



## ENERGY AND ENVIRONMENT CABINET

**Leonard K. Peters**  
Secretary

DEPARTMENT FOR ENVIRONMENTAL PROTECTION  
DIVISION OF WATER  
200 FAIR OAKS LANE, 4<sup>TH</sup> FLOOR  
FRANKFORT, KENTUCKY 40601  
PHONE (502) 564-3410  
FAX (502) 564-0111  
www.dep.ky.gov

**R. Bruce Scott**  
Commissioner

**Peter T. Goodmann**  
Director

January 28, 2015

Ms. Cynthia Giles  
Assistant Administrator  
United States Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
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  
1200 Pennsylvania Ave NW, MC 4101M  
Washington, DC 20460

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

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

Dear Assistant Administrator Giles and Deputy Assistant Administrator Kopocis,

The Kentucky Division of Water (the Division) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) regarding the Supplemental Notice and Proposed Rulemaking for the National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule ("eReporting" rule), 79 Fed. Reg. 71066-81 (December 1, 2014).

As you are aware, Kentucky has already made great strides towards implementing eReporting for its NPDES-regulated community, and believes that electronic reporting can increase efficient use of limited resources if properly designed and utilized. The Division would appreciate EPA considering changes to four troublesome aspects of the proposed rule which, in Kentucky's experience with eReporting, do not appear to further intended goals of the program.

First, the proposed rule would require data submission for facilities that do not fall within the NPDES permitting program, nor possess NPDES permits. Rather, the rule would require reporting from entities such as concentrated animal feeding operations (CAFOs) that do not discharge into a water body and therefore do not require a Kentucky NPDES permit, or may be regulated by the

Department of Agriculture or another agency. Two federal appellate courts have already held that the EPA does not have the authority to regulate entities without an actual discharge of pollutants (See, *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2<sup>nd</sup> Cir. 2005), and *National Pork Producers Council v. EPA*, 635 F.3d 738 (5<sup>th</sup> Cir. 2011)). The Division questions EPA's legal and jurisdictional authority to require information from entities it does not regulate, that may be regulated by other agencies, and that do not fall within the jurisdiction of the Clean Water Act. For these reasons, the Division urges the EPA to remove this requirement from the proposed regulation.

The EPA requested comments on whether it should establish an "opt-out" process for Initial Recipient determination. The Division supports an "opt-out" process, but believes that EPA should go a step further and develop a process by which authorized states and agencies can opt out of specific classes of information (such as pretreatment annual reports, eNOIs and eNOTs for general permits, etc.) that are otherwise irrelevant or erroneous to implementation of the state NPDES program.

While the Division believes that its eReporting participation will meet the proposed 90% participation rate for State Readiness Criteria, its experience with eReporting also indicates that factors beyond its control – including federal development of appropriate forms and technical support programs – may prevent states from initially meeting that ambitious goal within a 2-year time frame. The Division respectfully reminds the EPA that ICIS became inoperable during the federal government shutdown in the Fall of 2013, though required information was still expected to be entered in a timely fashion. The EPA must develop a contingency plan – and 'grace periods' for reporting – should the electronic system be inaccessible for any reason in the future. The Division suggests that participation rates should be based on a progressive schedule with an extended implementation timeframe of three years (such as, 35% participation at the end of the first year, 70% at the end of the second year, and 90% at the end of the third year). This "phase in" schedule should better enable states to meet the goals of the proposed rule, while giving appropriate time for all parties to develop solutions to problems as they arise.

Finally, Appendix A lists required data elements under the proposed rule. The Division maintains that Appendix A includes data elements that do not provide any foreseeable benefit to NPDES program management (for example, Horizontal Accuracy Measures and Facility Source Map Scale Numbers are already available and easily accessible elsewhere). KDOW suggests that the EPA carefully review each data element in Appendix A - with state and stakeholder input - to evaluate the relevance of RIDE elements in implementing NPDES programs, and removing obsolete elements to streamline the list and further the efficiency and relevancy of the eReporting program.

The Kentucky Division of Water appreciates the opportunity to comment on this proposed regulation, and remains ready to answer any questions or provide further information regarding these comments or Kentucky's experience with eReporting.

Sincerely,



Peter T. Goodmann, Director  
Division of Water

PTG/cjc

Cc: Kentucky EEC Secretary Dr. Leonard Peters  
Kentucky DEP Commissioner Bruce Scott