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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
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**ELECTRONIC SUBMISSION:** [www.regulation.gov](http://www.regulation.gov)

December 12, 2013

U.S. Environmental Protection Agency  
EPA Docket Center  
Enforcement and Compliance Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OECA-2009-0274

**Re: AGC Comments on EPA's NPDES Electronic Reporting Rule**

Dear Sir or Madam:

The Associated General Contractors of America (AGC) is pleased to submit the following comments on the new rule that the U.S. Environmental Protection Agency (EPA) proposed on July 30, 2013, under the heading "National Pollutant Discharge Elimination System (NPDES) [Electronic Reporting Rule](#)" (78 FR 46005).

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 many construction companies (e.g., landfills, asphalt or concrete batch plants, gravel pits and associated processing operations used to support road and bridge construction) require coverage under a "Multi-Sector" General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).

The proposed "Electronic Reporting Rule" identifies specific information that all NPDES-permitted facilities, including construction sites, would have to provide electronically to EPA and authorized states and that authorized states would have to provide electronically to EPA. Specifically, the proposal

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.

According to EPA’s proposal, one of the top goals of the NPDES Electronic Reporting Rule is to provide broad public access to data on the location, operational practices, effluent discharges, monitoring results, compliance status and related enforcement actions of all entities that are subject to the NPDES permitting program. Not only the well-motivated but also anyone at odds with any of these entities, for any business, political or other reason could easily access and make extensive use of the central databases that the agency plans to make available. The ready availability of this information would not only empower communities to play more active roles but also empower businesses to search for their competitors’ propriety or otherwise confidential information. The system would completely circumvent the Freedom of Information Act, and the limitations that it expressly imposes on the disclosure of government records.

AGC also has a great concern that competitors or disgruntled employees, or perhaps others, might misuse the data to inflict reputational harm on the regulated entities. There would be nothing to prevent the data from being misconstrued, taken out of context, or simply misunderstood.

EPA’s proposal, as published in the *Federal Register*, is 112 pages in length and it requests public input on at least 35 different matters that range from questions on discrete topics to appeals for the recommendation of alternative approaches. AGC finds that the proposal raises more questions than it answers and the information shared with the public to date does not present a very clear or understandable path forward.

In the discussion that follows, AGC shares the construction industry’s thoughts and perspective on the four main goals that the agency clearly identifies in its proposed rule. AGC also responds to specific provisions throughout the proposal on which EPA has requested stakeholder comment.

*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 addition to the minimum set of data provided in Appendix A to [40 CFR Part 127](#)). EPA states in the proposal that its electronic reporting tools would be flexible to allow the collection and transfer of these additional data to authorized NPDES programs.

As shown in the *excerpt* from Table 2 below, it includes an entire section on construction and industrial stormwater information. In that section, EPA includes a field where permittees would need to relate and communicate the best management practices and processes that will be employed to control pollutants in stormwater discharges during construction and after construction is complete. The minimum set of required data would also include a description of applicable state and local erosion and sediment control requirements. The construction industry is not currently required to report this information under either EPA’s 2012 CGP or EPA’s 2008 MSGP.

**Construction and Industrial Stormwater Information (from the permitting authority derived from the NPDES Permit Application, Notice of Intent, or Waiver) - EXCERPT**

Proposed Best Management Practices for Industrial Activities and Stormwater	This is a text field that describes the proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements	122.26(b)(15), 122.26(c)(1)(i)(B), 122.26(c)(1)(ii)(C)
Post-Construction Best Management Practices for Industrial Activities and Stormwater Discharges	This is a text field that describes the proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements. This field also describes the nature of fill material and existing data describing soils	122.26(b)(15), 122.26(c)(1)(i)(B), 122.26(c)(1)(ii)(D)

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 spend significantly more time and money (compared to present day) to meet an across-the-board mandate to submit all NPDES-related forms and data electronically. EPA estimates that permittees would incur *implementation* costs totaling \$258 or less, per company, to meet the proposed electronic reporting requirements. AGC finds these cost estimates way too low. AGC members estimate that it would cost well-above EPA’s proposed figures in just training costs alone. As explained above, the proposal would require construction companies to take additional steps, beyond what’s required under EPA’s 2012 CGP and EPA’s 2008 MSGP, to list out for public review and scrutiny the BMPs that will be used to control pollutants in stormwater discharges during construction and after construction is complete. We also expect there to be other hardware and software costs that we are unable to fully assess at this time.

