



AGC Comments on EPA's NPDES Electronic Reporting Rule

Dear Sir or Madam:

AGC remains the nation's leading construction trade association. Founded in 1918 at the request of President Woodrow Wilson, AGC represents nearly 30,000 firms, including general contractors, specialty-contracting firms, and service and supply providers. These members are associated with AGC through a nationwide network of chapters. They engage in the construction of commercial buildings, hospital and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing developments. These important construction projects play a powerful role in sustaining economic growth, in addition to producing structures that add to productivity and the nation's quality of life.

At some point, EPA's proposal could impact all construction firms and would certainly have widespread implications for the industry, as stormwater permits are a component of the Clean Water Act NPDES permit program. *See* 40 CFR 122.26. Discharges of stormwater from construction activities that disturb one acre or more of land require coverage under a Construction General Permit (CGP). In addition, discharges of stormwater from certain industrial activities operated by m Specifically, the prop

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would require all construction site operators covered by an NPDES permit to submit to their authorized state(s) or EPA a variety of permit-related information and data in an electronic form. This information would include all discharge monitoring reports, annual reports, and a variety of other forms specific to the general permitting framework, such as the following: Notices of Intent (NOI), Notices of Termination (NOT), No Exposure Certifications (NEC) and Low Erosivity Waivers (LEW). If an authorized state does not meet certain “readiness criteria” to implement electronic reporting in its permits, EPA would obtain the required information from permittees and then share that information with the state. Permittees’ electronic submissions would be supplemented by information collected by authorized states, including facility information, permit data, inspection data, violation determinations and enforcement data. Ultimately, EPA would centralize this information “in a nationally-consistent manner [i.e., using national data standards, in a format fully compatible with the NPDES national data system (ICIS-NPDES currently), and using consistent units of measure].” Under the proposal, EPA would then “provide the public with real-time, easy access to this information” via a web-based interface.

EPA's Four Main Goals of the Proposed Rule

EPA Goal 1: Use technology to shift from paper to electronic reporting without increasing the amount of information currently required from NPDES-permitted facilities.

EPA states in its proposal that the Electronic Reporting Rule “does not expand the reportable data from NPDES-regulated facilities or other regulated entities beyond what is required by existing regulations.” AGC finds that this statement is false.

In the proposal, Appendix A, Table 2 – Required NPDES Data, identifies the specific data that would constitute the “minimum set of data to be reported electronically.” EPA notes that authorized states, tribes and territories may also require permittees to submit additional data electronically (data in
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AGC is both concerned and confused about the applicability of the Electronic Reporting Rule to any new reporting provisions that may be added to NPDES permits that are reissued in the future. For example, the draft 2013 MSGP—which is open for public comment until Dec. 26, 2013—contemplates a new provision that would require more information in an applicant’s NOI (application for permit coverage) about the location of outfalls, the type of surface water into which the facility discharges and details about the stormwater pollution prevention plan. The proposed language in the draft 2013 MSGP permit would also provide permittees with an alternative option to post their SWPPPs on a publically accessible website and provide the URL in the NOI. In addition, the latest reports are that EPA is continuing work on its long-delayed rule to regulate stormwater runoff after construction activities are completed; this post-construction program could be administered and enforced via the NPDES permit program. AGC has met with senior officials within EPA’s Office of Water to share concerns regarding who will be liable if the “post-construction” controls fail to work as designed. AGC has been focused on liability issues concerning the contractor's legal/contractual obligations with regard to the site and the owner after the contractor completes work and leaves the site.

Any requirement to publicly report Best Management Practices (BMPs) used to control construction site runoff would be problematic because maintaining a website version of the SWPPP for every minor modification that is made to the master SWPPP presents an undue burden and significant risk of technical non-compliance with the permit for even the most minor oversight. Providing preliminary, limited SWPPP information is fundamentally more feasible, but a general description of industrial processes, potential pollutants and types of structural and non-structural BMPs being used is all that should be required. It would also be problematic for EPA’s public database to link a construction firm to permanent erosion and sediment controls intended to control runoff long after the general contractor has left the site.

