

the reviews, and the overall effectiveness of the program.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

**Burden Statement:** The annual public reporting and recordkeeping burden for this collection of information is estimated to average 376.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 94.

*Frequency of response:* Once every four years.

*Estimated total average number of responses for each respondent:* one.

*Estimated total annual burden hours:* 20,331 hours.

*Estimated total annual costs:* \$679,597.02. This includes an estimated burden cost of \$ 0 for capital investment or maintenance and operational costs.

#### **Are There Changes in the Estimates From the Last Approval?**

There is an increase of 3,851.8 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase reflects EPA's recent experience with administering the SRF program, an estimated increase in the number of respondents during the next SRF cycle, and its work with the states to try to improve the value and utilization of the elements and metrics by which state environmental programs

are measured. Based upon revised estimates, the annual public reporting and recordkeeping burden for the collection of information under the SRF program has decreased from 384 to 376.5 hours. Additional numbers for these estimates are still being collected and confirmed, so these estimates may change in the final ICR.

#### **What Is the Next Step in the Process for This ICR?**

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: July 7, 2008.

**Lisa Lund,**

*Office Director, Office of Compliance, OECA.*

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**BILLING CODE 6560-50-P**

#### **ENVIRONMENTAL PROTECTION AGENCY**

[FRL-8690-8; EPA-HQ-OW-2008-0238]

#### **Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of final permit issuance.

**SUMMARY:** EPA Regions 1, 3, 6, 7, 8, 9, and 10 today are issuing their 2008 National Pollutant Discharge Elimination System general permits for stormwater discharges from new dischargers engaged in large and small construction activities. Hereinafter, these NPDES general permits will be referred to as "permit" or "2008 construction general permit" or "2008 CGP." "New dischargers" are those who did not file a notice of intent ("NOI") to be covered under the 2003 construction general permit ("2003 CGP") before it expired. Existing dischargers who properly filed an NOI to be covered

under the 2003 CGP continue to be authorized to discharge under that permit according to its terms. The 2008 CGP contains the same limits and conditions as the Agency's 2003 CGP with the exception of a few minor modifications which are detailed below. EPA is issuing this CGP for a period not to exceed two (2) years and will make the permit available to new construction activities and unpermitted ongoing activities only.

**DATES:** This permit shall be effective on June 30, 2008. This effective date is necessary to provide dischargers with the immediate opportunity to comply with Clean Water Act requirements in light of the expiration of the 2003 CGP on July 1, 2008. In accordance with 40 CFR Part 23, this permit shall be considered issued for the purpose of judicial review on July 28, 2008. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be had by filing a petition for review in the United States Court of Appeals within 120 days after the permit is considered issued for purposes of judicial review. Under section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings. Deadlines for submittal of notices of intent are provided in Part 2.3 of the permit. This permit also provides additional dates for compliance with the terms of these permits.

**FOR FURTHER INFORMATION CONTACT:** Greg Schaner, Water Permits Division, Office of Wastewater Management (Mail Code: 4203M), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., EPA East, Washington, DC 20460; *telephone number:* (202) 564-0721; *fax number:* (202) 564-6431; *e-mail address:* [schaner.greg@epa.gov](mailto:schaner.greg@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. General Information**

##### *A. Does this Action Apply to Me?*

If a discharger chooses to apply to be authorized to discharge under the 2008 construction general permit ("2008 CGP"), the permit provides specific requirements for preventing contamination of stormwater discharges from the following construction activities:

Category	Examples of affected Entities	North American Industry Classification System (NAICS) code
Industry .....	Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities:	
	Building, Developing and General Contracting .....	233
	Heavy Construction .....	234

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of activities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of "construction activity" and "small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Eligibility for coverage under the 2008 CGP is limited to operators of "new projects" or "unpermitted ongoing projects." A "new project" is one that commences after the effective date of the 2008 CGP. An "unpermitted ongoing project" is one that commenced prior to the effective date of the 2008 CGP, yet never received authorization to discharge under the 2003 CGP or any other NPDES permit covering its construction-related stormwater discharges. This permit is effective only in those areas where EPA is the permitting authority. A list of eligible areas is included in Appendix B of the 2008 CGP.

*B. How Can I Get Copies of This Document and Other Related Information?*

1. Docket. EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OW-2008-0238. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Publicly available docket materials are available

in hard copy at the EPA Docket Center Public Reading Room, open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>. Electronic versions of the final permit and fact sheet are available at EPA's stormwater Web site <http://www.epa.gov/npdes/stormwater>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.regulations.gov/fdmspublic/component/main> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search", then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Section I.B.1.

Response to public comments. EPA received 9 comments on the proposed permit from industry (7), state government (1), and the public (1). EPA has responded to all significant comments received and has included

these responses in a separate document in the public docket for this permit. See the document titled *Proposed 2008 CGP: EPA's Response to Public Comments*.

*C. Who Are The EPA Regional Contacts for This Permit?*

For EPA Region 1, contact Thelma Murphy at tel.: (617) 918-1615 or e-mail at [murphy.thelma@epa.gov](mailto:murphy.thelma@epa.gov).

For EPA Region 2, contact Stephen Venezia at tel.: (212) 637-3856 or e-mail at [venezia.stephen@epa.gov](mailto:venezia.stephen@epa.gov), or for Puerto Rico, contact Sergio Bosques at tel.: (787) 977-5838 or e-mail at [bosques.sergio@epa.gov](mailto:bosques.sergio@epa.gov).

For EPA Region 3, contact Garrison Miller at tel.: (215) 814-5745 or e-mail at [miller.garrison@epa.gov](mailto:miller.garrison@epa.gov).

