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**Re: Ecological Rights Foundation Comments Supporting Proposed Rule Allowing
Electronic Service of Citizen Suit Notices - Docket ID No. EPA-HQ- OGC-2024-0557**

Ecological Rights Foundation (“EcoRights”) respectfully submits these comments in strong support of the Environmental Protection Agency’s (“EPA”) proposed rule revising regulations governing service of citizen suit notice letters on certain federal government entities under multiple federal environmental statutes to generally require electronic service. However, EcoRights also proposes making additional changes that will streamline notice and avoid formalistic problems where notice has actually been achieved, as discussed below.

EcoRights is a nonprofit public interest organization dedicated to protecting water quality, public health, and environmental resources through education, community engagement, and citizen enforcement actions under federal environmental laws, including the Clean Water Act (“CWA”) and Resource Conservation and Recovery Act (“RCRA”). Because EcoRights regularly prepares and serves citizen suit notices, the proposed rule directly affects the efficiency and effectiveness of our citizen enforcement.

I. Modernization of Notice Letter Service Requirements Is Appropriate and Necessary

EPA’s proposal appropriately updates longstanding procedural regulations that currently require service of notice letters on the government by mail. Electronic service reflects modern administrative and litigation practices and will help ensure that EPA receives and processes notice letters in a timely and efficient manner.

The existing Certified Mail, Registered Mail, or personal service framework creates unnecessary delay and expense without improving notice quality or reliability. Transitioning to electronic service is a commonsense modernization consistent with current federal practice.

II. Electronic Service Advances the Purpose of Citizen Suit Notice Provisions

Citizen suit statutes require advance notice so that EPA, and sometimes states, have an opportunity to investigate violations and take enforcement action before litigation proceeds. Electronic submission improves the effectiveness of this statutory framework because EPA will receive notice letters immediately rather than after mailing delays. Earlier receipt increases the likelihood that violations can be addressed during the statutory notice period, potentially avoiding prolonged litigation and accelerating environmental compliance.

III. The Proposed Rule Reduces Costs and Administrative Burdens with Regard to Service on Certain Entities

Nonprofit organizations and community groups frequently must submit lengthy supporting documentation with notice letters. Printing and mailing, or otherwise serving, these materials imposes unnecessary financial and administrative burdens. Indeed, sometimes attachments are so voluminous that multiple mailings are required for each recipient due to maximum page numbers associated with Certified Mailing.

Electronic service will:

- Reduce printing and mailing costs;
- Simplify submission of supporting materials;
- Improve accessibility for smaller organizations and community-based groups; and
- Reduce administrative burdens for both EPA and notice providers.

EcoRights agrees with EPA's determination that the proposal results in a net reduction in regulatory burden for service on certain government entities.

IV. Electronic Service Improves Reliability and Reduces Procedural Disputes

Electronic submission systems providing automated date stamps and confirmation receipts will reduce disputes regarding timing or receipt of service that occasionally arise under mailing and other service procedures. Improved certainty regarding service benefits EPA, regulated entities, citizen plaintiffs, and courts alike.

V. Support for the Practicability Exception

EcoRights supports EPA's decision to retain an exception allowing service by Certified Mail where electronic service is impracticable (as discussed below, EcoRights proposes replacing all Registered Mail requirements with Certified Mail requirements, which proposal also extends to service on the government entities under the practicability exception). This

safeguard appropriately ensures continued access for individuals or communities with limited internet access while maintaining electronic service as the default method.

VI. Implementation Recommendation

EcoRights encourages EPA to ensure that implementation includes:

- A simple and publicly accessible electronic submission portal;
- Automatic confirmation receipts documenting submission and receipt; and
- Prompt posting of submitted notice letters to EPA’s public-facing repository to promote transparency.

