieve incrementally smaller improvements in water quality.

Increased regulatory complexity requires greater environmental, economic, and engineering analyses. A more robust Total Maximum Daily Load (TMDL) program has also added to the NPDES program workload, driving up the costs and staff resources to issue a permit. Furthermore, fact sheets are commonly much more detailed and the permit renewal process can be protracted. Several states have backlogs of expired permits, at least in part the result of the ever-increasing list of new requirements. That said, even with all of the new expectations, compliance rates in many states have improved over the years, and remaining noncompliance for point sources is notably overshadowed by the water quality impacts from nonpoint sources.³ The cumulative effect of all of these new and increasingly complex requirements should not go unnoticed. States and EPA should be working together to maintain the current progress, avoid future declines in water quality, and invest in those program areas where meaningful water quality benefits can be achieved.

While EPA has taken the position that these proposed revisions would generally not result in new or increased workload for authorized states, ACWA does not believe this is, in fact, the case. There are several aspects to the proposed rule changes where states anticipate more, and not less work result from the proposed rule changes. For example, significantly longer and more detailed fact sheets require substantially more resources from delegated state programs in their development and review. Additional data acquisition and analysis required in developing permits (e.g. additional data for reasonable potential analysis, ambient water quality data for mixing zones, etc.) in fact do require substantially greater resources allocations to these efforts by authorized programs. Likewise, all of the potential extra requirements EPA is considering that could come attached to publishing draft permits on the web have resource implications. Responding to EPA objections or other actions regarding administratively continued permits has very substantial resource implications for authorized states.

Over the last few years, states' permitting processes have become much more efficient as staffing and total program funds have decreased and federal requirements have increased. Nonetheless, nearly all states have had to prioritize permit workloads. Under current staffing levels, it would be unrealistic to assume that *all* of the relatively new water program rules can

² *Scope and Regulatory Framework of the NPDES Program*, <https://www.epa.gov/sites/production/files/2015-09/documents/scope-and-regulatory-framework-of-the-npdes-program.pdf> (last visited Aug. 2, 2016).

³ *Water Quality Assessment and TMDLs: National Summary of State Information: National Probable Sources Contributing to Impairments*, https://ofmpub.epa.gov/waters10/attains_nation_cy.control#prob_source (last visited Aug. 2, 2016).

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successfully be implemented without potentially increasing the permit backlog. Indeed, it is ACWA's understanding that there are currently 18,029 backlogged permits.⁴

This current proposed rule fails to acknowledge the cumulative impact of all the new NPDES program updates states have been asked to implement over the last few years, including new antidegradation requirements (which is just one of six (6) key program area modifications in the August 2015 Update of the National Water Quality Standards Regulation), §316 Cooling Water Intake Rule, the Steam Electric Rule, the NPDES Electronic Reporting Rule, pesticide permitting, the sufficiently sensitive methods rule, enhanced public notifications for Combined Sewer Overflows, the coal ash rule, the Concentrated Animal Feeding Operations Rule, and the soon to be finalized new Small Municipal Separate Storm Sewer System Remand Rule.

Recommendation 1: EPA should work closely with ACWA and the states to better understand potential administrative and operational resource impacts of this proposed rule and do a better job describing, analyzing, and mitigating resource implications associated with NPDES Updates Rule implementation.

Recommendation 2: EPA should state in the preamble that the agency does not expect any of the new finalized provisions to be immediately incorporated into state's permits and that states will be afforded opportunity to revise their statutes, revise their regulations/programs, and incorporate changes to permits as they come up for renewal but no sooner than two years after the effective date.

Proposed NPDES Updates Rule

There are two provisions in this proposed rule that states believe are helpful to have in regulation, are consistent with current NPDES program implementation, and are not likely to create significant new work for the permitting authority. These include:

1. Vessels Exclusion (40 CFR 122.3(a))
2. Best Management Practices (BMPs) (40 CFR 122.44(k)(4))

Recommendation 3: EPA should finalize these sections as proposed.

Purpose and Scope (40 CFR 122.1)

ACWA supports EPA's effort to remove the outdated provisions in this section. However, the association questions whether it makes sense to continue to provide specific contact information in a regulatory "note" that requires a rulemaking process to update. Perhaps EPA could find a more generic way to handle this issue or simply remove the note entirely.

