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Executive Director & General Counsel  
**Julia Anastasio**

January 30, 2015

Ms. Cynthia Giles  
Assistant Administrator  
United States Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
William Jefferson Clinton Building  
1200 Pennsylvania Ave NW, MC 2201A  
Washington, DC 20460

Mr. Ken Kopocis  
Deputy Assistant Administrator for Water  
United States Environmental Protection Agency  
Office of Water  
William Jefferson Clinton Building  
1200 Pennsylvania Ave NW, MC 4101M  
Washington, DC 20460

*Via email to: [docket.oeca@epa.gov](mailto:docket.oeca@epa.gov)*

**Re: Supplemental Notice NPDES Electronic Reporting Rule  
Docket EPA-HQ-OECA-2009-0274**

Dear Assistant Administrator Giles and Deputy Assistant  
Administrator Kopocis:

The Association of Clean Water Administrators (ACWA, hereafter  
also referred to as the association or 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) and  
related compliance/enforcement activities.

ACWA appreciates the opportunity to comment on the Supplemental  
Notice and Proposed Rulemaking for the *NPDES Electronic  
Reporting Rule* (hereafter referred to as the eReporting Rule).<sup>1</sup> This

<sup>1</sup> NPDES Electronic Reporting Rule, Proposed Rule, 79 Fed. Reg. 71066-81 (December 1, 2014).

Supplemental Notice provides several implementation options, which states recommended during the initial comment period, as well as clarifies those areas where misunderstandings had occurred.

The association appreciates EPA’s recognition of the need to work closely with states on this rule. Specifically we wish to thank all of the staff within the Office of Compliance, Enforcement Targeting and Data Division who worked tirelessly to ensure this effort was one of the standout examples of “working with states” to develop a rule proposal. While we may not completely support all aspects of the rule in its final form, the open dialogue and communication process, while rigorous at times, was exceptional and worth highlighting in these opening comments. When EPA purposefully engages with states early in the process, and true collaboration is the goal, better regulations are drafted, superior policy is created, duplication is curtailed, national consistency is improved and flexibility is incorporated, unintended consequences are avoided, greater certainty is realized, legal challenges are minimized, and the public is better served.

States generally support EPA’s goals to improve reporting efficiency, reduce administrative burden, increase transparency, support program decisions, and decrease noncompliance rates by leveraging technological innovations to better protect and enhance water quality. Likewise, states support many of the options proposed in the supplemental notice and believe those options will lead to an eReporting Rule that is more implementable than the version originally proposed.

However, states believe EPA does not recognize the significant budgetary and resource burden that the eReporting Rule requirements represent for many states. As federal and state budgets continue to dwindle, states have fewer and fewer resources available to accomplish a growing list of priorities. Additionally, EPA must acknowledge that states vary considerably in terms of how prepared they are to implement the proposed rule’s electronic reporting requirements. Some states may already have established, robust electronic permitting and reporting infrastructure that is widely utilized by permittees. Conversely, other states may be largely unprepared, with little or no electronic permitting/reporting infrastructure. For example, in one state, prior to even considering implementation of reporting requirements in this rule, information for thousands of existing permits must be manually keyed into an electronic database to create parent permitting records. This effort alone could take several years. Implementation of eReporting Rule, over the short term anyway, is likely going to shift resources away from water quality initiatives and focus them on data systems and management. Even if the infrastructure were 100% funded, states would not necessarily be able to hire more people as some states have hiring freezes in place.

It is particularly important to note that states believe EPA is missing a key opportunity to reduce federal, state, and facility reporting burden by not specifically and intentionally using the eReporting Rule to reduce the number of programmatic reporting requirements that exist throughout the NPDES program. While EPA has repeatedly said that Appendix A does not represent any new data reporting requirements, states believe regulatory agencies and the public would be better served by streamlining the NPDES reporting requirements (vis a vis

Appendix A) down to the minimum number of data elements needed to oversee management of the programs and for which a business case can be made.

## **RESOURCES**

States believe the economic analysis fails to consider all of the implementation costs associated with the rule including IT development upgrades and maintenance, customer support for facilities/permittees, outreach and training, and revisions to statutes, regulations, and guidance materials. Likewise, many states believe EPA has drastically overstated the benefits, especially the \$29 million of annual savings to states after year two of implementation. To achieve such savings, EPA assumes eReporting participation will be at almost 100% by the end of year two, which directly conflicts with the experience of states that have implemented electronic reporting. In almost every state example, reaching a participation rate of over 70% has taken much more time.

