



Call for Change – NPDES Program

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The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) has developed a set of recommendations believed necessary to maintain and continue to improve the water quality in the United States. This "Call for Change: Water Quality Improvement in the 21st Century" is an invitation to the Federal government to reestablish an effective partnership and forge a new course of action to protect and improve the nation's water resources. ASIWPCA looks forward to an on-going constructive dialogue with the US Environmental Protection Agency (EPA), the incoming Administration, and interested stakeholders to meet this challenge.

General Overview and Background:

The National Pollutant Discharge Elimination System (NPDES) has achieved significant reductions in pollutant discharges since it was established by the Clean Water Act (CWA) in 1972, and resulted in tremendous improvement to the water quality, even as the number of permitted facilities has greatly increased and Federal resources have continued to decline. While incremental advancements in water quality may occur in some parts of the country, for most States these advancements likely peaked long ago and have now tapered off. Compliance rates have improved over the years, and remaining noncompliance for point sources is overshadowed by the water quality impacts from nonpoint sources. The law of diminishing returns dictates that the Federal government should consider revising some of its national policies to maintain this progress and avoid future declines in water quality.

Forty-five States are now authorized to directly implement NPDES and have primary responsibility for the day to day operations of their program. Authorization was provided by EPA only after an intense and exhaustive review of a State's NPDES program construct and legal authorities. Included within this review was also consideration of current and future program resource estimates. In general, once a State is authorized to administer the program, EPA no longer conducts these activities, but has an opportunity to review different aspects of the program to ensure compliance with Federal requirements. The "*Permitting for Environmental Results*" and "*State Review Framework*" are two extremely comprehensive initiatives to assess, review, and oversee the States' NPDES programs.

For most States there is relatively little overall gain in water quality left to be realized by further controlling and limiting conventional pollutants from point sources. Yet, the NPDES program remains at the center of debates about the solutions to pollution, petitions for cleaner water, and lawsuits over how the program is implemented. ASIWPCA and its membership are extremely proud of everything the NPDES program has accomplished over the years, particularly as the number of permitted facilities has greatly increased and Federal financial support has continued to decline.

Reason for Change:

A. An Overwhelmed Program

The NPDES program has matured and continued fine adjustments will not necessarily improve water quality. The NPDES program should work better than it does now. The number of sources requiring permits has increased from 100,000 to well over 600,000. Many States have backlogs of



expired permits at least partially caused by the ever-increasing list of requirements and refinements aimed at removing smaller and smaller amounts of pollution. It is becoming more common at times to take five years to renew a permit for another five years. The fact sheets EPA wants can be as long as the actual permit, which is counterproductive. The continued tightening of rules will lead to more headaches without improving water quality. Recent discussion on the level of energy consumed by wastewater treatment (carbon footprint) also raises questions about the sustainability of applying lower and lower discharge limitations to point sources.

One basic NPDES tool that facilitates a comprehensive and efficient process for addressing a category of similar discharges is the “general permit”. General permits contain specific limitations or requirements that apply to all facilities involved in similar operations that can be adequately regulated with a standard set of conditions. Unfortunately, EPA's focus on issuing guidance to provide clarification for certain program areas has created legal vulnerabilities which undermine general permit usage. Further, the complexities of issuing a general permit for impaired waters should also be considered as well as the need for guidance on public notice.

Under § 304(b) of the CWA, EPA must develop, review, and update national technological standards that represent the greatest pollutant reductions economically achievable for a particular industry. Unfortunately, the development and updating of these “effluent guidelines” have remained a low priority for EPA and have not kept pace with the technology. Outdated standards, or in some instances, no regulatory standard (e.g. for ballast water discharges) may exist. This requires the permit writer to use best professional judgment.

Recommendations:

- Together, EPA and States should update and document NPDES permit requirements and streamline the permit process. There should be specific provisions for basin-wide or statewide water quality standards variances.
- EPA should address the legal vulnerabilities surrounding general permits by developing a regulation(s) that ensures that general permits will remain a viable tool.
- Provisions should be made for minor sources that do not need renewed attention every 5 years. A simplified reissuance process or the option for a 10-year permit would provide greater efficiency in this area.
- EPA should reinvest in the development, review, and updating of effluent guidelines to modernize this aspect of the program.

B. Square Peg in a Round Hole – Use of NPDES and Other Tools

The recent trend of stretching the NPDES program to control pollution it was not intended to control has been troublesome. Efforts to identify ways to transform precipitation-related discharges into point sources which are not related to precipitation in order to take advantage of the NPDES regulatory tool have led to litigation and uncertainty. EPA's rules on concentrated animal feeding operations (CAFOs) were largely thrown out by the courts and a revised rule has been delayed many months while the EPA wrestles with the idea of regulating the application of manure on crop fields with a program designed for point sources. How to apply the permit program to a CAFO that may or may not discharge is also a challenge. Even before the final rule is effective, groups are lining up to continue the fight in court.

Most States have relatively few 303(d) waters listed due to impairments from sources regulated by NPDES permits. Large-scale unregulated and insufficiently controlled precipitation-related discharges will continue to keep the States from meeting clean water goals unless the programs



are revamped. In many States, agriculture and forestry are the dominant land uses, and except for certain animal operations, their discharges are exempt from pollution control requirements. States acknowledge that farm and forestry programs over the years have delivered significant results, but those land uses continue to account for the bulk of impaired waters in many States. Large scale gains in water quality will require unprecedented controls over the dominant land uses in the States. For less traditional sources, using the NPDES program to “permit” the way to substantially cleaner water can no longer be expected as the best tool.

