

The U.S. Environmental Protection Agency (EPA) has finalized a **nationwide rule** that will require construction site operators to submit certain National Pollutant Discharge Elimination System (NPDES) stormwater permit documentation to their permitting authorities using an electronic reporting tool, instead of filing paper. The new rule requires states to share these data with EPA, along with government-administered inspection and enforcement results. EPA currently plans to make these data available to the public through its publicly-accessible **Enforcement and Compliance History Online (ECHO)** website.

Contractors should expect to see new electronic reporting requirements added to their federal/state stormwater permits when they are reissued.

The **NPDES Electronic Reporting (e-Reporting) rule** took effect on Dec. 21, 2015. AGC met with EPA staff several times, and submitted extensive written comments, during the course of this rulemaking. The final rule reflects significant AGC input – providing important flexibility and key distinctions that recognize the large universe of transient construction operations each year.

“Operators” of construction sites and industrial facilities covered by an NPDES stormwater permit must electronically submit the following NPDES documents, as required by their applicable permit:

- General Permit Reports [Notices of Intent to discharge (NOIs); Notices of Termination (NOTs); No Exposure Certifications (NOEs); Low Erosivity Waivers and Other Waivers from Stormwater Controls (LEWs)]
- Discharge Monitoring Reports (only as required by the NPDES permit)

It is important to note that the e-Reporting rule does not, in and of itself, add new reporting requirements on NPDES regulated entities; rather it substitutes electronic transmission for paper-based filings.



NPDES e-Reporting Rule

Environmental Services Fact Sheet

The new requirements will directly apply to construction firms when the e-reporting provisions are added to individual or general NPDES stormwater permits (i.e., Construction General Permits and Multi-sector (Industrial) General Permits) that apply to their jobsites and/or construction-related facilities. **NPDES-authorized states** that currently do not require e-reporting will have to establish the requirement, presumably in conjunction with their **NPDES permit reissuance cycle** – but perhaps sooner to meet the implementation deadlines. The rule also requires all authorized state permitting authorities to electronically submit to EPA certain jobsite- and facility-specific data they collect from permittees, along with certain data the state generates (on its own), when it conducts a compliance inspection that ultimately results in a formal enforcement action.

The minimum set of NPDES program data that must be shared with EPA is listed in the final rule (Appendix A to 40 CFR Part 127). Where the state is the designated initial recipient of the data, the rule requires the state to share the information with EPA. [Note: Not all of the data fields in Appendix A are applicable to all NPDES permittees; it depends on the type of permit that covers your site(s)/facility(ies).]

Public Access to Site-Specific Information

EPA noted in the preamble to the final rule that “[s]eparate from this rulemaking, EPA intends to make this more complete set of data available electronically to the public, to promote transparency and accountability by providing communities and citizens with easily accessible information on facility and government performance.” Indeed, as EPA shifts its NPDES program from paper to electronic reporting, a lot more construction site-specific data will be readily shared with – and searchable by – the public via EPA’s ECHO database. (Although it is not codified in the final regulation, EPA’s national NPDES data system (“Integrated Compliance Information System” or ICIS-NPDES), which will be the repository of all federal/state data collected under the e-Reporting rule, currently feeds directly into ECHO on a weekly basis.) **AGC has reported** on this development and suggested that members may want to consider assigning a representative to access and monitor what EPA is posting about their project sites and support facilities.

An important change from the proposal to the final e-Reporting rule – that directly addresses concerns that AGC raised – is that state permitting authorities are only required to share with EPA “Single Event Violation” (SEV) data from a construction stormwater inspection when the state also issues a formal enforcement action against the inspected construction site. This distinction is significant, because, in all other respects, the final rule requires states to share with the agency SEV data on facilities designated as “nonmajors” (prior to this final rule, EPA only required authorized NPDES programs to share with EPA SEV data on facilities designated as “major” sources of stormwater pollution).