While some states plan to provide details which will further inform these cost/benefit discussions, EPA’s current projections indicate this rule will incur upfront costs to states and EPA of at least \$35 million over next 5 years. Without this upfront investment, zero dollars in benefits can be realized, yet EPA has been fairly circumspect about identifying a supplier for these upfront costs.

**Recommendation 1:** EPA should revise the cost/benefit assumptions based on state input provided during the “Proposed Rule” and “Supplemental Notice” comment periods. EPA should also link implementation of the NPDES eReporting Rule with a significant increase in flexible CWA §106 funding to ensure appropriate resources will be directed to states.

**Recommendation 2:** Along with increasing core program funding, EPA must ensure that all related sources of IT Infrastructure grant funding are available to meet the growing state need that is expected. EPA should continue funding and technical support for development of tools to flow states’ data to ICIS-NPDES through the Network Node. EPA should also consider the creation of a new competitive needs-based granting program that provides resources to states that demonstrate a need, desire, and thoughtful planning surrounding eReporting implementation.

## **IMPLEMENTATION**

States agree with EPA that there was some confusion regarding the relationship between “initial recipient” and “state readiness criteria” and support EPA’s goal of helping “all states be the initial recipient” for those data groups the state wishes. The proposed rule also notes that EPA will “work with the Director of the authorized NPDES program to remediate all issues identified by EPA that prevent the authorized NPDES program from being the initial recipient.”<sup>2</sup> Likewise, EPA notes that “a state NPDES program can initially elect for EPA to be the Initial Recipient and then at a later date, seek EPA approval to change the initial recipient status from EPA to the authorized state, tribe, or territory.” Finally, EPA solicits

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<sup>2</sup> Proposed §127.27(d)(4).

comments on whether “initial recipient” determinations should be an ‘opt-out’ process for an authorized state, tribe, or territory NPDES program.

EPA should consider that several states may be forced to ‘opt-out’ of different data groups as the Initial Recipient because their systems are not ready and EPA has not provided a viable path forward. “Opting-out” will likely lead to dual reporting, especially if the state does not have an electronic system to which the state nor EPA can direct facilities. This result is anything but efficient and may lead to serious issues such as data discrepancies and reporting compliance questions.

**Recommendation 3:** States support the Initial Recipient determination as an ‘opt-out’ process for authorized programs. Further, states would support eliminating the Initial Recipient status from the State Readiness Criteria, as doing so reduces confusion and better reflects EPA’s intent during implementation.

**Recommendation 4:** EPA should better address the potential impacts of state programs “opting-out” due to technical and/or financial resource constraints and should further assess whether the goals of the rulemaking could still be met.

As part of the State Readiness Criteria, there is an expectation that the participation rate of a data group will be at least 90%. While states support high participation rates, reaching 90% may not be achievable initially. Several factors beyond the state’s control may affect electronic reporting participation rates. Likewise, it may take time for a state to determine the appropriate sector specific incentives that can/will drive participation rates up.

**Recommendation 5:** EPA should delay review of state readiness until after the rule has been fully implemented and the ICIS-NPDES data flows have been constructed. As part of the state-specific implementation plans, EPA should consider phasing in the participation rate increases for the different data groups (e.g. Year 1 = 20%, Year 2 = 40%, Year 3 = 60%, Year 4 = 80%, Year 5 = 100%).

The Supplemental Notice further describes under which conditions and authorities EPA might choose to “fill in the gaps” where NPDES regulated entities are not yet reporting and/or the participation rate is below 90%. While EPA does not anticipate this would be a widespread occurrence, states are concerned that any use of this authority might create an environment where a facility has to report to both agencies or some facilities in a sector might report to the state while others would be required to report to EPA. This could lead to data discrepancies and an inability for the state to appropriately manage their programs. As noted above, given the realities of state program resources, EPA should evaluate and fully discuss the potential for this occurrence in the final rule, while keeping the following recommendation in mind.

**Recommendation 6:** EPA should make every effort to limit use of these authorities and allow states to determine the appropriate path to meet a longer term implementation schedule. Should EPA determine use of these authorities is absolutely necessary, then states would recommend that all data collected under these authorities

be reported to the authorized permitting authority or initial recipient. EPA should provide greater detail as to how the agency would assert their authority and ultimately ensure facility compliance.