⁴ *Percent Current Status - Major, Minor, and Non-Stormwater General Permit Covered Facilities*, https://www.epa.gov/sites/production/files/2016-05/documents/mid-year_fy2016_non-tribal_backlog_summary_report_card.pdf (last visited Aug. 2, 2016).

Recommendation 4: EPA should consider alternatives to updating a note with contact details that could need to be revised again in the near future.

NPDES Program Definitions (40 CFR 122.2)

EPA is proposing to revise the existing definition of WET to refer to both acute and chronic WET test endpoints. States agree that toxicity can include both acute and chronic endpoints, and that EPA's 40 CFR 136 approved test methods include procedures for both acute and chronic endpoints, and that for chronic testing the approved methods include procedures for both lethal and sub-lethal endpoints. However, chronic toxicity testing is not limited to life-cycle endpoints and could also be partial life-cycle or early life stage testing. States disagree that this regulatory definition change will have no effect on how states are required to express effluent limits for WET in permits. States are concerned that EPA will point to this regulatory definition to compel states to include sub-lethal endpoints in the expression of chronic WET effluent limits **in all cases**. While many states have permits that express chronic WET limits to include sub-lethal endpoints, states must retain discretion to express WET effluent limits as they interpret their state water quality standards for toxicity. Most state water quality standards for toxicity are narrative, and do not include prescriptive requirements for the level of protection be it acute versus chronic, and for chronic be it for lethal and/or sub-lethal endpoints. States are best suited to interpret their state water quality standards for toxicity and to determine how best to express effluent limits for WET.

Recommendation 5: ACWA suggests the following revision to the definition.
Whole effluent toxicity (WET) means the aggregate toxic effect of an effluent measured directly by a toxicity test, where the test results are based on acute and/or chronic endpoints.

EPA is proposing to revise the definition for "proposed permit." See discussion on the Objection to Administratively Continued Permits (40 CFR 123.44) section.

Recommendation 6: EPA should not revise the definition for "proposed permit."

Changes to Existing Application Requirements (40 CFR 122.21)

States agree with EPA that as the NPDES program has evolved, many existing application requirements and associated forms have become outdated with respect to current program practices. In particular, most states support the proposed updates to this section including the request for electronic mailing addresses, establishing an eighteen-month timeframe for Publicly Owned Treatment Works (POTWs) and non-POTWs to submit effluent information, increasing data age for permit renewal to 4.5 years, cooling water intake structure data, and the request for variance indicators.

Recommendation 7: EPA should finalize the updates noted above as proposed. EPA should also provide specific exceptions to the 4.5 year lookback where some of the data

is no longer relevant (i.e. permit renewal is occurring sooner than 4.5 years and/or operations have significantly changed).

Recommendation 8: EPA should clarify whether the start of the eighteen-month timeframe for POTW and non-POTWs to submit effluent information as beginning at the “commencement of discharge” in all locations.

While states appreciate the desire for consistency in latitude/longitude resolution, and the need to embrace a modern classification system such as the North American Industrial Classification System (NAICS), states are concerned with the potential for confusion and inconsistency. EPA should consider allowing states the option of reporting latitude and longitude in decimal degrees. Mapping websites frequently used by permittees to obtain latitude and longitude data in many cases use decimal notation. Converting to degrees minutes seconds (DMS) notation increases the risk of errors in a data element that is historically error prone. Applications should specify which format is required for the application while the CFR should provide flexibility by allowing both options. Furthermore, using decimal degrees reflects a more modern approach to GIS data management and states should not be penalized for selecting such a data standard.

Recommendation 9: EPA should work with states to develop a more strategic, phased-in approach (delayed effective date) for states and the agency to completely move over to NAICS.

Recommendation 10: Some states would like the option of using latitude/longitude in decimal point.

Several states indicated they were concerned with requiring the use of centroid facility location data for all facilities, except for POTWs and Treatment Works Treating Domestic Sewage (TWTDS) facilities, and would prefer to see this as an optional data field. In particular, these states believe the information can be fairly subjective and would prefer a uniform requirement utilizing front gate coordinates. At least two states requested clarification on how the pretreatment reporting requirements applying to both Significant Industrial Users (SIUs) and Non-Significant Categorical Users (NSCIUs), including trucked or hauled waste, might apply to state administered mini-pretreatment programs.

It should be noted that EPA’s Office of Water is claiming in this proposed rule that “several revisions included in this proposal are necessary in order to ensure the information required by the application forms across the different categories of facilities submitting applications is consistent with EPA’s current data standards and the NPDES Electronic Reporting Rule.” However, the NPDES Electronic Reporting Rule indicates that none of the data being collected was new and that it was already required under OW regulations. EPA should provide justification for each additional data field.