VII. Proposed Substantive Changes to the Proposed Rule

While EcoRights agrees with the proposal to allow service on certain government entities electronically, EcoRights also points out that some of the proposed changes will seriously increase the burden on noticing parties and will retain problematic notice provisions that already exist in some of the current regulations. EcoRights thus requests that EPA take this opportunity to fix some other unnecessarily burdensome notice procedures and to align the requirements of these proposed new notice procedures in a sensible fashion. As the proposed rule recounts, subject to certain statutory requirements, the citizen suit notice provisions at issue provide EPA with authority to promulgate notice regulations for these citizen suits. *See, e.g.*, 42 U.S.C.S. § 6972(c) (“Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.”). These provisions are broad enough to include all of the proposed changes that EcoRights discusses below. These changes are also consistent with the rulemaking petition that EcoRights submitted to EPA on September 30, 2024, regarding making changes to the RCRA regulations.

The changes that EcoRights proposes are: (1) allow service by Certified Mail or personal service for all of the covered provisions, removing the unnecessary and burdensome requirement to use Registered Mail for some statutes; (2) make the service date the date of mailing, not the date shown on a return receipt card, or, in the alternative, that service is effective where online tracking shows the notice letter was delivered (removing all references to return receipt cards and sending “return receipt requested”); (3) provide that service of a notice letter can take place through any online portal created by state or federal agencies, if any exist now or are created in the future, to provide for more efficient administration through the development of future technologies; and (4) limit the entities that must be served with notice to be coextensive with those required by the statutes themselves, removing additional recipients added in the regulations. The contrary provisions in certain of the current and proposed regulations increase the burden on noticing parties and increase uncertainty without improving the quality of notice. Making these changes is consistent with EPA’s proposal and goals with this proposed rulemaking.

A. Replace requirements for service of citizen suit notice letters by Registered Mail with service by Certified Mail.

EPA's current and proposed RCRA and Noise Control Act ("NCA") regulations require that service of notice letters be by Registered Mail, return receipt requested, or by personal service on various entities. Service by Registered Mail is unduly burdensome for various reasons. USPS describes Registered Mail as "[t]he most secure United States Postal Service® mail service (protected by safes, cages, sealed containers, locks, and keys)." <https://faq.usps.com/s/article/Registered-Mail-The-Basics>. This makes sense given that "[c]ommercial customers shipping cash amounts of over \$500 are required to use Registered Mail" and that Registered Mail can be insured up to \$50,000. *Id.* In short, Registered Mail is USPS's most secure shipping method, to be used for items of inherent monetary value, including large sums of cash. It is not intended for shipment of items of no inherent value, such as the sheets of paper constituting RCRA and NCA citizen suit notice letters.

In addition to being unnecessary, it is also expensive due to the extensive security precautions associated with Registered Mail, and time consuming given that senders need to tape every seam on such mail with special tape in addition to the other mailing requirements. There is, of course, an argument that secure, trackable shipping should be required for citizen suit notice letters as failure of an entity to bring itself into compliance with the law during the notice period opens the entity up to civil penalties and other liability. However, there is no evidence that Certified Mail would not be just as effective. For example, EPA's current and proposed regulations implementing the CWA provide for service of citizen suit notice letters by Certified Mail, 40 C.F.R. § 135.2, and there is no indication that this has created serious problems in the past.