For any number of reasons a state may choose to manually enter some data for some universes/data groups. In the absence of data systems that meet the states' needs by a deadline imposed by the eReporting Rule, a state may be forced to populate ICIS-NPDES manually for certain data families. For example, a state may not have an electronic permit application for §316(b) facilities, which means state staff will need to enter cooling water intake structure information from paper applications into its state system. After the permit is issued, the data will be transferred to ICIS-NPDES.

**Recommendation 7:** As long as the data is flowing into ICIS-NPDES, EPA must ensure states are not penalized, and facilities are not legally vulnerable, for the state's decision to manually enter certain data elements or certain data groups.

EPA initially proposed a two year phased implementation schedule. EPA is aware of the diversity that exists among the states as it relates to size of the NPDES program, resources available to the state, current condition of data management within the state, NPDES sector prioritization, CROMERR approval status, and timing of individual and general permit cycles. Many states also manage permitting programs that exceed federal authority and include smaller facilities or facilities that discharge to groundwater or other waters of the state and may consider these as part of an overall implementation plan. Additionally, some states have local, authorized programs that perform the responsibilities of the pretreatment program or the construction storm water program. These types of factors will weigh heavily on how and when a state chooses to implement different aspects the rule.

**Recommendation 8:** The most likely approach to achieve success is to develop individual state-specific plans with varying schedules for implementation based on each state's readiness, priorities, and resources to implement electronic reporting. The proposed two year phased schedule is insufficient time for implementation of the proposed rule. In fact, some states believe that it may take closer to five to eight years to implement the proposed requirements.

Several states expressed appreciation for the resources being made available to streamline the CROMERR application submittal, review, and approval process. These states also supported use of EPA's newer systems including NeT and the CROMERR Shared Services, model CROMERR applications, assistance and trainings, along with the associated standard checklists and forms. States support the creation of a dedicated liaison/resource that will be available to discuss high level issues with states and EPA senior officials.

**Recommendation 9:** EPA should work with 2-3 states to pilot different aspects of the NeT and CROMERR shared services. These pilot projects could then be presented to the rest of the states so they all have a better understanding of the functionality,

efficiencies, and cost reductions that can come from using these products/services, along with any challenges that may be discovered.

**Recommendation 10:** EPA should acknowledge that, despite best efforts to ensure data accuracy, mistakes will occur and a process for initiating and completing data sharing must be defined in a way that maintains and ensures data quality. EPA should clearly outline in the final rule the roles, responsibilities, and acceptable processes for EPA, authorized NPDES programs, and regulated entities, especially in situations where data discrepancies arise.

ICIS-NPDES is not ready to receive all of the Appendix A data. Our understanding is that more than 150+ data elements will be new to ICIS. Likewise, EPA’s application forms, which many states still use, do not mirror the data requirements in Appendix A.

**Recommendation 11:** EPA must update all of their information collection and data sharing tools before states can be expected to create the necessary links in their own systems. Any implementation timeline must recognize this as a required step in the process.

#### **UNPERMITTED FACILITIES (Non-NPDES)**

While EPA claims authority to require non-NPDES facilities to electronically report data, this issue has not been fully litigated in the federal court system. Beyond the general legal authority questions, EPA must also meet obligations under the Paperwork Reduction Act by securing the appropriate Information Collection Request (ICR). Should EPA’s jurisdictional claims be affirmed and an ICR approved, this authority does not directly transfer to states authorized to implement the NPDES permitting programs. In most cases, state authority would have to come from state law. Several states regulate/permit sectors that go beyond the federal thresholds for the NPDES programs and/or discharge into groundwater or other waters of the state. Requiring states to supply a federal agency with data for facilities regulated under state law clearly has federalism implications. Beyond the legal questions raised, any effort to collect/transfer electronic data on non-NPDES facilities would likely lead to confusion and bias, as this information would be supplied out of context.

