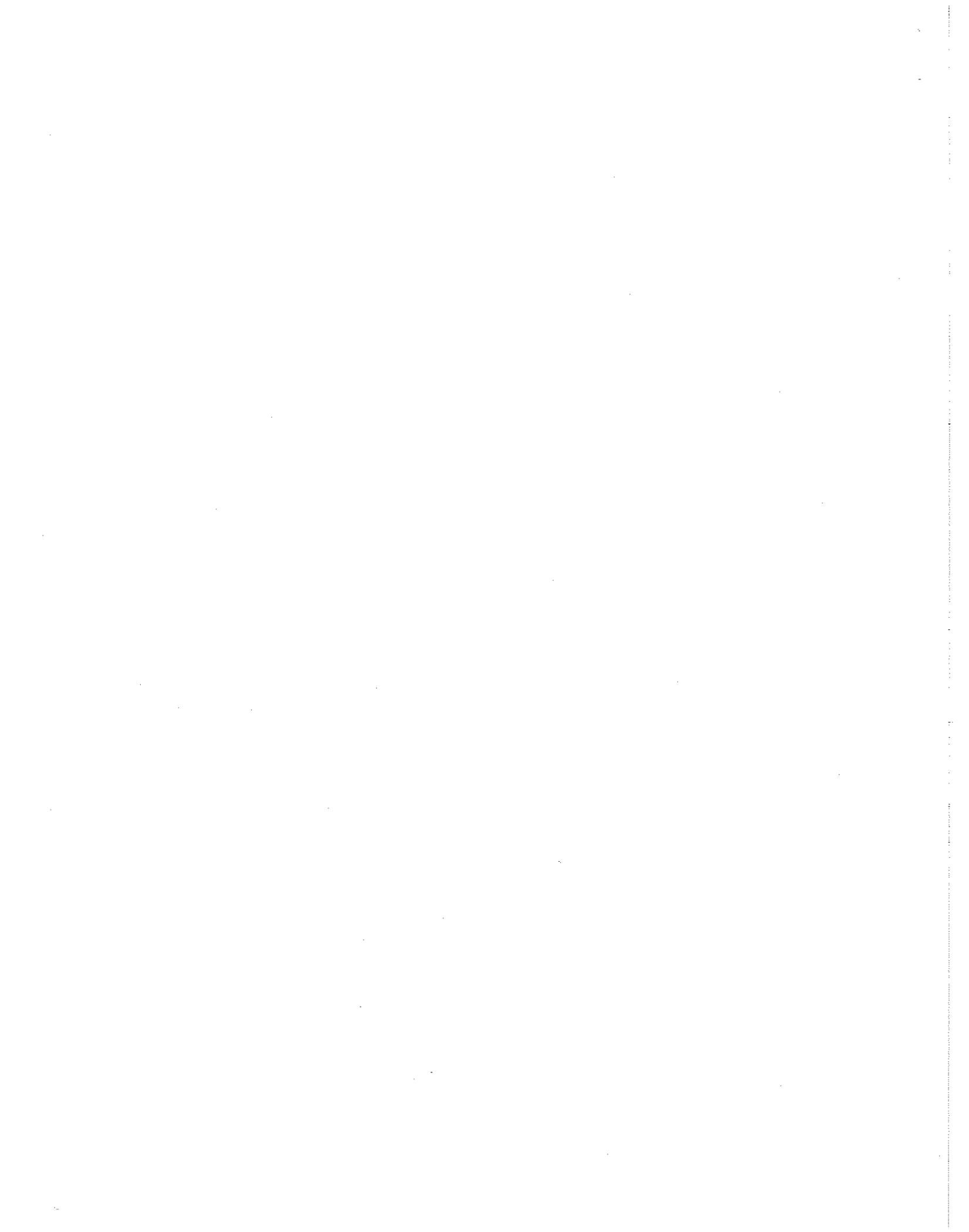


Commenters on the NPDES Permit Fee Incentive Rule

- * Alaska Department of Environmental Conservation
 - California Water Resources Control Board
 - Colorado Department of Public Health, Water Quality Control Division
 - Connecticut Department of Environmental Protection
 - Delaware Department of Natural Resources & Environmental Control
 - Hawaii, Department of Health
 - Illinois Environmental Protection Agency
 - Kentucky Division of Water
 - Louisiana Department of Environmental Quality
 - Maine Department of Environmental Protection
 - Minnesota Pollution Control Agency
 - Missouri Department of Natural Resources
 - Michigan DEQ
 - Nebraska Department of Environmental Quality
 - Nevada Division of Environmental Protection
 - New Hampshire Department of Environmental Services
 - New Mexico Environment Department
 - New York Division of Water
 - NEIWPCC
 - North Dakota Department of Health
 - Oklahoma DEQ
 - * Oregon Department of Environmental Quality
 - RI Department of Environmental Development
 - South Dakota Department of Environment and Natural Resources
 - Tennessee Department of Environment and Conservation
 - Texas Commission on Environmental Quality
 - Virginia DEQ
 - * Washington Department of Ecology
 - Wisconsin
- ASIWPCA
Association of State Drinking Water Administrators
- * Environmental Council of the States (ECOS)
Agriculture, Environment and Energy Committee, National Conference of State Legislatures

Comments submitted by Senator Richard Durbin et al.

- American Farm Bureau Federation
- American Forest & Paper Association
- Coalition Against Permitting Unfunded Mandates
- Dynegy, Inc. (TX)
- EarthView Environmental, L.L.C. (IA)
- Federal Water Quality Coalition
- Hampton Roads Sanitation District
- Illinois Energy Association
- Indiana Farm Bureau, Inc.
- Los Angeles Department of Water and Power
- Maine Waste Water Control Association
- * National Association of Clean Water Agencies
- National Association of Home Builders
- New York City Department of Environmental Protection
- New York State Conference of Mayors and Municipal Officials
- New York Water Environment Association
- Phoenix Water Services Department
- Public Power Association
- U.S. Small Business Administration Office of Advocacy
- Water Environment Federation





ASIWPCA

Association of State and Interstate
Water Pollution Control Administrators

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March 5, 2007

Water Docket

U.S. Environmental Protection Agency, Mailcode: 2822T

1200 Pennsylvania Avenue, N.W.

Washington, DC 20460

Attention: Docket ID No. OW-2006-0765