As explained below, permittees would need a substantial amount of training and technical support to meet EPA’s proposal. Even EPA acknowledges in its rulemaking proposal that transitioning to electronic reporting would require “comprehensive training” and “registration support.” Yet, EPA’s Economic Analysis of this proposal assumes that all of this training would be conducted online by webinar. AGC disagrees.

Under the proposal, all NPDES permittees would need to register with EPA’s Central Data Exchange (CDX). (The instruction document designed to guide construction site operators through the process of submitting their Notice of Intent (NOI) for coverage under the 2012 Construction General Permit using the electronic Notice of Intent (eNOI) system in EPA’s CDX is 54 pages.) All permittees reporting anything other than NOIs also would need to ensure that their data submissions meet EPA’s current signatory and chain of custody requirements in EPA’s Cross-Media Electronic Reporting Regulation (CROMERR) and EPA’s NPDES signatory requirements. *See* 40 CFR Part 3, 40 CFR Part 122.22 and 40 CFR Part 127. This would include registration, subscriber agreements, electronic signatures, associated training on document preparation and submissions, etc. In addition, permittees subject to any effluent monitoring and reporting requirements would need additional training on how to submit their DMRs (discharge monitoring reports) via approved electronic reporting tools—like NetDMR—developed by EPA, states or third parties. Construction companies that work in multiple states likely would need to become proficient in multiple state reporting systems.

AGC maintains that additional compliance costs would stem from the inevitable computer software and hardware upgrades necessary to comply with the function-based capabilities required by the proposal. While EPA’s proposed electronic submission requirements purport to decrease paperwork

burdens, permittees would not be relieved of the requirement to make accurate and complete copies of NPDES program reports and data available to inspectors upon request, during the entire record retention period. It appears that the construction industry's obligation to comply with the recordkeeping aspects of stormwater permit program would apply in addition to any newly promulgated requirements to submit electronic reports to EPA. AGC would like more clarification on this point.

The retention of records that include electronic signatures brings forth a host of issues that are not routine to many construction companies, including reproducing the name of the signatory, the date and time of the signature, information explaining the meaning of the signature, and protections that ensure that electronic signatures cannot be detached, copied or compromised. Electronic signature validation is regulated under EPA's CROMERR, which provides the legal framework for regulated entities to report information electronically to EPA and states, tribes and local governments that are authorized to administer EPA programs. The standards are designed to provide electronic submittals with the same level of legal dependability as the corresponding paper submittals.

In the proposal, EPA references environmental management system (EMS) software tools as the one example to support the "feasibility of electronic reporting" for the regulated community (industry perspective). AGC members are very clear in sharing that this is not the norm. EMS software is not an inexpensive venture. Customized programs run in the thousands of dollars range and have customer or web-hosted options. "Off the shelf" programs are several hundreds of dollars to purchase and many require monthly subscription fees. Any additional customization or access to technology support is often an extra expense. For example, a starter plan with ISOTracker Software costs \$538.56 for a 12 month subscription.<sup>1</sup> MAUS Environmental Planner offers varying levels from \$499.00 to \$999.00 for business owners.<sup>2</sup> Open Mind Solutions' ActiveQuality for quality, environmental or safety management programs offers an "a la carte" pricing structure dependant on number of users (single is \$280.00; 11-30 concurrent users is \$780.00), annual support fees and releases, etc. An unlimited site license will cost \$2,500.00 and the source code \$7,500.00.<sup>3</sup> For other programs, such as QMS Solutions or BSI Entropy, AGC would have had to request a quote to determine the cost.