Electronic reporting may increase enforcement (by both government and third-party citizen suits), due to the increased availability of data and ease of data analysis. AGC submitted **two rounds of comments**, held face-to-face meetings with EPA staff, organized a member webinar, and will continue to take extensive steps to ensure that the agency understands the construction industry’s concerns regarding the misinterpretation or misuse of such information. A paramount concern is

protecting sensitive material that could cause damage or be prejudicial to national security or safety, if publicly available. AGC will continue to engage with EPA as it enhances ECHO to accommodate the minimum set of NPDES program data.

What Contractors Must Do

Looking ahead, what does this mean for construction firms? As further explained below, jobsite/facility “operators” tasked with stormwater permit compliance will need to:

- Identify the appropriate recipient (EPA or state) for all stormwater documentation;
- Get trained on how to use the electronic reporting system(s) applicable in the state(s) where they do work;
- Register and obtain a user account(s) as required and, probably, obtain a valid electronic signature (in accordance with the federal identity-proofing and encryption standards); and
- Report using an approved e-reporting program/tool by the specified deadlines.

Electronic reporting may increase enforcement (by both government and third-party citizen suits), due to the increased availability of data and ease of data analysis.

Notably, AGC requested in its comments on the proposal that EPA provide some flexibility in the final rule that would allow construction operators the ability to electronically submit the required documentation without an electronic signature. EPA addressed this in the final rule by allowing state permitting authorities to use data capture technology [e.g., two dimensional barcodes such as Quick Response (QR) codes, optical character recognition] for Construction (Stormwater) General Permit reports, thereby eliminating the need to obtain a digital signature on electronic submissions. Under this so-called “Hybrid Approach,” the state will need to maintain the signed and dated paper submissions.

Another positive outcome is that the final rule provides authorized NPDES programs with flexibility

to grant temporary waivers from electronic reporting of NPDES program data, subject to review once every five years. This closely tracks AGC's recommendations.

Two-phased Implementation

Under the final rule, EPA will implement nationwide electronic reporting requirements in two phases over a five year period. Following are the provisions that will affect construction professionals:

- **Phase 1, by December 2016:** All NPDES permitting authorities must electronically collect Discharge Monitoring Report (DMR) information from permittees and electronically manage and share that information with EPA Headquarters. (General contractors may have DMR requirements under their Multi-sector (Industrial) Stormwater Permits that apply to construction-related operations such as cement or concrete manufacturing, asphalt paving, minerals mining, or landfill sites.) In addition, data originating from the states (related to inspections, violation determinations, and enforcement actions – per Appendix A of the rule) must be shared electronically with EPA Headquarters.
- **Phase 2, by December 2020:** EPA and authorized state NPDES programs must electronically collect, manage, and share general permit reports (e.g., NOI, NOT, NEC, LEW); and all other remaining NPDES program reports – per Appendix A of the rule.

Electronic Reporting Tools

Many NPDES-authorized states have their own electronic data systems and reporting tools for managing NPDES data. (For example, DMR electronic reporting tools are already deployed in 42 states, with an additional six states actively developing similar systems, according to EPA. But participation in most states has been voluntary.) Those that do not, will need to “build or adopt electronic reporting systems for Phase 2 data as well as register and train NPDES regulated entities [by the assigned deadlines],” the rule’s preamble says. Recognizing state agencies’ limited resources, a favorable option will likely be to adopt

EPA’s electronic reporting tools, as described below—

- **NPDES e-Reporting Tool (NeT)**
 - Accessed through the Central Data Exchange (CDX) at <https://cdx.epa.gov/>
 - Used to electronically prepare and submit the following general permit reports: NOI, NOT, NEC, LEW
- **NetDMR**
 - Accessed at <https://netdmr.epa.gov/netdmr/public/home.htm>
 - Used to electronically prepare and submit DMR monitoring results

EPA’s new 2015 MSGP currently requires electronic reporting, by the use of the tools above (absent a waiver); the permit applies only where EPA still administers the NPDES permit program. The electronic NPDES data EPA receives is now publicly available through the ECHO system at <http://echo.epa.gov/>.