In the 1972 Clean Water Act, the United States Congress directed USEPA to work with the States to keep our nation's waters clean. An important part of this partnership is the authorized grants to State and Interstate Agencies under Section 106 "to assist them in administering programs for the prevention and elimination of pollution." Pursuant to 106, those funds are to be allotted based on the "extent of pollution." By regulation, a methodology was established to accomplish that. The Clean Water Act provides for allocation of 106 grant funds only based on extent of the pollution problem. How States fund their NPDES programs is not relevant, and is not an authorized basis for allocation.

Based on the above and the following concerns, the Association requests that the Agency withdraw this proposed rule making. If the Agency does not take such action and is committed to go forward with a rule, we urge that the comment period be extended longer than the original 60 days. It is clear to the Association that many entities covered by the NPDES program that will be affected by this rule are only now becoming aware of the Agency's proposal. We further urge the Agency, before moving any further on this rule, to assess the impact on State administrative, accounting, and reporting burdens and on the regulated community of bearing the total cost of the NPDES program (permitting, compliance and enforcement) or 75% or 90% of those costs. Regarding the latter, small entities are of particular concern.

Our deepest concern is the overall intent of the incentive program set forth in the proposed rule. It is clear that USEPA and OMB want to expand the role of fees in funding State NPDES programs. Many States interpret the initiative as a means for the Federal government to substantially reduce 106 funding, to the point where State agencies may be required to bear the full costs of the national program in the future. Given the Administration's history of USEPA setting aside 106 funds for certain priorities, this is not an unreasonable conclusion. States are unequivocally opposed to reallocating 106 funding. Increased 106 funding and flexibility in State use of those funds are necessary due to increased national mandates being placed on States and increased pollution due to population and economic growth. A meaningful Federal role in funding is essential to maintaining the State/Federal partnership.

The intent of this proposed rule is unclear and it is a solution in search of a problem. No case is made that national action is needed. USEPA has not identified what specific water pollution control needs this rule would serve. USEPA has not made the case that it would lead to better NPDES program performance, such as greater efficiency, predictability, timeliness of and better

permitting decisions or sustainability. The proposal is so vague and general that we anticipate that USEPA will need to issue extensive guidance. We emphasize that the grant process is already burdensome. States and USEPA do not have the staff to carry out what this rule entails. It will lead to greater bureaucracy, not environmental results.