**Recommendation 12:** Under the NPDES eReporting Rule, EPA should only require states/facilities to electronically submit data for those facilities strictly regulated under the federal NPDES program and in particular only those covered by an NPDES permit.<sup>3</sup>

#### **CAFO SECTOR**

All states have facility specific data on the permitted CAFOs/AFOs in their state. Many states have this information in an electronic format and several have this information available on their websites. Likewise, EPA’s Enforcement and Compliance History Online database

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<sup>3</sup> Please note that a select few states issue SPDES permits where the authority may come from either federal or state law. Recommendation 12 is intending to say those NPDES permits issued by the state per federal law.

(ECHO) has a large number of NPDES permitted CAFO's in the national database populated by several states. However, ECHO has significantly less electronic data available on the unpermitted (non-NPDES) CAFOs and AFOs. In addition, federal court rulings have reversed and/or significantly limited the federal mandate to apply for and obtain NPDES permit coverage for certain facilities that states have historically permitted and may still require/have permit coverage. EPA is proposing, for privacy reasons, to mask facility specific information on unpermitted facilities that state inspectors found were not discharging and do not require an NPDES permit. However, once in EPA's possession, states believe this masked data would likely still be available under the Freedom of Information Act.<sup>45</sup> It is important to also note that animal agriculture facilities are not the only sector where a residence may be onsite at the facility. Other examples include dry cleaners, salvage yards, storage facilities, etc.

**Recommendation 13:** As noted above, states believe the NPDES eReporting Rule should only require states/facilities to electronically submit data for those facilities strictly regulated under federal NPDES program, and more specifically only those covered by an NPDES permit.<sup>6</sup>

### **STORMWATER SECTOR**

While we understand that comments previously submitted do not need to be resubmitted, we believe the association's comments on the construction stormwater program warrant repeating. For more than a decade, states have been making the point that the construction stormwater program is different from other NPDES programs. Construction is an activity that has a planned completion date. With over 200,000 regulated entities, the universe is by far the largest and also most dynamic, because new entities seeking permit coverage are added and subtracted daily. Unless the state has a robust post-construction stormwater program, the NPDES relationship generally concludes when construction at the site is completed. States should not feel pressured to design their programs more or less stringently than the federal program just to make it easier for permittees to submit data electronically. Likewise, some states have delegated review of NOIs to the counties or qualifying municipal programs, which have not traditionally required electronic reporting, and moving those counties to an enterprise solution will be very expensive. Finally, several of the data elements in Appendix A are deemed required for individual permits, but under 40 CFR 122.28(b)(2) are not required for general permits. The eReporting Rule does not clearly reflect this.

**Recommendation 14:** EPA should consider making electronic reporting of this sector optional, unless an enforcement inspection has been taken by a state and/or an enforcement action has been taken. This would allow states to consider the value of

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<sup>4</sup> *AFBF, et al v. EPA*, et al filed in the United States District Court of Minnesota, docket number 12-1751.

Agricultural groups filed a lawsuit to enjoin EPA from further disclosure of farmers' personal information.

<sup>5</sup> *Beveridge & Diamond, P.C. v. EPA*, 2015 BL 12636 (D.D.C., No. 14-cv-631, 1/20/15). The District Court said that in the absence of EPA possession or control, the FOIA requested asbestos information was not an agency record. And even if EPA had the right to control the data, EPA did not exercise that right and therefore had no obligation to turn the information over.

<sup>6</sup> Please note that a select few states issue SPDES permits where the authority may come from either federal or state law. Recommendation 13 is intending to say those NPDES permits issued by the state per federal law.

requiring electronic reporting vs. the workload associated with maintaining accurate, complete, and timely high quality data from a transient universe, while still keeping the public informed as to the violations that warranted formal action.

### **SINGLE EVENT VIOLATIONS**

Many states have negotiated commitments under their Performance Partnership Grants/Agreements for submitting data to ICIS-NPDES on Single Event Violations (SEVs) for significant wet weather violations. This might include data for significant stormwater, sanitary sewer overflow, and concentrated animal feeding operation violations. EPA has indicated the NPDES eReporting Rule would supersede all of those negotiations around the country and would in fact require that every single SEV be electronically reported and show up in ICIS. This new, superseding requirement would measurably and detrimentally affect many states' ability to focus compliance oversight and data management resources on addressing the most significant environmental/water quality issues.

**Recommendation 15:** EPA should revise the language in the rule to allow states and EPA regions to continue to use the PPA/PPG process to manage SEV data entry commitments. This approach would also better reflect EPA's goal of not "creating any new reporting requirements."