Also noteworthy is the fact that the proposal would require the permit holder to get its NPDES permit information directly to EPA, on top of also submitting it to the state in compliance with state laws and regulations, *if* EPA determines the state lacks the capability to meet the standards for electronic reporting. What was a single instance of paper reporting could potentially become two separate types of reporting to two separate agencies through two different processes (see section below on "State Readiness Criteria"). This flies in the face of EPA's stated goal of easing the paperwork and permitting burden, because it adds an additional layer of obligation.

AGC also is concerned that EPA's proposal would disproportionately impact small- and minority-owned construction firms. In its proposal, EPA has "certif[ied] that this action would not have a

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<sup>1</sup> See <http://www.getapp.com/compare/quality-management-software> (accessed Dec. 12, 2013).

<sup>2</sup> See [http://www.maus.com.au/environmental\\_planner/](http://www.maus.com.au/environmental_planner/) (accessed Dec. 12, 2013).

<sup>3</sup> See [http://www.open-mind-solutions.com/Online\\_Store.htm](http://www.open-mind-solutions.com/Online_Store.htm) (accessed Dec. 12, 2013).



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 would spend training already limited staff on how to manage the inputs to avoid system "glitches" that could lead to a Notice of Violation. EPA should not require small business construction companies to be database operations specialists.

This shift to electronic reporting will cost money at a time when government resources are dwindling. States have been pushing back. Just recently, reports have surfaced about issues with adoption of the electronic waste manifest, which has been hampered by budget constraints.

### **EPA Goal 3: Using technology to improve transparency and freeing resources to focus on the most important problems.**

EPA states in its proposal that the Electronic Reporting Rule will “enhance transparency and public accountability ... [and] allow NPDES- authorized programs in states, tribes, and territories to shift precious resources from data management activities to those more targeted to solving water quality and noncompliance issues.” AGC has many concerns, as outlined below.

EPA has not documented any public need to review site-specific stormwater control information, or how the public gains any useful knowledge about the specific BMPs and processes employed at construction or industrial sites. In our experience, the primary reason that certain groups have requested SWPPPs is to threaten citizen suits under the CWA for trivial paperwork or other inconsequential inconsistencies relating to how a facility describes versus implements a control measure. AGC is concerned about the accuracy of data that would appear in EPA’s publicly-available database(s) (see “EPA Goal 4” below), the likelihood that such data will be misinterpreted or misconstrued, and the potential disclosure of confidential business information.

On a related note, EPA is proposing to change the classifications of different violations by including many more types as “significant noncompliance,” or SNC. Under the proposal, SNC would include violations by minor permittees and non-numeric violations that are deemed to threaten water quality. SNCs are subject to greater regulatory scrutiny and a higher likelihood of enforcement.

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 more accurate, timely and complete information about the NPDES program and operators of those facilities.**

EPA states in its proposal that the Electronic Reporting Rule will "provid[e] regulatory agencies and the public with more timely, complete, accurate, and nationally-consistent sets of data about the NPDES program and potential sources of water pollution." AGC seeks additional clarification on many of the points raised in this statement.

AGC is concerned about the quality and accuracy of any data that would appear in EPA's publicly-available databases. As a threshold matter, AGC urges the agency to provide a more solid framework and much-needed oversight to govern how this information would be used by the public. Much of the data that EPA seeks to share with the public is not self-evident and there is strong potential for it to be honestly misinterpreted (or even intentionally misconstrued) if it is published without context or qualification. Specific points of concern include:

- The proposed regulation states that the primary responsibility for data quality for information from facilities would rest with the owners and operators of those facilities. Some states require co-permittees on stormwater construction Notices of Intent (NOIs). AGC would like more clarification on how the electronic reporting rule would support situations where both the owner and the general contractors of a project are required to file an NOI.
- EPA states in its proposal that it plans to develop "checks" in its electronic reporting tools to identify significant data errors before data submission. AGC requests more information on this point.
- EPA states in its proposal that it would "provide the basis for ensuring that the data are nationally consistent, complete, accurate, and timely." AGC requests more information on this point.