Recommendation 11: EPA should work with states to finalize some of the updates, ensuring the application updates are consistent with state data collection efforts already

underway *and* that a compelling business case can be made for each additional new data field.

Recommendation 12: EPA should ensure timeframes associated with developing or updating application forms are reasonable and not inconsistent with the timeframes articulated in the NPDES Electronic Reporting Rule.

Antidegradation Reference (40 CFR 122.44(d))

States are not opposed to EPA ensuring NPDES program consistency with the state antidegradation requirements established under 40 CFR 131.12. However, several states are still trying to figure out how best to implement the new antidegradation provisions. States expressed concern that the NPDES program updates, if not careful, could take away some of the flexibilities for antidegradation implementation originally envisioned in the Water Quality Standards Rule. The states also caution that the preamble and revisions should not imply that antidegradation is equivalent to the water quality based effluent limit.

Recommendation 13: EPA should ensure the proposed changes to 40 CFR 122.44(d) do not undermine the flexibilities envisioned and articulated in the August 2015 Water Quality Standards Rule.

Dilution Allowances (40 CFR 122.44(d))

States have expressed concerns with this provision as its potential impacts are unclear.⁵ For many states, these proposed changes may require that more water quality background data be collected to support permit decisions. Not all sites in a water quality monitoring network have been sampled in recent years due to the high cost and effort associated with sampling and analysis. While EPA has communicated the purpose of this update is to describe how states have dealt with background concentrations, several states expressed concern that this may create more pressure to gather additional data when dedicated resources for these updates are not being provided. States disagree with EPA's statement in the preamble indicating there would be minimal if any new costs associated with this rule's implementation.

Recommendation 14: EPA should plainly state that in the absence of data, zero concentration background assumptions can continue to be made as long as there are no relevant and readily available data indicating otherwise. Supporting data should be from state/federally recognized sources.

Recommendation 15: EPA should clarify that none of the changes to this section are intended to modify a state's current Quality Assurance/Quality Control (QA/QC) data

⁵ More than one state indicated they lack the information needed to accurately account for background data, especially for many of the toxics. Existing data sets for metals were compiled without using clean sampling techniques, thereby rendering much of the metals data inaccurate and inappropriate for use in a reasonable potential analysis. Even for parameters with sufficient data sets such as dissolved oxygen, modeling discharged BOD along with background DO would represent a significant increase in the amount of time needed to conduct the reasonable potential analysis.

analysis for determining which data can and cannot be used for decision making. Likewise, EPA needs to articulate in the rule that states will not be required to use third party data or compelled to respond to third party data submissions.

Recommendation 16: EPA should clarify how this provision would affect states whose water quality standards do not identify specific low flows for a particular pollutant (e.g., would the state have discretion to determine the flows used for mixing?).

Recommendation 17: EPA should reconsider the costs to the states and the regulated community associated with complying with the proposed language in this section.

Reasonable Potential Determinations for New Discharges (40 CFR 122.44(d))

Most states are generally not opposed to EPA articulating that a "reasonable potential" determination consider relevant qualitative/quantitative data, analyses, or other valid and representative information.⁶ States generally support EPA's proposal to require the use of relevant qualitative or quantitative data, analyses, or other valid and representative information for pollutants or pollutant parameters that could support the need for effluent limitations. It is not clear to many states how EPA intends for states to use qualitative data. States view reasonable potential analysis as a permitting authority responsibility, delegated to the states per the approved authorization process and EPA already has authority to object to permits that do not meet this regulatory standard. States that have approved procedures may wish to maintain those.

Recommendation 18: EPA should clarify exactly what is meant by qualitative data and also clarify that none of the changes to this section are intended to modify a state's current QA/QC data analysis for determining which data can and cannot be used for decision making. EPA needs to articulate in the rule that states will not be required to use third party data or compelled to respond to third party data submissions.

Recommendation 19: EPA should reconsider the costs to the states and the regulated community associated with complying with the proposed language in this section.

