



July 17, 2015

Via e-filing on [www.regulations.gov](http://www.regulations.gov)

Water Docket  
U.S. Environmental Protection Agency  
Mail Code: 4203M  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Re: Comments of the American Exploration & Production Council in Response to the U.S. Environmental Protection Agency's Proposed Rule entitled "Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category" (80 Fed. Reg. 18,557 (Apr. 7, 2015)). EPA-HQ-OW-2014-0598.

Dear Sir/Madam:

The American Exploration & Production Council ("AXPC") and its member companies appreciate being given the opportunity to submit comments on the U.S. Environmental Protection Agency's Proposed Rule entitled "Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category" (80 Fed. Reg. 18,557 (Apr. 7, 2015)). EPA-HQ-OW-2014-0598. (O&G ELG Rule).

AXPC is a national trade association representing 31 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

The O&G ELG Rule could have widespread, detrimental consequences which EPA appears not to have considered fully before proceeding with its latest round of regulation-making. While EPA justifies its promulgation of the rule on the agency's having "not identified

any existing onshore [Unconventional Oil and Gas] UOG extraction facilities that currently discharge UOG extraction wastewater to [Publicly Owned Treatment Works] POTWs,”<sup>1</sup> a current absence of discharge is not sufficient justification for establishing a discharge prohibition, and EPA’s short-sightedness ignores both the relevant history responsible for POTWs’ non-existent role in UOG operations today and future water scarcity issues which may one day demand industry discharge to POTWs as a matter of course. In addition to these and other comments presented in the following pages of this letter, AXPC incorporates herein by reference all of the compelling arguments in the comment letters submitted by the American Petroleum Institute and the Independent Petroleum Association of America. Ultimately, AXPC requests that EPA withdraw this proposed rule based on the fact that EPA failed to follow the requirements of the Clean Water Act in preparing the proposed rule.

## **I. A Brief Recap of Relevant History**

An isolated occurrence in a single state and shale play does not constitute a national trend which warrants the one-size-fits-all regulatory response in EPA’s O&G ELG Rule. When it was revealed in early 2011 that several operators in the Marcellus were disposing of produced water at fifteen different POTWs in Pennsylvania, it sparked a media frenzy and immediate intervention by the Pennsylvania Department of Environmental Quality and EPA. Existing water quality protection regulations were used to address the concerns, and shortly thereafter, the Marcellus operators involved in the investigation altered their disposal practices. Of course, it is important to recall one reason a handful of operators opted to rely on POTWs in the first place: limited availability of saltwater disposal wells in the area. Unsuitable geology in Pennsylvania has made it cost-prohibitive in many cases to drill deep injection wells, a fact which no doubt influenced the decision of a handful of Marcellus operators to truck their produced water to nearby POTWs.

While the highly publicized episode of discharge to POTWs in Pennsylvania was an isolated and unique event that ended almost as quickly as it began, EPA’s rulemaking appears to be largely based on evaluation of that water and ignores the fact that other unconventional waters could be treated to a quality consistent with other POTW influents. The POTW episode was a byproduct of injection well scarcity. By proposing an O&G ELG Rule which completely eliminates the possibility of discharging produced water to a POTW, EPA has painted all UOG operators and all shale plays with a broad and disparaging brush. Moreover, EPA unnecessarily risks depriving all UOG operators and the public of a produced water management option which may not be prevalent today but could be necessary tomorrow.

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<sup>1</sup> Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 80 Fed. Reg. 18,557, 18,560 (proposed Apr. 7, 2015) (to be codified at 40 C.F.R. Part 435) [hereinafter O&G ELG Rule].

## II. Flawed Rulemaking Process

AXPC believes the proposed rule is the result of a flawed rulemaking process that did not take into account key facts and procedures including, but not limited to the following:

- The water management options evaluated by EPA (disposal by deep well injection, reuse/recycle in subsequent drilling/hydraulic fracturing, and/or land application) are not wastewater treatment for discharge and it is inappropriate in the context of a Clean Water Act compliance evaluation to identify these practices as a “treatment technology”. Injection, reuse, and/or disposal are not and cannot be used as a method to prepare/treat wastewater for discharge. These practices are alternatives to wastewater discharge. They are irrelevant to EPA’s obligation to evaluate technologies available for treating wastewater to meet discharge limitations and they do not serve as a “technological basis” for the proposed prohibition. Technologies do exist for treating a subset of the waters in this industry category, and the Clean Water Act obligates EPA through the ELG development program and pre-treatment program to evaluate them.
  
- Application of the Clean Water Act, and common logic, require that EPA follow a technical and economic evaluation process to develop ELGs; and we believe it is clear that an industry-wide prohibition requires all of the following:
  1. Application of risk analysis techniques and identification of the risk-based concentration(s) necessary to provide adequate protection of water quality;
  2. Demonstration that all sources of wastewater within the category contain the pollutant(s) of concern at or above the proposed risk-based concentration limit (i.e. when/if sources exist for which pollutants of concern are below the limit, there is no justification for an industry-wide prohibition), and
  3. Determination that for all sources of wastewater within the category (considering the full range of concentrations determined to be present, not just the high end of the range), there is no possibility of treating any of the wastewater to levels below the proposed risk-based limit (i.e. when/if sources contain pollutants at concentrations that can be treated, there is no justification for an industry-wide prohibition).