- Data is only valuable if it is presented in a manner that allows one to interpret it accurately. For example, some NPDES permit parameters do not have compliance limits; rather they are listed simply to require benchmark monitoring. The EPA database must have a mechanism to differentiate between data with and without permit limits so that DMR information can be accurately interpreted by the public.

If NPDES-regulated facilities fail to comply with this federal regulation for electronic reporting of NPDES information, EPA and the authorized programs would have available their full set of compliance and enforcement tools and actions to address the failure of a NPDES permittee to electronically submit required NPDES information, just as they do to address any other noncompliance by NPDES-regulated facilities. In addition, the public would also have the ability to initiate citizen suits under Section 505 of the CWA to ensure that noncompliance is remedied when there are violations of existing regulations, permit conditions or requirements in enforcement actions.

### *Temporary Waiver from Electronic Reporting*

EPA recognizes that electronic reporting could be problematic for certain facilities, particularly those located in remote rural areas. Taking into account the limitations of broadband availability and technological capabilities, EPA has proposed a process for temporary waivers (for up to one year) to the electronic reporting requirements for facilities lacking broadband capability or high-speed Internet access.

AGC members report that a year-to-year renewal would be burdensome for permit holders in rural areas because the area cannot predict when broadband access will not only be implemented, but even considered by their respected state governments. AGC recommends that EPA allow permittees that qualify for a waiver to submit their NPDES compliance information on paper-based forms for their entire permit term or a maximum of five years.

### *State Readiness Criteria*

States would have two years after the effective date of the rule to modify statutes and regulations, if necessary, and implement e-reporting in their permits. Where states have not been able to meet certain criteria, EPA would use its CWA Section 308 authority as a backstop to obtain the required electronic information from permittees, and will then share that information with the states. AGC is concerned that this could result in the need for double, or even triple reporting by permittee:

- electronic reporting directly to EPA;
- submission of paper copies of reports to states; and
- electronic reporting to states that have implemented electronic reporting that doesn't meet EPA's readiness criteria (e.g., the state's electronic reporting systems doesn't yet communicate with EPA's reporting system).

Docket ID No. EPA-HQ-OECA-2009-0274  
AGC of America Comments  
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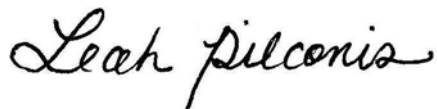
AGC strongly objects to EPA's plan to use its authority under the Clean Water Act to require electronic collection of data in the event that an authorized state is not ready to implement electronic reporting. Permittees must not be penalized, by requiring reporting to EPA and their respective state authority, if their state agency experiences delays in making electronic reporting available. EPA must apply its authority to the state rather than permittees.

### *Inspection Information*

EPA notes that the list of minimum federal data (Appendix A to [40 CFR Part 127](#)) only includes construction stormwater inspection data from the authorized state, tribe, or territory when the authorized program identifies violations and completes a formal enforcement action (*i.e.*, authorized state programs are not required to report construction stormwater inspection data to EPA for inspections that do not identify violations). EPA made this distinction based on the large number of facilities in this segment of the NPDES universe (approximately new 200,000 facilities each year). EPA solicits comment on this approach. AGC members point out that this information would be subject to the same risk of abuse and misunderstanding as any other data that the agency proposes to require.

AGC appreciates the opportunity to comment. Thank you for taking our concerns into account. Given the large scope of this proposal, and AGC's request for clarification and revision, we ask that EPA follow through on its commitment to publish a supplemental notice for additional public review and comment. If you have any questions, please contact me at [pilconisl@agc.org](mailto:pilconisl@agc.org) or (703) 837-5332.

Sincerely,



Leah F. Pilconis  
Senior Environmental Advisor to AGC of America