Anti-Backsliding (40 CFR 122.44(l))

EPA has indicated they are not taking comment on this section as the proposed revision to 40 CFR 122.44(l) will incorporate the existing statutory requirements for anti-backsliding into the regulations verbatim. However, it appears to ACWA that EPA may have inadvertently left off a clause, that for consistency's sake we would recommend the agency reincorporate. Likewise,

⁶ At least one state has expressed concerns with conducting reasonable potential analysis using surrogate data rather than actual effluent data. This state highlighted their very transparent process for establishing procedures for conducting reasonable potential analysis that are developed with stakeholder participation and approved by EPA. The state in particular was concerned that the use of surrogate data could significantly increase state workload as amended permits (once actual effluent data comes in) will need to go through a public participation/public hearing process.

more than one state noted that the current language in 40 CFR 122.44.44(l)(1) is both broader and more comprehensive than the statutory language found at CWA § 402(o)(1).⁷

Recommendation 20: In order to more closely mirror the statute, EPA should revise proposed 40 CFR 122.44(l)(3)(ii) and add back the phrase “For waters identified under paragraph 303(1)(A) of the Act, where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards...”.

Design Flow for POTWs (40 CFR 122.45(b))

Many States support EPA clarifying that permit writers are required to calculate permit effluent limits for POTWs using “design flow” where the limits are based on technology standards. However, in some cases permit effluent limits, standards, or prohibitions derived from technology-based requirements pursuant to 40 CFR 125.3(a)(1) do not need to be calculated, such as when 85 percent removal requirements and concentration-based effluent limits for Biochemical Oxygen Demand (BOD) and Total Suspended Solids (TSS) are applied. In such cases, the design flow of the facility does not inform development of the effluent limits. Only when deriving a mass-based limit, such as a mass-based loading limit that is being substituted for an 85 percent removal requirement does the design flow need to be used.

Recommendation 21: ACWA recommends the following regulatory language revision for 40 CFR 122.45(b) Production Based limitations. (1) “In the case of POTWs, when permit effluent limits, standards, or prohibitions derived from technology-based requirements pursuant to Section 125.3(a)(1) need to be calculated, they shall be calculated based on design flow.”

Recommendation 22: EPA should not make any revisions that would preclude a state from utilizing design flows for Water Quality Based Effluent Limits (WQBELs).

States believe this change provides additional flexibility yet still allows existing practices to be maintained.⁸ For example, states have utilized a variety of approaches in calculating WQBELs through practices for establishing design flow. The term design flow is not defined in the permit regulations and most states feel that the term should be interpreted on a state by state basis. Some states have requirements and engineering review procedures that formalize POTW design flows,

⁷ CWA §§402(o)(1) and 402(o)(2) only reference effluent limitations, yet 40 CFR 122.44(l)(1) references effluent limitations, standards, or conditions. While EPA claims to be proposing regulatory language intended to be consistent with, if not identical to, CWA statutory language, EPA’s current regulatory language on antibacksliding appears on its face to be broader than the statute.

⁸ A few states expressed concern that changes to 40 CFR 122.45(b) would result in a more complicated permitting process, requiring additional dedicated resources. At least two states see value in defining “design flow” by federal regulations to encourage national consistency, eliminate confusion, and reduce risk of litigation. A few states expressed concern that this provision might inadvertently discourage water conservation and water recycling. Likewise, some states are interested in better understanding whether it is EPA’s intent to provide the permitting authority with increased ability to determine assimilative capacity allocations, based on considerations including, but not limited to, the actual discharge flow relative to the design flow of the facility. At least one state questioned whether this change would allow the development of new or additional discharges to TMDL-limited waterbodies by allowing the calculation and implementation of WQBELs based upon actual rather than design flows for facilities which are consistently discharging at a fraction of their design flow.

other states utilize actual recent flow to inform design flows for the next permit term, while still other states rely on information provided by the facility and contained in the permit application to determine design flow for the permit term. The regulatory change provides certainty that these varied approaches are all valid and acceptable. EPA should further emphasize in the preamble the importance of state discretion on determining the appropriate approach, considering factors unique to the state.

Objection to Administratively Continued Permits (40 CFR 123.44)

ACWA strongly objects to EPA's proposed provision allowing the agency to designate certain administratively continued permits as "proposed permits." Many states believe EPA can address the concerns associated with administratively continued permits in other ways, including via the PPA/PPG work plan negotiations process, and identifying "priority permits." Most states do not believe this new regulatory authority will achieve EPA's goal of "more timely reissuance of state NPDES permits." The preamble for the rule states that "EPA would expect to exercise this authority only in very limited circumstances..." However, EPA's proposal to apply the current EPA permit objection process to administratively continued permits is an overly broad solution to address what EPA itself identifies as a limited need. Under this provision, EPA has also not identified a solution to address those situations where the NPDES permit that has been administratively continued also contains state specific permit provisions. Would the objection then create two or more permits? Would the permit conditions that fall under state jurisdiction remain in effect?