Comments on USEPA's Proposed Permit Fee Incentive Rule

1. The Rule Is A Distraction from the Primary Issue – The Need for Better Funding For State Clean Water Programs

As Congress envisioned in the Act, States and Interstate Agencies are the primary stewards of the nation's water quality. While there has been an increase in the total §106 funding in recent fiscal years, funding to the core program has actually *decreased* every year from FY-04 to FY-07 due to USEPA setasides of funds intended for States and Interstate Agencies. The proposed NPDES fee rule is just another example of USEPA earmarking State dollars for their priorities. With this proposed rule, the setasides will total over 25% of appropriated 106 funds. Rather than USEPA working with stakeholders to address the over \$750 Million funding gap this proposal, under the guise of providing incentives for States, worsens the situation and seriously strains the partnership States have with USEPA. The proposed rule increases the amount of environmental challenges States will face across the country.

2. Ineffectiveness Of The Incentive and Increased Burdens

USEPA's redirection of Section 106 funds will not accomplish the desired result. This incentive proposed will hardly be sufficient for a governor's office or State legislature to justify battling the political pressure against establishing or raising fees and the program workload that entails. To create an incentive, the proposed rule would penalize States that do not to become fee dependent by withholding Section 106 funds. This is contrary to the intent of Section 106 – to support State *water quality problem solving* using an *equitable allotment* formula based on the *extent of pollution*.

Since States face major political battles establishing or increasing fees, it can take multiple legislative sessions to get such proposals adopted and they can fail despite a State environmental agency's work. This proposed rule provides no incentive for such efforts.

Of equal concern are the administrative requirements imposed by the rule which will entail significant new accounting, reporting and oversight. The grant process is already too onerous for States and USEPA. The proposal fails to recognize those impacts in a quantitative or qualitative way – or that the resources to satisfy these burdens will have to come from other parts of the NPDES program --- ultimately leading to less environmental results. Based on experience in the air permit fee program, these costs and the generally high overhead of permit fee programs would be onerous. They will more than likely offset any benefits to be derived from the proposed incentives.

Further, the proposal requires that a State's level of effort in funding the entire water program be maintained at existing levels (unless all State programs are equally affected by budget cuts). The requirement is not appropriate. It is not NPDES related and does not relate to the rule's stated intent to amend the 106 allotment formula. It will entail onerous bookkeeping and oversight and contradicts what the Agency is trying to achieve via the PPA/PPG process. The text raises many questions that need to be explored with States before any finalization. It is questionable whether

either condition will be met, since adoption or increases in fees are generally revenue neutral. Funding fluctuates year to year and rarely are budget reductions applied equally across programs. How will the water program be defined? Strict adherence to the beginning and end of fiscal years does not capture how activities are funded. Water quality programs include funds that are Federal or not State general funds. What would happen if those funds, e.g. 319 or lottery proceeds declined? If a State's share of the incentive pie declines because more States participate, would that State become ineligible?

3. Polluters Pay? States and Their Stakeholders Should Decide

ASIWPCA feels strongly that the States should decide what mix of fees and general revenues constitute appropriate and "adequate" funding for their NPDES program. While "polluters pay" is sometimes a popular public sentiment, many State legislatures and their stakeholders have recognized that all citizens benefit from cleaner water and, therefore, should share in the costs.

State legislators are charged with balancing the financial impacts to cities, small towns, industries and other sources (the primary permit holders) with sustaining economic growth and maintaining an equitable taxing framework. State legislatures and administrations must decide for their own State what is an appropriate funding approach. We emphasize the proposed rule in a few States will lead to a doubling of permit fees. In other States, fees would have to increase from 4 to over 10 times current levels. Sources that do not now pay fees will face a radically changed program.

4. Disproportionately Harms Small Towns and Businesses

NPDES permit holders could face adverse economic harm under the user fee approach. Small towns and small businesses, that struggle under the cumulative regulatory burden, will be disproportionately harmed by this approach. In many cases, the per citizen or per employee cost of a fee increase will far exceed that paid by larger cities and businesses. Due to the lack of economies of scale, rural States would also find it difficult to depend on fees for NPDES program operation. The proposed "incentive" approach will especially penalize these States for which Federal 106 support is of utmost importance.