### **WAIVERS**

States generally believe the availability of waivers for a state program is an excellent idea. There are several reasons why an entity may not be able to submit data electronically and neither the state nor the facility should be penalized for this inability. States support most of the waiver examples discussed by EPA and provided by commenters. Examples include, lack of broadband availability, religion, facility security measures, and financial hardship. Waiver could be temporary or for a longer term (e.g. a permit cycle). States do not expect a large percentage of facilities to qualify for waivers, and therefore do not see significant value in trying to police this universe annually. States would also support an emergency exception/waiver for situations where a natural disaster impedes reporting.

**Recommendation 16:** In the preamble, EPA should identify an example list of reasons a waiver might be granted and delegate the development of waiver criteria to the states. The permitting authority should have final discretion on whether to grant the waiver or not and how long such a waiver would last. States would also support the availability of automatic renewal, unless the permitting authority determines the factual circumstances that justified the initial waiver have changed in a way that warrants reconsideration.

**Recommendation 17:** EPA should consider allowing a temporary waiver provision for natural disaster or emergency situations, as well as those situations where the electronic reporting/data collection system may be made unavailable for an extended period of time.



## **APPENDIX A**

States believe EPA continues to miss an enormous opportunity to reduce federal, state, and facility reporting burden by not specifically and intentionally using the eReporting Rule to reduce the number of programmatic reporting requirements that exist throughout the NPDES program. While EPA has repeatedly said that Appendix A does not represent any new data reporting requirements,<sup>7</sup> most states would not agree with this assertion. Most states believe the eReporting rule does create new reporting requirements for many of the NPDES programs, especially the number of data elements for general permits. Until this proposed rulemaking, many of the individual data element requirements only existed in guidance, not rule. Further, many states believe regulatory agencies and the public would be best served by streamlining the NPDES reporting requirements (vis-à-vis Appendix A) down to the absolute minimum number of data elements needed to appropriately manage the programs and, for which a convincing business case can be made.

**Recommendation 18:** EPA should reframe the discussions around Appendix A to focus its intent as a tool to streamline the national NPDES reporting requirements by amending several sections of the 40 CFR 122, 123, 403, and 503 and any other regulatory reporting requirements for the NPDES program. In the alternative, EPA should consider labeling data elements as mandatory or optional; to better reflect the information states absolutely need to manage their programs.

**Recommendation 19:** As soon as reasonably possible, EPA should finalize the list of required data elements (Appendix A) and clearly communicate this list to states so they can start planning for implementation. Additionally, when the final rule is issued, EPA should provide states with a template delivery mechanism that will identify how states are expected to transfer information to EPA. This will further allow states to make decisions regarding implementation.

## **CONCLUSION**

The association appreciates EPA's goals to work with states to embrace new technology, improve public data accessibility and transparency, and to more effectively use limited collective resources. States believe that converting to electronic reporting can improve facility compliance and both directly and indirectly improve water quality. However, several states remain concerned that they are unprepared for implementation of a national NPDES eReporting Rule. Many states are also concerned that some aspects of the proposed rule could be very difficult and costly to implement, could detrimentally impact the proposed benefits, and in some cases, could redirect resources away from water quality improvements towards administrative activities. The association has provided you with several recommendations in both the current and December 12, 2013 comment letters that we think will improve the overall efficacy and implementation of the proposed NPDES Electronic Reporting Rule and stand ready to work with you to incorporate those recommendations.

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<sup>7</sup> Please see ACWA's December 12, 2013 comment letter for more details.

Nothing in this letter is intended to supersede the concerns and observations of individual states and ACWA encourages EPA give individual state comments the highest regard. The association appreciates the opportunity to comment on this proposed rule and looks forward to future dialogue. If you have any questions, please contact ACWA's Executive Director & General Counsel, Julia Anastasio, at 202-756-0600 or [janastasio@acwa-us.org](mailto:janastasio@acwa-us.org).



Michael Fulton  
Director, Water Quality Division, Arizona DEQ  
ACWA President

Cc: Lisa Lund, Director, Office of Compliance, EPA

John Dombrowski, Director, Enforcement Targeting and Data Division,  
Office of Compliance, EPA

Andrew Sawyers, Director, Office of Wastewater Management,  
Office of Water, EPA

Deborah Nagle, Director, Permits Division, Office of Wastewater Management, Office  
of Water, EPA