Recommendation 23: An overwhelming majority of the states recommend that EPA remove this provision from the rule before finalizing.

Recommendation 24: Should EPA wish to proceed with this provision in opposition to states' overwhelming objections, EPA should issue a more comprehensive and detailed Supplemental Notice of Proposed Rulemaking (SNPRM) for this provision based on the comments received. As part of a future SNPRM, EPA should work closely with ACWA and the states to consider the following concepts:

1. Limited permit eligibility for objection to at least five years administratively continued and not currently part of an administrative proceeding.
2. Require mediation to occur between states and EPA at least one year before EPA provides notice of objection.
3. A more comprehensive preamble description that includes discussion and consideration of EPA's own administratively continued permits, including use of updated §401 Certifications and other tools as appropriate.
4. This objection process should be between the state and EPA and should not create new opportunities for the public or third parties to engage.

It should be noted that 40 CFR 123.44(h)(3) gives EPA exclusive authority to issue the permit if the state fails to resolve objections. Even if an issue leading to a delay in state issuance is later resolved, it appears the state cannot issue the permit - EPA must. There also does not appear to

be a clear deadline for when EPA is required to reissue the permit once state authority has been displaced. Likewise, EPA's attempt to revive its objection authority through this proposal could have the practical implication of suspending or revoking a permit. The Administrative Procedures Act provisions governing the withdrawal, suspension, revocation, or annulment of permits requires "notice by the agency in writing of the facts or conduct which may warrant the action...and an opportunity to demonstrate or achieve compliance with all lawful requirements."⁹

Recommendation 25: Should EPA choose to pursue this new authority in opposition to states' overwhelming objections, before finalizing EPA should more clearly articulate in a SNPRM how authority to issue a permit is returned back to the state. This should include situations where EPA has failed to propose/finalize a permit in a timely manner. EPA should also clearly articulate the §401 Certification process for permits in situations where the authority has been returned back to EPA.

Public Notice Requirements (40 CFR 124.10(c))

ACWA and the states support EPA allowing permitting authorities to provide public notice of permitting actions for NPDES major individual and general permits on the permitting authority's publicly available website in lieu of the newspaper publication requirement. Most states indicate they already provide public notice for all/most of their major draft permits on their websites, or are planning to in the near future. It should be noted that some states expressed concern that there appeared to be no clearly articulated distinction between the master general permit and the Notice of Intents (NOIs). While some states have chosen to make NOI's publically available on their websites before coverage under a general permit commences, this did not occur without cost and staff resources.

Requiring states to provide public notice on their website (cf. allowing states the option to do so) burdens states currently working to implement other technology priority commitments (e.g., the NPDES Electronic Reporting Rule). Several states indicated that they would likely need to change their regulations/statutes to allow them to do this. Likewise, more than one state has moved to a centralized IT Agency which sets priorities more than a year ahead of time. States prefer the flexibility and option to integrate this concept into their programs at a time that makes the most sense given other technology updates they are considering. It should also be noted that updated fact sheets are not required to be included with a final permit, but EPA is considering options that would require the state keep the fact sheet, response to comments, and final permit on the web for the entire permit term. While several states have identified cost savings in archiving permits online, EPA should not be adding mandates that will ultimate cost money and undermine efficiencies.

Recommendation 26: EPA should allow states to publish their proposed permits and fact sheets on their website to meet the public notice requirement. EPA should not require this type of publication/accessibility. EPA should not expand the required public notice provision beyond majors and minors, and should in no way imply that NOIs generally

⁹ 5 U.S.C. §558(c)

need to be publicly noticed. EPA should not require states that provide notice via their website to maintain web access to the permit for the entire permit term.

Recommendation 27: EPA should clarify how this provision might impact or be impacted by the proposed Small MS4 Remand Rule.

Recommendation 28: EPA should provide significant flexibility for states to implement this provision over time, as the state deems appropriate.

CWA §401 Certification Process (40 CFR 124.55(b))

ACWA and the states support EPA articulating the circumstances under which a state may issue a modified CWA §401 certification in connection with an EPA-issued NPDES permit and the effect of such modification. EPA should consider the appropriateness of having a state recertify the permit when administrative or judicial actions affect the original certification.