5. Impacts On Non-Delegated States

States now seeking delegation have that objective seriously undermined with this proposal, since it is not consistent with their carefully negotiated funding strategies. Since USEPA charges no permit fees in States where they administer the program, delegation can be a "very hard sell." Non-delegated States, who cannot pursue the "incentive," would have their 106 allotment reduced by this proposal.

6. Wrong Focus For Success

With this proposed rulemaking, the measurement of the success of a State's Clean Water Act program would be shifting from overall support for the program and water quality improvement, to the amount of fees a State generates. This would be a poor measure of NPDES success and inconsistent with USEPA's 2006-2011 Strategic Plan. ASIWPCA believes that success should be measured in terms of water quality improvement.

7. Inappropriate Process To Create New Policy

By using the budget process under direction by OMB, USEPA is ignoring the role of Congress in the development of new Federal policies and programs. Establishment of a national fee-based NPDES system should occur through the traditional Congressional authorizing committees with hearings and opportunities for broad stakeholder input. This is far too complex an issue to be relegated to a 60 day comment period on a grant rule that is subject to a low level of administrative procedures.

8. Lack of Authority

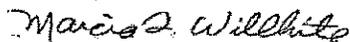
§35.162(d) provides for an alternative allotment formula to be used. The last sentence of that paragraph reads: "*The Administrator will make this determination under this paragraph only if EPA's appropriation process indicates that these funds should be used for this purpose.*" At the present time, a Federal mandate has not been enacted; therefore we question USEPA's authority to move ahead absent Congressional consent.

We question the legal authority of USEPA to set aside §106 funds which Congress intended to go directly to State and Interstate Agencies for water pollution control.

While required in §35.162(d), the States have not been consulted on the details of the proposed rulemaking. It is clear that the potential impact to State programs and permittees has not been thoroughly documented or reviewed. We urge USEPA to re-consider this rulemaking until such time that a clear understanding of its true intent and impact is known, or until such time that an alternate non-106 funding source is found.

While this proposed rule is being presented as an innocuous grant rule to revise an allotment formula, it makes significant changes to the core NPDES program that affects States, permittees (direct and indirect) and the public. It should go through the normal rulemaking processes subject to routine administrative procedures. We believe that USEPA's rule is subject to and should be reviewed under Executive Orders 12866 (Regulatory Planning and Review), 13272 (Proper Consideration of Small Entities in Agency Rulemaking) and 13132 (Federalism). We do not see any "compelling public need" for this rule and EPA has not articulated one. The costs and burdens imposed by this rule need further scrutiny under these orders. In the preamble to the proposed rule, the Agency states that the rule was not a "significant regulatory action" and was not subject to these Executive Orders. We respectfully disagree.

Sincerely,



Marcia T. Willhite
ASIWPCA President and
Chief, Bureau of Water, Illinois EPA

Attachment

Cc: ASIWPCA Membership Ben Grumbles
 Jim Hanlon



Association of State and Interstate
Water Pollution Control Administrators

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**Response to Notice of Proposed Rulemaking
NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula**

**Federal Register Docket ID No. EPA-HQ-OW-2006-0765
Federal Register, Vol. 72, No. 2., Thursday, January 4, 2007**

Responses to USEPA's Four Questions:

- 1. Is the proposed rulemaking incentive amount sufficient to encourage States to establish or expand their permit fee programs? If not, what amount should EPA consider?**

There are no incentives, financial or otherwise, that USEPA could provide that would overcome the obstacles that States face in gaining support for establishing and raising permit fees. Nor is the incentive sufficient to offset the significant amount of work, the extensive stakeholder involvement and negotiations that would be required to become and continue to be eligible for the incentive. This is due, in part, to the extensive accounting and certification requirements. This proposal does not help States establish or expand fee programs. Rather, it rewards some by penalizing others that do not have enough of a fee program to satisfy USEPA and OMB. To the extent the rule is successful, as more States divide up the incentive pie, the shares become smaller and smaller. Cumulatively these factors raise serious questions as to viability of the proposal.

The States' need to adequately fund their permit programs is motivation enough. There is no incentive USEPA could offer that would make a difference in the success of their efforts.