That the CWA allows for service of citizen suit notice letters by Certified Mail is also the source of another main reason that the price of Registered Mail is an undue burden rather than a reasonable cost for noticing parties. EcoRights and other plaintiffs often bring lawsuits alleging violations of both RCRA and the CWA for related conduct by the same polluters. Even where the RCRA and CWA claims are included in the same citizen suit notice letter, as is EcoRights' practice and the practice of many other plaintiffs given the overlapping nature of the laws and the violations of those laws, the conflicting service requirements, Registered Mail and Certified Mail respectively, cause EcoRights and these other plaintiffs to print and mail the same notice letter to an overlapping group of entities once for each statute by each mailing means. Therefore, by requiring that service take place under more expensive Registered Mail for RCRA claims, EPA's regulations more than double the notice costs as compared to if EcoRights could serve the notice letter under Certified Mail for both statutes without adding any benefits for these RCRA/CWA cases. Indeed, given that there are numerous third-party online services that will allow you to send Certified Mail from your computer without the need to leave your office, allowing service by Certified Mail would save citizens from the additional hassle and expense of printing notice letter documents; preparing envelopes; preparing Certified Mail or Registered Mail labels (and return receipt cards under the current regulations), much of which must be done by hand; and spending significant time at the post office while Postal Service employees undertake the work-intensive process of preparing these documents for mailing. For these reasons, EPA should

change its RCRA and NCA regulations to allow for service of citizen suit notice letters by Certified Mail.

B. Calculate the start of the citizen suit notice period by the date of mailing or, in the alternative, remove the requirement to request and procure return receipt cards to prove receipt of citizen suit notice letters.

The provisions throughout EPA's proposed new regulations requiring mailing "return receipt requested" and stating that the notice period does not begin to run until the date on the return receipt card, where served by Certified or Registered Mail, are likely the most problematic provisions in the proposed rule. The requirement to procure return receipt cards has caused serious delays in EcoRights' citizen suits and has even drawn an unsuccessful motion to dismiss in one instance where the defendant did not understand the complicated interplay of the service regulations at issue. Adding this problematic requirement to more regulations, as the proposed rule does, is a step back as compared to the current regulations and is not consistent with the goals of EPA's rulemaking effort. EPA should thus eliminate these return receipt requirements for all of the regulations at issue.

By way of example, under EPA's current RCRA regulations, the notice period does not begin to run until the "date of receipt," and, "[i]f service was accomplished [sic] by mail, the date of receipt will be considered to be the date noted on the return receipt card." 40 C.F.R. § 254.2(c). The primary problem with this requirement is that it relies on the use of "return receipt cards." In EcoRights' experience, as many as about 20% of these return receipt cards do not make it back to the sender for mail that is actually delivered through to the recipient. The number seems to be even higher for federal government recipients. In speaking to U.S. Postal Service employees, EcoRights is aware that machines moving mail through the system, including those used to sort mail in government agency office buildings, often rip these cards off of the service envelopes; they are often not removed from the package after signature and placed back into the mail for return mailing; and they are otherwise often lost in the shipping process. Even where these return receipt cards are actually received with the notice letter, signed, and sent back, it often takes two weeks or more to get these return receipt cards back after receipt of the notice letter by its recipient, meaning that EcoRights cannot be sure whether or not it will be getting a return receipt card back until three or more weeks after mailing, causing it to try mailing again or to incur the additional substantial expense of personal service to ensure that the notice period begins running. Indeed, EcoRights noticed that EPA Region IX, a required recipient under EPA's current regulations for all of EcoRights' California RCRA lawsuits, virtually never returned these cards, causing EcoRights to serve them personally on several occasions after already successfully providing them with copies of the notice letters by Registered Mail. This was further problematic as only certain individuals could accept personal service at this office, and those individuals were not regularly in the office. As a result, EcoRights had to spend both its own time and EPA employee time coordinating times at which those employees would come into the office to accept service, even though they had actually already received the notice letters based on U.S. Postal Service electronic tracking information. This cost EcoRights, a nonprofit entity, hundreds of additional dollars in service costs for citizen suit notice letters that the Regional Administrator had already verifiably received. The only thing missing was the return receipt cards.

While EPA likely included this requirement to ensure that the required entities were actually served, it is unnecessary today where electronic tracking numbers are provided and easily used with every Certified Mail purchase. This proposed requirement thus serves only to burden would be citizen suit plaintiffs and to hamper enforcement of RCRA, and these other laws if EPA adopts the return receipt requirement for these other laws. The reasons are at least three-fold: (1) EPA has long provided that the date of mailing is the date on which the notice period begins for the CWA, with no noted ill-effects; (2) all Registered Mail and Certified Mail is trackable online, allowing for confirmation of service without the need to wait for and receive the return receipt cards; and (3) return receipt cards add one more cost to mailing, albeit smaller than the duplicate service cost of requiring Registered Mailing, discussed above.