Recommendations:

- EPA should work with States to identify specific water quality issues in each State or region and devise solutions that can be effectively implemented by State and Interstate Agencies.
- A reasonable consensus must be reached on a useful role for functionally equivalent State approaches and “reasonable potential.”
- New tools should to be developed to control pollution in addition to the NPDES program.
- EPA should lead other Federal agencies in developing clear objectives for controlling pollution from lands in production. They should take advantage of existing voluntary programs to the highest extent possible.

C. The Advancing Deluge that is Storm Water

The number of regulated storm water sources greatly exceeds the capacity of permit agencies to give them individual attention. These sources have commonly been regulated through general permits that specify pollution control practices rather than individual permits with numerical discharge limits and effluent monitoring. Storm water permit applicants cannot readily characterize either quality or quantity of discharges in advance. Because of this, permit authorities cannot precisely establish, as they would for process wastewater sources, whether the discharges will cause or contribute to standards violations or comply with Total Maximum Daily Load (TMDL) waste load allocations. Storm water monitoring requires considerable expertise and expense, and relating stream impacts to off-stream sources is beyond the current state of the science.

Recently, some stakeholders have argued, and some courts have ruled, that storm water sources should be subject to the same issuance procedure, individual review, and monitoring requirements that apply to traditional point sources. State agencies have neither the resources nor the information to manage regulated storm water in that manner.

Recommendations:

- Permit conditions and monitoring requirements should be developed that are appropriate on a watershed or other regional basis. This will require continued national investment in research on Best Management Practice (BMP) performance and pollutant transport modeling. States should prioritize watersheds for this detailed level of attention.
- EPA should work with States to establish appropriate procedures for general permits through rule making for industrial storm water, construction storm water, municipal separate storm sewer system (MS4s) and CAFOs. This includes:
 - Permit limits - clarifying how BMPs and Maximum Extent Practicable satisfy water quality based effluent limits and TMDL requirements.
 - Notice Of Intent - setting content requirements for pollution control plans, nutrient management plans (NMP) or storm water pollution prevention plans.



- Plans Review – establishing an appropriate standard of review by the permit authority.
- Public Notice – covering notice procedures, document review, and response to comments.
- Monitoring - addressing assessment of performance, in impaired waters, as required by the NMP.
- Extension of Expired Permits - specifying how general permits extend and transition.

D. Program Oversight and Data Reporting

Several national institutionalized policies must be revised, especially in the areas of inspection frequency, data collection, data reporting and management, and compliance assurance and enforcement. Without a national philosophical shift in these areas, more funds will be spent on duplicative and unnecessary program management activities (relabelled as actions “necessary for oversight administration) than will actually be invested in water quality improvement and environmental benefits.

While there may be many different approaches to Federal management of water pollution control, EPA has focused much of its efforts on creating “one size fits all” policies that reduce State flexibility, create national priorities that conflict with State water quality priorities, and undermine creative problem solving. The universe of facilities covered under the NPDES program has continued to expand at a rate that far exceeds available resources. Though States are continuing to see a decline in resources, EPA is placing great emphasis on inspecting a particular universe of facilities in a given time period. A more strategic, State-specific, risk based approach focused on water quality rather than bean counting is preferred. Disinvestment in major point sources may be ill advised. As infrastructure ages, these sources may be in critical need of attention.

The methods that EPA has used for measuring and documenting the performance of State and Interstate programs are clumsy and overly burdensome. Data is loaded into Federal databases and permits are sent to the regional offices for review on a routine basis, but program evaluations consist of duplicative data requests and permit file searches. Clear standards of performance for core activities are not developed with the States and Interstates before hand to prevent mission creep. The State Review Framework attempts to define clear standards but has grown into another version of the same burdensome process. Not enough attention is given to compliance assistance as a necessary, effective, and appropriate aspect of every State program.

National data systems such as the Integrated Compliance Information System (ICIS-NPDES) are very cumbersome and problematic when large amounts of data are batched in or out. There is a difference between reporting for oversight and establishing a national database of regulated facilities. States signed up for the former when they asked for authorization. If the later is desired, it should be supported by EPA. Requiring facility specific data in the national database is duplicative and not consistent with the co-regulator partnership. Recent efforts to modernize the national reporting requirements and required ICIS-NPDES Data Elements (RIDE) will place such a demand on resources that permits cannot be issued in a timely manner, inspections are delayed, compliance assistance efforts are diminished, and enforcement activities become limited.

Recommendations:

- A sustainable Federal funding solution must be identified to keep pace with this expansion and inflation.



- States and EPA should work together to set meaningful, risk based program goals that are directly related to water quality. Different areas of the nation have different environmental issues that may call for State or Region specific program goals.
- EPA should conduct program evaluations based on performance measures developed with the States and Interstates at the start of the review period. Where ever possible, EPA should use information submitted throughout the review period to eliminate duplication of effort and reduce the burden on the program.
- National NPDES data reporting requirements should focus on oversight information.
- EPA should consider the broad range of compliance assistance opportunities when revising national policies.

NOTE: *Throughout this document reference to States also refers to Interstate Water Pollution Control Agencies.*

For more information on ASIWPCA's Call for Change, go to www.asiwpca.org