Recommendation 29: EPA should broaden application of this update to include legal decisions closely associated with issues identified in the state §401 Certification.

Recommendation 30: EPA should revise this section to read "...if the modified certification or notice of waiver is received after final agency action on the permit, the Regional Administrator *shall* modify the permit to be consistent with any more stringent conditions...".

Recommendation 31: EPA should consider allowing states to update their CWA §401 certifications for any EPA administratively continued permits.

Fact Sheet Requirements (40 CFR 124.56)

States support fact sheets providing a basic level of understanding for how a permit was developed and that "sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit." However, many states do not support EPA requiring the level of specificity proposed in the rule for documentation. ACWA and states disagree with EPA's assessment that complying with the new fact sheet requirements will not be a significant burden. Beyond the work of attempting to distill a significant amount of analysis to incorporate into these documents, several states are also concerned there will be more "back and forth" with the Regions, leading to further delays and possible increases in permit backlogs. Proposing to add sample type, monitoring frequency, and other parameters carried forward from previous permits does not seem necessary when considering how permits evolve over time. Many of the original parameters were first established by BPJ during initial issuance which does, in fact, require documentation and explanation. Upon the next reissuance of the permit these parameters then become BPT/BCT/BAT (as applicable) and a stand-alone reference just as any EPA promulgated guideline.

States are also concerned with the level of detail required in fact sheets for general permit, which seems to undermine the administrative efficiencies intended in using general permits. It should be noted that EPA's Construction General Permit Fact Sheet was 120 pages long. States prefer some level of flexibility in determining which information is necessary for a fact sheet (e.g. the basis for major changes to terms and conditions of a general permit since last issuance, or how best handle reliance on EPA's fact sheets.)

States noted that proposed 40 CFR 124.56(a)(iv)(B) requires that "[t]he receiving water ambient pollutant concentration data for all pollutants for which a dilution or mixing allowance is granted pursuant to 40 CFR 122.44(d)(1)(ii), or an explanation of why such data are not applicable or available...". Including the raw data for every pollutant in the fact sheet is a significant and unnecessary burden. The data and analyses are available upon request and should not be required to be fully included in the fact sheet. Any explanation of why data are not available would be subjective and not useful, and should not be required.

It is also noted that proposed 40 CFR 124.56(a)(1)(iv)(E) would require the fact sheet to provide a description of how narrative criteria related to nutrients are assessed and implemented. This information is generally found in the submittal of a WQS package, which EPA already reviews and approves. This new fact sheet requirement seems to impose CWA §303(d) impairment-like determination into the NPDES permitting process and could require states to address numerical criteria through the permitting process, which many states do not believe is appropriate. This requirement also has the potential to result in a huge burden on state NPDES permitting programs.

Recommendation 32: EPA should withdraw this provision and over the next year work closely with states to find a more streamlined approach for ensuring fact sheets provide a basic level of understanding for how a permit was developed, while providing the significant factual, legal, methodological, and policy questions considered in preparing the draft permit.

Recommendation 33: Should EPA choose to pursue this provision in opposition to states, before finalizing EPA should clarify that states would not be expected to go back and fix any old/preexisting fact sheets, and that it may be appropriate for a state to use/rely on an EPA fact sheet.

Also, some states raised questions regarding EPA's MS4 Remand Rule (Option 2) and how fact sheets might be written to comply with this section of the proposed rule, given it is the MS4 that identifies the best management practices (BMPs).

Recommendation 34: EPA should work closely with states to clarify how this rule might impact the MS4 Remand Rule.

Summary

In the proposed NPDES Updates Rule, EPA has proposed a number of important and helpful provisions that will update the national NPDES regulations to reflect current implementation practices. However, EPA also has proposed several controversial provisions that states cannot support. Many states are concerned that some provisions in the proposed rule could be very difficult and costly to implement, could detrimentally impact the proposed benefits, and in some cases, redirect resources away from water quality improvements and towards administrative activities. ACWA has provided you with several recommendations that we think will improve the overall efficacy and implementation of the proposed rule and stand ready to work with you to incorporate those recommendations.

While ACWA's process to develop comments is fairly robust and intended to capture the diverse perspectives of the states that implement these programs, EPA should also seriously consider all of the recommendations that come directly from states, interstates, and territories. Please contact ACWA's Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,



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ACWA President
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