EPA invites comment on how to best address the variability in general permits issued by EPA, states, tribes and territories. For these general permits, EPA believes a reporting tool based on the federal MSGP and CGP, which includes a number of definable data fields can accommodate the full range of state, tribe or territory variability. In essence, the reporting tool could merge the EPA data fields with other definable fields to produce a “customized” general permit reporting tool specifically for use by permittees within that state, tribe or territory. EPA anticipates a certain amount of data commonality that will help limit the number of truly unique fields on reporting forms. Based on AGC’s experience working with EPA on its stormwater programs, we believe this task could be more difficult than EPA suggests. AGC members spent nearly a year providing EPA staff with input on its checklists for documenting compliance with the inspection and corrective action provisions under its 2012 CGP. Similarly, AGC has been working for many, many months to turn these checklists into a mobile app and we have not even addressed state-specific permit nuisances; and ultimately opted to leave space for the permittee to self-customize the forms. There are simply too many variables.

AGC also wants to point out that EPA’s Economic Analysis of this proposal indicates that the time involved in assembling and submitting the data on an electronic basis is negligible. EPA’s rationalizes this by stating that it has accounted for the reporting burden when it promulgated the implementing regulations. As stated above, AGC disagrees and finds that the proposal would add reporting requirements for NPDES-permitted construction sites and potentially other NPDES-regulated entities.

EPA Goal 2: Using technology to save money and time for the regulated community.

In numerous places throughout the proposal, EPA repeats that the Electronic Reporting Rule “will save time and resources ... [and] money” for NPDES permittees. For the reasons explained below, AGC disagrees with EPA’s blanket statements and related cost estimates.

Based on its outreach to the regulated construction community, AGC finds that EPA’s proposal does not sensibly account for the regulated community’s cost of compliance. NPDES permittees would

significant economic impact on a substantial number of small entities.” EPA estimates the cost to small entities to be \$363, per company (just an additional \$105 in overall compliance costs). [Note that EPA finds that none of these costs would exceed the threshold of 1% of annual revenue for any of the affected entities; therefore, EPA has determined that the proposed rule does not have a significant economic impact on any small entity.] AGC strongly disagrees.

Small business is big in construction. The United States had roughly 740,000 construction firms in 2012, of which 92 percent were small businesses employing fewer than 20 workers. Only one percent had 100 or more employees.

This EPA action stands to uniquely affect small construction businesses in that it would require the hiring of experts, the purchase of sophisticated or expensive equipment and extensive training. Such companies are not likely to have an in-house compliance officer, staff attorney or technology specialist on staff to help ensure compliance. The proposal would require them to decipher hundreds of pages of instructions. Not to mention the time permittees

AGC is concerned that EPA's proposal would increase the potential for the disclosure of confidential business information (CBI). Protecting CBI, both in transmitting and storing confidential information, should be a key agency priority. Indeed, addressing confidentiality is a difficult and time-consuming task, as evidenced by the substantial effort EPA has made to address CBI determinations in its greenhouse gas reporting rules. Surprisingly, the proposal gives relatively short-shrift to scenarios involving CBI filings. AGC requests that EPA establish procedures for handling CBI and identify the criteria for making a CBI claim.

AGC is aware of litigation surrounding the recent release of livestock producers' personal information. Earlier this year, EPA released the personal information on more than 80,000 individual livestock producers pursuant to Freedom of Information Act (FOIA) requests. The information released was highly sensitive in nature; including telephone numbers, e-mail addresses and other personal information from livestock producers. AGC submits that EPA should place strong protections on NPDES permittees' names, home addresses, e-mail addresses, telephone numbers and other personal information, which should not be made public without the consent of the individual.

EPA Goal 4: Using technology to obtain confidential personal information,

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AGC strongly objects to EPA's plan to use its authority under the Clean Water Act to require electronic collection of data in the event that an authorized state is not ready to implement electronic reporting. Permittees must not be penalized, by requiring reporting to EPA and their respective state authority, if