EPA's CWA regulations currently provide that "[n]otice given in accordance with the provisions of this subpart shall be deemed to have been served on the postmark date if mailed, or on the date of receipt if served personally." 40 C.F.R. § 135.2(c). As is plain, this is a date of mailing trigger to start the notice period as postmarks are received at the time of mailing for Certified Mail, as compared to the date of receipt, as determined sometime in the future should the return receipt card ever make it back to the citizen suit plaintiff. Given that a date of mailing trigger for the CWA has functioned suitably for decades, EPA should adopt such a trigger for the RCRA regulations, and all of the other regulations, in its final rule.

Should EPA decline to adopt a date of mailing trigger for running of the citizen suit notice periods, the current and proposed requirements that citizen suit plaintiffs request return receipt and obtain return receipt cards should be eliminated because it does nothing more to prove the fact or date of service than providing electronic tracking information obtained from the U.S. Postal Service's website. Therefore, even if EPA were inclined to keep the actual date of service for the triggering of the start of the notice period, which is not warranted and is more onerous than CWA notice under EPA's current CWA regulations, EPA could still ensure service of the notice letters and the date of service without requiring that plaintiffs request return receipts and receive the return receipt cards. Online tracking is now ubiquitous with the U.S. Postal Service providing online tracking for all Registered Mail and Certified Mail items. Requiring plaintiffs to provide return receipt cards that routinely fail to make it back to would be plaintiffs, even where receipt is otherwise readily provable, adds cost to the process and is inefficient, unnecessary, overly burdensome, and interferes with enforcement of these laws. The only alternative under EPA's proposed regulations is personal service, which can present hundreds of dollars in additional costs over mailing per notice letter and comes with its own set of inefficiencies and difficulties, as discussed in part below with regard to EcoRights' experience attempting to serve EPA officials at controlled-access government facilities. As a result, if EPA keeps the date of receipt trigger for running of the notice periods, it should eliminate the requirement that such date of receipt is proved by reference to return receipt cards. If EPA keeps the return receipt requirement, EcoRights will likely switch its standard practice to more costly personal service to avoid the inconsistency and uncertainty associated with return receipt cards, which costs it will subsequently seek to recover from defendants, including state and federal agencies, in fee and cost recovery litigation.

C. Streamline service by allowing for service of citizen suit notice letters by online portal where state or federal agencies have created such portals.

EcoRights requests that EPA include provisions in its final regulations for online service to state and federal government entities through online portals where such portals exist or are created for this purpose. As one example of such a system, for service of citizen suit notice letters under California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65"), California Health & Safety Code § 25249.7(d), the State of California has created a portal whereby such notices may be served on at least some recipients without the need for mailing at all. As this proposed rule acknowledges by proposing to create portals for service on certain federal government entities, such portals reduce the burden on plaintiffs and government agencies from delivery and receipt of such notice letters while also providing for the government entities to automatically store these notice letters in searchable digital formats. These portals can create efficiencies for everyone involved and should be provided for where state or federal government entities choose to create and use them. Making these changes now would encourage development of further portals, creating further efficiencies.

