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Governor *Acting Commissioner*

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February 27, 2002

United States Environmental Protection Agency
Enforcement and Compliance Docket and Information Center
Mail Code 2201A
Attn: Docket #EC-2000-007
1200 Pennsylvania Avenue, NW
Washington, DC 20460

SUBJECT:
(CROMERRR); Docket #EC-2000-007

Dear Sir / Madam:

New Jersey's Department of Environmental Protection appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA) proposed electronic reporting and records rule.

New Jersey's DEP has made considerable progress with – and significant investments in – electronic reporting in order to improve the quality, efficiency and effectiveness of the flow of environmental information between the States and the regulated community. NJDEP strongly promotes the electronic reporting of data in a more flexible manner
result in the collection of enforceable and legally defensible information. For this to be achieved, it is imperative that performance-based criteria be established instead of technology-based requirements, since technology is a moving target. We strongly believe that instead of promoting electronic reporting, the proposed rule would impose rigid legal and technical requirements that would likely discourage digital records and submittals. This concern is most pronounced for the record-keeping part of the proposed rule where EPA is imposing record keeping requirements for electronic data submittals that go beyond the counterpart requirements for the underlying information that would otherwise be used to prepare final

paper reports.

The proposed rule contains overly prescriptive procedures that will impede or preclude the ability of many states to implement their existing or future electronic reporting systems. For example:
The electronic signature/certification scenario prescribes the exact process and the order to complete these steps. The prescriptiveness of this proposed language is counterproductive as written it will preclude other approaches that would effectively accomplish this goal.
Many of the electronic information systems or recording devices that would be covered given the broad definition for electronic records in the proposed rule could not meet the audit trail requirements.
Business records are defined by a general standards approach under the Federal Rules of Evidence.
Under these rules, there is no prescriptive list of procedures for recording or maintaining the record.

Instead, the document can be admitted into evidence if it is "made at or near the time" of the transaction, "by a person with knowledge," "in the course of a regularly conducted business activity" and in a trustworthy manner.

While these general standards can be met in a variety of ways, the federal courts have found them adequate for decades. In contrast, the proposed rule language may be so prescriptive that it unintentionally limits the ability of state agencies or prosecutors to admit otherwise admissible evidence showing environmental violations in administrative, civil, or criminal proceedings. NJDEP recommends, that EPA create general or performance-based standards that could be met in a variety of ways.

The proposed requirements for acceptable electronic document receiving systems present a complex process for identifying the submitter and verifying their authority to originate the transmission. The complexity makes the process unnecessarily difficult to implement.
Most states have adopted the Uniform Electronic Transactions Act, which makes the submitter bound by their electronic signature. Accordingly, states may find that elaborate electronic signature agreements are unnecessary and may cloud an otherwise clear legal obligation.
States will be able to establish stronger requirements by tailoring their agreements to meet individual state needs and by focusing on fundamental obligations such as notifications to the state agency immediately upon discovery that an electronic signature has been compromised.

Electronic reporting systems used by the States currently use a variety of forms of electronic signatures (e.g. PIN, PKI). EPA needs to consider statewide standards, state law (e.g. UETA) and cost of implementation, as well as the technical feasibility for the State to use only one form of electronic signature, when deciding on what standards are acceptable. NJDEP currently used PINS and passwords for e-government applications and New Jersey Statewide PKI infrastructure is not finalized and ready for use by all agencies at this time. EPA should take these issues into account and avoid approving a state system only if a PKI solution is in place. Substantial disruption will occur to existing State e-government portals if these issues are not considered.

The EPA is offering to allow the states (and presumably industry) to meet the requirements of CROMERRR using PKI credentials issued directly to them by the GSA's ACES Certificate Authority (CA). NJDEP is unclear about how this process would be implemented. The clear intent of the EPA is to move to a PKI environment with PKI services supported the by the Federal Bridge ACES infrastructure. There remain many unanswered questions concerning the adoption of the ACES infrastructure. Many

states have recently inaugurated or are in process of building their own PKI infrastructure. For example, New Jersey is engaged evaluating the benefits and issues associated with developing its own PKI domain and is currently involved in a pilot with VerSign in this regard. NJDEP understands that the EPA is very interested in developing cross certification relationships with state PKI domains as means of reducing the complexity and expense associated with supporting multiple PKI domains. NJDEP seeks clarification from the EPA on the ability to and requirements associated with cross certification with the ACES CA through the Federal Bridge.

The archiving requirements, unfortunately, cannot be met as proposed since technologies for the long-term storage of documents containing digital certificates and a number of other requirements are not well established. In addition, implementing the requirements as written would be costly to States. For example, States would bear the cost of preserving legacy systems and records in their entirety until the record retention period ends would be considerable because of maintenance and administration skills retention.
States recommend that EPA consult with:
National Archives and Records Administration and the Department of Defense Records Management. Program to gain understanding of how other federal agencies have addressed the archiving of electronic records.
Other professional archivist organizations to gain understanding of how the private-sector is addressing archiving of electronic records.

This proposed rule is not voluntary and could be quite costly to States that are implementing electronic reporting and record keeping.
Electronic record-keeping systems, as broadly defined in the proposed rule, already exist in states and regulated facilities. In such cases, the proposed rule would be applicable to those existing systems and records, regardless of whether there were any problems with their use.
Many states have existing systems that meet the underlying performance goals of the proposed rule. Under this proposal, these state systems would be required to undergo costly and unnecessary modifications.

States currently assume the responsibility for proper record-keeping and reporting aspects of their authorized programs or delegation agreements, and that mechanism should serve the purpose for electronic reporting and record-keeping. States are also authorized to collect information from regulated entities. NJDEP request that EPA remove any language imposing a new review and approval process on those States who choose to use electronic reporting and record-keeping in lieu of paper documents.

EPA can provide direction during oversight reviews or rescind the delegated program if a state is not adequately addressing the specified performance criteria.

The NJDEP supports the following recommendation as put forth by Robert E. Roberts the Executive Director of the Environmental Council of the States (ECOS):
EPA should work with state environmental and Attorney General representatives as co-regulators to proceed with the electronic reporting portions of the proposed regulation, to incorporate appropriate amendments based upon public comments.
EPA should hold the record-keeping requirements in abeyance until the implications can be more fully examined. This portion of the proposed regulation should be reexamined in the context of all records, not just electronic records. They should also be reexamined for consistency with the policies and regulations of other federal agencies.

EPA should gather additional information on States and the regulated industry electronic record-keeping practices and technologies.
EPA should re-propose electronic record-keeping part of the rule when the above research and analysis is completed.

Thank you for the opportunity to submit our comments on these issues.

Best regards,

Irene S. Kropp
Chief Information Officer
New Jersey Department of Environmental Protection