Will Your State Be Ready?

The final rule notes that EPA can compel companies in states with low compliance rates to begin e-reporting to their state permitting authorities, through information collection requests. EPA notes in the preamble to the rule that it “may send individual notices to compel electronic reporting when the authorized state ... has less than 90-percent participation rate for one or more data groups” after the implementation deadline has passed. EPA also notes that authorized NPDES programs can use their enforcement discretion to allow NPDES permittees to forgo filing paper forms as long as they use the approved electronic reporting systems.

EPA has stressed that the e-Reporting rule does not increase the amount of information required from NPDES regulated entities, under existing regulations. However, states can require more.

In the proposed version of the rule, EPA would have designated itself as the primary recipient of NPDES e-reporting data, rather than state authorities, if states failed to meet “readiness

criteria," including a 90-percent electronic submission rate. AGC expressed in its comment letter the importance of ensuring that authorized states (responsible for issuing NPDES permits) remain the initial recipient of permit data to avoid confusion and the potential need to "double-report" (paper and electronic) to both the state regulatory agency and EPA. EPA responded by making the change noted above and extending the Phase 2 implementation deadline (from two to five years) to help ensure states successfully transition from paper to electronic reporting. This will help to ensure that delegated states remain the initial recipient of data and that regulated entities can continue to look to their state-specific permits for instructions on how to comply with NPDES requirements (reporting or otherwise).

The final rule requires EPA to maintain a list of initial recipients (the governmental entity, either the state or EPA, who first receives the NPDES program data listed in Appendix A to 40 CFR 127) for each state and by each NPDES data group and to publish this list on its website and in the *Federal Register*. NPDES permitted entities should be on the lookout for this list, or check your stormwater permit(s) for electronic reporting requirements.

EPA estimates that the 46 states and other U.S. territories that are authorized to administer the NPDES program will collectively save about \$22.6 million a year as a result of switching from paper to electronic reporting, once the rule is fully implemented.

Stormwater Pollution Prevention Plans Online

EPA has stressed that the e-Reporting rule does not increase the amount of information required from NPDES regulated entities, under existing regulations. Note that in an earlier proposed version of the e-Reporting rule, EPA would have required contractors seeking coverage under either a general or an individual permit to electronically report the "best management practices ... to control pollutants in stormwater discharges from

construction activities." AGC pointed out that this is not currently required under the regulations on stormwater general permits and EPA deleted that provision from the final rule (and from Appendix A).

However, EPA reminds state permitting authorities in the final rule's preamble that they can "require NPDES regulated entities to submit more data than what is listed in Appendix A" – and collect such additional information electronically and share it with EPA and the public. For example, [EPA's 2015 MSGP](#), which serves as a model for the nation, meets the minimum e-reporting components of this new rule, but it also requires public access to stormwater pollution prevention plan information, either by posting on the Internet or by incorporating salient information into the application form. At a recent meeting with EPA's Office of Water, AGC learned that the agency is pursuing a similar approach with reissuance of the federal Construction General Permit in early 2017. AGC will oppose this change for reasons outlined in this fact sheet – along with the fact that 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 best management practices and processes employed at construction sites.

This rulemaking is part of [EPA's Next Generation Compliance \(Enforcement\)](#) strategy, through which the agency hopes to leverage information and technology to streamline enforcement procedures and strengthen compliance with federal environmental laws.

Over the next few months, EPA will schedule trainings and outreach webinar sessions for regulated entities to provide an overview of the final rule, and the next steps for implementing electronic reporting. [Click here](#) to access EPA's press release, fact sheet, economic analysis, and the final e-Reporting rule (including the final set of data elements in Appendix A).



This fact sheet should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, AGC urges you to consult your own lawyer on any specific legal questions you may have concerning your situation. All photographs are courtesy of the U.S. Environmental Protection Agency unless otherwise indicated.

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