D. Remove requirements to serve redundant citizen suit notice letter recipients.

EPA should review the required recipients for notice letters in the proposed regulations at issue to ensure the proposed regulations do not require service on a broader list of entities than those required by statute. For example, EPA's RCRA regulations currently provide for redundant service and service in excess of the RCRA statutory requirements. The RCRA statutory language only requires service on "the Administrator [of EPA]", "the State in which the alleged endangerment may occur", and "any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste..." 42 U.S.C. § 6972(b)(2)(A). Conversely, EPA's RCRA regulations require service on the owner or site manager of the building, plant, installation, or facility alleged to be in violation, if they are a private individual or corporation; the violator's agent for service of process if it is a corporation; the EPA Administrator; the EPA Regional Administrator for the relevant region; and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. 40 C.F.R. § 254.2(a)(1). This requires service on at least two individuals in the case of corporations that are not required by the statute and that are redundant of other service recipients: (1) the owner or site manager of the building, plant, installation, or facility alleged to be in violation, and (2) the EPA Regional Administrator for the relevant region. The agent for service of process is the legal entity that accepts service of process for the violator, and service on the violator as well, through "the owner or site manager of the building, plant, installation, or facility alleged to be in violation," is redundant. Also, there is no need to serve the Regional Administrator if you have already served the actual EPA Administrator.

While EPA may assume that such redundant service is harmless, in practice it is not. One purpose of having an agent for service of process is so that litigants need not find and serve an individual, which poses a series of problems in many instances that could complicate or preclude service and allows violators to attempt to dodge service to avoid enforcement of RCRA against them, which, under EPA's current RCRA regulations could be accomplished merely by refusing

to sign and return the return receipt card. Indeed, EcoRights has multiple times experienced violators dodging service in just these ways, but it has not experienced agents for service of process dodging service on behalf of their clients. Requiring service on the agent for service of process alone reduces the difficulty of locating and actually successfully serving the appropriate entity. With regard to the Regional Administrator, as mentioned above, EcoRights has had extensive difficulty procuring return receipt cards from the EPA Region IX Regional Administrator. This has caused EcoRights to attempt to serve the Regional Administrator multiple times by Registered Mail before ultimately giving up and having to attempt service by personal service, even though online tracking information showed that the Regional Administrator had actually received the notice letter each time. Furthermore, due to work from home policies and limitations posed by EPA on who may accept personal service on behalf of the Regional Administrator, EcoRights had to extensively coordinate with EPA staff and the process servers to find a time where the EPA staff would not be out of the office and during which time the process servers could complete service even where EcoRights eventually gave up on Registered Mail and decided to use this much more expensive form of service. This was all wasted time and effort, not only because the Regional Administrator had actually received the notice letter by the first Registered Mail mailing in all instances, but because this notice was wholly redundant of notice on the EPA Administrator, *the only EPA official included in the RCRA statute*. EPA should thus remove these redundant notice requirements for all of the statutes covered by the proposed rule and should limit required notice recipients to those required by the statutes at issue.

VIII. Conclusion

Citizen suit provisions play a critical role in ensuring compliance with federal environmental laws, including the laws addressed in the proposed rule. EPA's proposal takes steps to appropriately modernize procedural requirements in a manner that improves efficiency, transparency, and public participation while reducing unnecessary costs with regard to certain notice letter recipients. However, EPA should further revise the regulations in the proposed rule to address existing and proposed problems that are contrary to EPA's stated purposes for the proposed rule. These are: (1) EPA should amend all of the regulations to allow service by Certified Mail or personal service for all of the covered provisions, removing the requirement to use Registered Mail for some statutes; (2) EPA should amend all of the regulations to make the service date the date of mailing, not the date shown on a return receipt card, or, in the alternative, that service is effective where online tracking shows the notice letter was delivered (removing all references to return receipt cards and sending "return receipt requested"); (3) EPA should provide that service of a notice letter can take place through any online portal created by state or federal agencies, if any exist now or are created in the future, to provide for more efficient administration through the development of future technologies; and (4) EPA should amend all of the regulations to limit the entities that must be served with notice to be coextensive with those required by the statutes themselves, removing additional recipients added in the regulations. With these proposed changes, EcoRights strongly supports adoption of the proposed rule.

Sincerely,
Stuart Wilcox
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