- 2. Are there any non-financial incentives States may prefer that would encourage States to establish or expand adequate permit fee programs?**

USEPA could provide technical support,

- 3. Is the proposed permit fee collection formula, to be used in determining whether States receive a full share of the incentive, something that States can attain? If not, what barriers exist to States recovering the full 100% of NPDES program costs through permit fees? What alternatives would States recommend?**

Most States will find it difficult and not desirable to attain a 100% fee based program. The issues are many:

- The 75/90/100% tier structure appears arbitrary. Why not 60/80/100?

- What beneficial purpose is served by giving a State at the 100% fee funded level an incentive that could be over \$500,000? Those funds would be diverted from other States that need them to support core water programs.
- The proposal is unrealistic:
 - Fee programs are very complex, controversial and generally take years to gradually put into place
 - Creation of fee programs is generally revenue neutral – with corresponding cuts in State general funds. The proposal does not seem to allow this.
 - The incentives seem inadequate for what States have to do administratively to qualify. As more States participate, the incentive pool would be divided into smaller slices.
- Restoring and maintaining water quality benefits everyone, not just permittees. There are significant benefits to maintaining the involvement of the Federal government, State legislatures and the public in funding.
- Affordability would be a problem for small towns and small businesses. USEPA does not consider this issue.
- More sparsely populated and rural States will not be able to pass program costs to the permittees, due to lack of economies of scale. USEPA does not consider this issue.
- Putting all eggs in the fee basket has risks, e.g., due to inflationary erosion, economic downturns, and changes in the regulated community. Balanced sources of funding (State, Federal and fees) avoid this problem.
- Reliance on permit fees does not mean the NPDES program will be “sustainable” – which is the Agency’s stated goal.
- Making the State enforcement presence reliant on fees raises policy issues that should not be for USEPA to decide.

The alternative we recommend is to recognize that how States fund their NPDES programs is not an USEPA issue. The proposal should be withdrawn.

4. What impact may this rule have on the States and the NPDES permittees in the States?

- There will be increased State reporting and administrative burdens that have no added value. Staffing to meet these requirements means less permit, compliance and enforcement resources and less environmental results. State experience in the air program indicates this process will be onerous. USEPA has not addressed this issue.
- There will be similar burdens on the USEPA regions and headquarters, where staff has a difficult enough time processing grants, etc. in a timely manner. This proposal and its vague terms make a bad situation worse.
- State reliance on fees will be revenue neutral. As fees increase, State funding will decrease commensurately
- Fee increases generally will not be accompanied by better customer service.

- To be eligible for the incentive, a State must maintain current funding levels to water programs or demonstrate that all State programs are equally affected. This provision raises many issues that the Agency needs to explore with the States before moving forward. For example, it is not appropriate to have a recurrent expenditure requirement be controlling for water quality program decisions that do not get 106 funding or are not NPDES related.
- The ability of some States to qualify for the incentive may vary from one year to the next.
- Permittees will pay a lot more in permit fees as they solely bear the cost of the NPDES program. Small towns and small businesses and rural States will be particularly affected. (Examples attached)
- Most States will experience a cut in their 106 funding, with commensurate adverse impacts on water quality.
- Can a level playing field be maintained across States as USEPA wanders further and further away from an equitable allotment formula approach?

United States Senate

WASHINGTON, DC 20510

March 5, 2007

Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Johnson:

We are writing to request that EPA reconsider promulgating a rule proposing changes in the manner that Clean Water Act (CWA) Section 106 funding is allocated to the states (72 Federal Register 293, January 4, 2007). This rule would fundamentally alter the way that Section 106 grants flow to the states and penalize those that fail to fund at least 75% of their National Pollutant Discharge Elimination System (NPDES) permit programs through user fees.

While the CWA is a federal mandate, states are primarily responsible for permitting, monitoring and enforcing their water quality management programs. Today, each state's NPDES program receives a portion of its funding from CWA Section 106 grants, based on the extent of the water quality problems in each state. States supplement EPA's 106 grants to meet their overall administrative funding needs with user fees and other discretionary funding.

We question EPA's authority to execute the proposed change. The Clean Water Act does not require the use of fees to fund state NPDES programs. While states may charge fees to pay for the cost of administering their programs, the authority to require such fees is under the jurisdiction of Congress, not EPA. In addition, EPA does not unilaterally have the authority to establish a national policy encouraging states to levy user fees on or tax municipal governments. Nor does EPA have the authority to divert program funds for a purpose - such as creating a set-aside for the sole purpose of promoting user fees -- that is not authorized by the Act.