We note that the information presented in the proposed rule demonstrates that there are some UOG sources that have TDS within acceptable levels. Specifically, Table XII-1 in the proposal indicates that TDS in produced waters range as low as 320 mg/L in some areas. And, Table XII-2 indicates that TDS concentration in produced waters range as low as 20 mg/L. Whereas Table XV-1 indicates that adverse effects would not be expected in livestock unless concentrations exceed 2,000 mg/L; and Table XV-2 indicates that levels as high as 1,400 mg/L would be permissible for irrigation water. While we believe the data presented is cursory and that substantial additional research would be required to adequately evaluate this risk and establish an appropriate limitation for discharge to POTWs, EPA's own proposed rule indicates that some sources of UOG wastewater would not pose a dissolved solids risk and/or could be treated to achieve TDS levels that are consistent with other discharges to POTWs.

EPA raises other potential pollutant issues such as organic and radioactive constituents but does not adequately evaluate the industry-wide range of these constituents, did not establish any risk-based levels, and did not show that treatment is technically and/or economically infeasible. Rather, EPA erroneously concluded that an industry-wide prohibition is necessary because the current business environment allows for the use of alternatives to treatment and discharge. In summary, the information provided in the proposed rule identifies a potential risk, but does not provide the required technical or economic data to support the proposed industry category-wide prohibition.

### **III. Water Scarcity**

Thanks to the hard work and ingenuity of AXPC member companies and other UOG operators, the peak oil panic of recent years has been replaced by a resurgence of domestic production and renewal of American strength. But water scarcity is a growing concern and a compelling reason EPA should rethink its O&G ELG Rule and preserve the POTW option. The use of saltwater injection wells is a safe and effective means of disposal, but it is a practice which, like the O&G ELG Rule, forecloses the possibility of beneficial reuse. Though not practical at present, there may come a day when it will make more sense to replenish water sources and combat the scarcity issue by diverting to POTWs an ever-increasing percentage of the substantial volumes of produced water currently being injected each year.

Drought-prone states in the arid west particularly need to preserve all potential tools in the water conservation toolbox. Centralized Waste Treatment ("CWT") facilities operated by various UOG operators have long been a staple of life west of the 98<sup>th</sup> meridian, sustaining wildlife as well as the ranching and farming operations which would otherwise have no reliable source of water. As such, CWTs point to the untapped potential of POTWs, which could play a far greater beneficial reuse role if technology and industry resolve are permitted to be applied to achieve the breakthrough necessary for POTWs to begin treating produced water on a

commercial scale. In their recently issued policy resolution, the Western Governors' Association acknowledged the vitally important role technology must play in a water secure future:

Technology exists to use produced, reused and brackish water – sources traditionally considered to be marginal or wastewater. Adoption of this technology has been limited by inadequate data, *regulatory obstacles*, financial barriers, public attitudes and logistical uncertainties. Governors support regulatory streamlining and policy options to encourage use of produced, brackish, and re-used water where appropriate.<sup>2</sup>

The O&G industry as a whole is synonymous with innovation, but UOG operators in particular are an enterprising and entrepreneurial group. Just as microchip manufacturers continue to develop smaller transistors which redefine the realm of computing possibilities so, too, are UOG operators constantly finding new ways to increase output and reserves, routinely shattering their own short-lived records, and demonstrating an uncanny ability to innovate their way to profitability in hostile regulatory and price environments. Discharge to POTWs may not be desirable or conceivable today, but EPA should not underestimate, as it has done in the O&G ELG Rule,<sup>3</sup> UOG operators' aptitude to discover ways to do it safely and economically tomorrow. For example, the notion that produced water could be recycled on a commercial scale was regarded with skepticism only a few short years ago. Today, however, many operators have embraced water recycling as a means to boost their respective bottom lines and ensure water resource availability in the future, thereby transitioning a once questionable concept into a commonplace practice that has been a boon not only to our industry but also the public and the environment. UOG operators will continue to be defined by their resourcefulness, but all the innovation in the world can't enable them to overcome a categorical ban on the discharge of produced water to POTWs. EPA's O&G ELG Rule threatens to stifle the very creativity which has allowed our industry to strengthen our nation, and it prematurely robs all Americans of the potential for greater water security in the future.

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<sup>2</sup> WESTERN GOVERNORS' ASSOCIATION, WATER RESOURCE MANAGEMENT IN THE WEST, POLICY RESOLUTION 08 (2015), <http://www.westgov.org/policies/301-water/989-water-resource-management-in-the-west> (emphasis added).

<sup>3</sup> O&G ELG Rule, *supra* note 1, at 18,561:

The [O&G ELG Rule] could impose some costs on industry if discharging wastewaters to POTWs becomes economically attractive to UOG operations relative to other management options such as reuse or disposal via underground injection wells in the future. EPA did not estimate these potential compliance costs or environmental benefits because of the uncertainty about future demand for POTWs to accept UOG extraction wastewaters and the associated incremental costs or benefits.

#### IV. Conclusion

AXPC appreciates the opportunity to submit its comments on the perils of the O&G ELG Rule. EPA insists its rulemaking will have a de minimis impact on the status quo, which might be true if the O&G ELG Rule were in fact a carefully considered regulation – not an indiscriminate prohibition – and accurately considered the variability of water quality within the industry it intends to regulate. History and experience tells us a categorical ban on the practices of a dynamic and innovative industry will have unanticipated and unfortunate consequences. We respectfully request EPA abandon this arbitrary and capricious rulemaking and preserve for our industry and our country a water management option which may one day prove to be indispensable.

Sincerely,

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