EPA's proposed rule also strongly suggests that EPA plans to discontinue funding for state NPDES programs in the future. The proposed rule diverts funding above FY 2006 levels to a set-aside account. States could compete for a share of this set-aside only if more than 75% of their program costs are funded through permit fees. To receive the maximum incentive, states must fund 100% of their program costs through permit fees. It appears that the point of the incentive program is to wean states from federal funding for their NPDES programs. We recognize that the federal government cannot bear the entire burden of the NPDES permit program; however, it is not appropriate to ask the states to fully fund a federally-mandated program through a single "acceptable" mechanism - user fees.

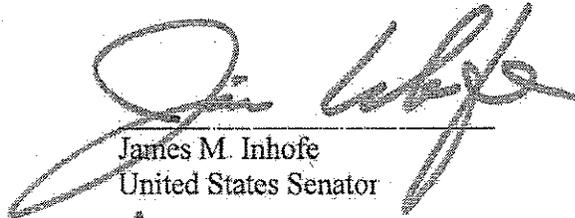
Many stakeholders have approached us with their concerns about EPA's proposed rule. Although the rule is currently in a public comment period, it is our understanding that they contacted the Agency earlier in the process to explain the undue burden it would impose on businesses and communities faced with higher user fees. EPA's proposal makes it clear that these concerns were not taken into account.

We therefore, respectfully request that EPA reconsider continued work on the proposed rule. If the Agency seeks to change the manner in which Clean Water Act programs are funded, then EPA has the burden of submitting a legislative proposal to Congress for its review and consideration.

Sincerely,



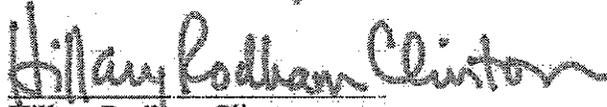
Richard J. Durbin
United States Senator



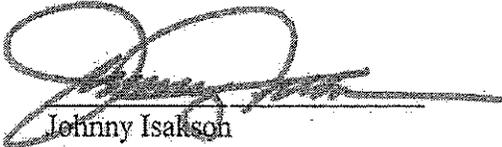
James M. Inhofe
United States Senator



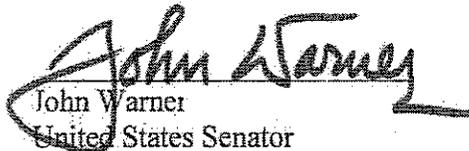
Ron Wyden
United States Senator



Hillary Rodham Clinton
United States Senator



Johnny Isakson
United States Senator



John Warner
United States Senator



Gordon Smith
United States Senator



Ken Salazar
United States Senator



Jon Kyl
United States Senator

Washington State Department of Ecology
Response to Notice of Proposed Rulemaking
NPDES Permit Fee Incentives for Clean Water Act Section 106 Grants
Federal Register Docket ID No. EPQ-HQ-OW-2006-0765
Federal Register, Vol. 72, No. 2

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The Department of Ecology (Ecology) wholeheartedly supports the comments made by ASIWPCA in their March 5, 2007 comment letter on these proposed rules. In addition, we provide these specific comments based on 20 years of experience with a permit fee program in the State of Washington:

1. Is the proposed rulemaking amount sufficient to encourage States to establish or expand their permit fee programs? If not, what amount should EPA consider?

The financial incentive is not sufficient enough for the efforts Washington would need to undertake to become eligible for the full incentive. Washington currently operates a joint NPDES/State Waste Discharge Permit Program. All holders of federal and state waste discharge permits pay annual permit fees. There is no difference in the fee amounts paid between holders of either a federal or state permit and Washington does not split out revenues received from NPDES and State permits.

The financial incentive being proposed by EPA totals approximately \$5.1 million dollars to be split between all states that meet the proposed eligibility requirements. There are currently 45 States authorized by EPA to administer all or some part of the NPDES program. If all States received some portion of the financial incentive, the amount per state would not exceed \$113,000. This amount would not begin to cover the costs of Washington expanding its current permit program to go to 100% funding.

Washington State believes the certification requirements alone required annually by EPA from the States would likely cost more than the proposed financial allotment available.

2. Are there any non-financial incentives States may prefer that would encourage States to establish or expand adequate permit fee programs?

Washington believes there are no 106 grant incentives that will encourage States to establish a permit fee program or enhance an existing permit fee program.

3. Is the proposed permit fee collection formula, to be used in determining whether States receive a full share or the incentive, something that States can attain? If not, what barriers exist to States recovering the full 100% of NPDES program costs through permit fees? What alternatives would States recommend?

Washington has a very robust permit fee program, with revenues in excess of \$28 million per biennium from over 4700 fee payers. However, we believe it currently may only meet the requirements for receiving 25% of a full share. However, to receive 50% of a full share (being at 90% fee funding) or a full share (being at 100% funding) would be extremely difficult to achieve. Some actions that would need to be taken are as follows:

- Fee increases are restricted by state law. To increase fees beyond the provisions of this law, the Washington State Legislature would have to grant a special exemption.
- Ecology would need to make a policy decision on whether or not the proposed fee increase were to be just for NPDES permit holders or for all permit holders in the state. The State's current fee structure does not differentiate between NPDES and state waste discharge permits.
- If fees are increased for only NPDES permit holders, the State's current systems used to manage the permit fee program would require expensive enhancements.
- Ecology would need to enhance its time management system (used for staff time tracking and fund source allocation).
- If the Legislature were to grant an exemption allowing Ecology to increase fees beyond current state law, Ecology would have to undertake formal rule-making which takes at a minimum 12 months to complete.
- Ecology will need to modify its existing accounting structure and database in order to differentiate NPDES fee revenue receipts from State Waste Discharge fee receipts. Washington does not differentiate between NPDES or State Waste Discharge permits.
- Ecology would need to impose surcharges on existing fee payers in order to fund the development of new general permits, or it would need to establish a complex system of "pre-application" fees from entities that are not yet regulated by are projected to be subject to future general permits. Both of these approaches are unworkable and inequitable.

4. What impact may this rule have on the States and the NPDES permittees in the States?

EPA is not proposing to charge permit fees for permit holders on lands that it regulates in Washington State; these include federal facilities and tribal lands. This creates an economic disadvantage between permit holders regulated by the state and those regulated by EPA. During every state fee rule making that has occurred during the past 18 years, permit holders have questioned why they are required to pay permit fees to the state when competing businesses and/or domestic wastewater plants operated on lands regulated by EPA pay nothing. They believe if permit fees are to be charged for those permits regulated by the states, then permit fees should be charged for all permit holders regardless of the administering agency.

In addition, although Washington State has one of the largest permit fee programs in the country that is generally self-supporting (we currently collect approximately \$28 million each biennium from over 4700 permit holders), Ecology and the State Legislature have occasionally established policies that limit the fees paid by certain categories of fee payers to avoid inequities and disproportionately high fees that would otherwise be paid by small businesses, farms, and local districts. In such cases, other state fund sources may be used to fill in the gap. It is well accepted by the State's businesses and municipalities that larger entities commonly pay fees that help subsidize smaller entities, and that the state adds additional funds for certain fee payers (such as dairies, for example). Fees for these smaller entities would have to rise many times over to fully fund the costs of administering their permits.

The State has also established a policy that permit fees can be used to fund inspectors, but we will use state general funds to fund our enforcement specialists. This arrangement has proved to work well over the years, and avoids any perception that Ecology may be taking excessive enforcement actions in order to feather it's own nest.

Finally, "permit fees" are not "application fees". Our permit fees are based substantially on a workload model approach that estimates costs for categories of permits. However, whenever new categories of facilities become subject to the NPDES permit program by virtue of new rules or requirements (such as municipalities under stormwater permits, or agricultural operations under CAFO permits), the cost of developing the new general permits that are needed is very difficult to fund from current fee revenue, and is therefore commonly funded from other state funds.

As an example, the state has worked for several years to develop new municipal stormwater permits for phase II permittees that will cover over 120 entities – however, no permit fees from those entities can be collected until after the issuance of the permit, long after the state has invested millions of dollars into the permit. It is not fair nor practical to charge other fee payers for this work, nor is it feasible to establish "pre-application" fees to be paid by entities that may be subject to future general permits. The recent experience with EPA's rules for CAFO permits, where revisions from draft to final rules

greatly narrowed the application of the rules, vividly illustrates the difficulty of pre-supposing who will be subject to a general permit prior to its issuance.

David C. Peeler
Water Quality Program Manager
Washington Department of Ecology