For EPA Region 5, contact Brian Bell at tel.: (312) 886-0981 or e-mail at [bell.brianc@epa.gov](mailto:bell.brianc@epa.gov).

For EPA Region 6, contact Brent Larsen at tel.: (214) 665-7523 or e-mail at: [larsen.brent@epa.gov](mailto:larsen.brent@epa.gov).

For EPA Region 7, contact Mark Matthews at tel.: (913) 551-7635 or e-mail at: [matthews.mark@epa.gov](mailto:matthews.mark@epa.gov).

For EPA Region 8, contact Greg Davis at tel.: (303) 312-6314 or e-mail at: [davis.gregory@epa.gov](mailto:davis.gregory@epa.gov).

For EPA Region 9, contact Eugene Bromley at tel.: (415) 972-3510 or e-mail at [bromley.eugene@epa.gov](mailto:bromley.eugene@epa.gov).

For EPA Region 10, contact Misha Vakoc at tel.: (206) 553-6650 or e-mail at [vakoc.misha@epa.gov](mailto:vakoc.misha@epa.gov).

**II. Background of Permit**

*A. Statutory and Regulatory History.*

The Clean Water Act ("CWA") establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA also includes the objective of attaining "water quality which provides for the protection and propagation of fish, shellfish and wildlife." 33 U.S.C. 1251(a)(2). To achieve these goals, the CWA requires EPA to control discharges through the issuance of National Pollutant Discharge Elimination System ("NPDES") permits.

Section 405 of the Water Quality Act of 1987 (WQA) added section 402(p) of the Clean Water Act (CWA), which directed EPA to develop a phased approach to regulate stormwater discharges under the NPDES program. EPA published a final regulation in the **Federal Register** on the first phase of this program on November 16, 1990, establishing permit application requirements for “storm water discharges associated with industrial activity.” See 55 FR 47990. EPA defined the term “storm water discharge associated with industrial activity” in a comprehensive manner to cover a wide variety of facilities. Construction activities, including activities that are part of a larger common plan of development or sale, that ultimately disturb at least five acres of land and have point source discharges to waters of the U.S. were included in the definition of “industrial activity” pursuant to 40 CFR 122.26(b)(14)(x). Phase II of the stormwater program was published in the **Federal Register** on December 8, 1999, and required NPDES permits for discharges from construction sites disturbing at least one acre, but less than five acres, including sites that are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres, pursuant to 40 CFR 122.26(b)(15)(i). See 64 FR 68722. EPA is issuing the 2008 CGP under the statutory and regulatory authority cited above.

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, NPDES permits are required to incorporate limits based on such limitations and standards. See 40 CFR 122.44(a)(1). Prior to the promulgation of national effluent limitations and standards, permitting authorities incorporate technology-based effluent limitations on a best professional judgment basis. CWA section 402(a)(1)(B); 40 CFR 125.3(a)(2)(ii)(B).

#### B. Summary of Permit

Construction operators choosing to be covered by the 2008 CGP must certify in their notice of intent (NOI) that they meet the requisite eligibility requirements, described in Part 1.3 of the permit. If eligible, operators are authorized to discharge under this permit in accordance with Part 2.

Permittees must install and implement control measures to meet the effluent limits applicable to all dischargers in Part 3, and must inspect such stormwater controls and repair or modify them in accordance with Part 4. The permit in Part 5 requires all construction operators to prepare a stormwater pollution prevention plan (SWPPP) that identifies all sources of pollution, and describes control measures used to minimize pollutants discharged from the construction site. Part 6 details the requirements for terminating coverage under the permit.

The 2008 CGP is effective for a period of not to exceed two years. The 2008 CGP includes conditions and limits that are nearly identical to the 2003 CGP, with the exception that the 2008 CGP only applies to new and unpermitted ongoing construction projects. Discharges from ongoing projects (or “existing dischargers”) will continue to be covered under the existing 2003 CGP. (However, EPA clarifies that if an operator of a permitted ongoing project transfers ownership of the project, or a portion thereof, to a different operator, that subsequent operator is required to submit a complete and accurate NOI for a new project under the 2008 CGP.) Although the existing permit expired on July 1, 2008, dischargers who filed notices of intent (NOIs) to be authorized under that permit prior to the expiration date will continue to be authorized to discharge in accordance with EPA’s regulations at 40 CFR 122.6. The 2008 CGP only applies to dischargers who were not authorized under the 2003 CGP, which includes both “new projects” and “unpermitted ongoing projects.” Operators of new projects or unpermitted ongoing projects seeking coverage under the 2008 CGP would be expected to use the same electronic Notice of Intent (eNOI) system that is currently in place for the 2003 CGP.

The other significant difference between the 2003 and 2008 CGPs is that this permit has been reorganized so that it is clearer which requirements are effluent limitations, which are inspection requirements, and which are SWPPP documentation requirements. As a result, the 2008 CGP now includes new sections (Part 3—Effluent Limits, Part 4—Inspections, and Part 5—Stormwater Pollution Prevention Plans) reflecting this reorganization. However, EPA emphasizes that although the requirements in the 2008 CGP have been placed in different sections, the requirements are substantially the same as they were in the 2003 CGP. The reorganized permit will be discussed further in Section III.B, Summary of Significant Changes from the 2003 CGP.

#### C. What Is EPA’s Rationale for the Two-Year Duration of the 2008 CGP?

As stated, EPA is issuing the 2008 CGP for a period not to exceed two years. As a result of recent litigation brought against EPA concerning the promulgation of effluent limitations guidelines and standards for the construction and development (“C&D”) industry, EPA is required by court order to propose effluent limitations guidelines and new source performance standards (hereinafter, “effluent guidelines”) for the C&D industry by December 2008, and promulgate those effluent guidelines by December 2009. See *Natural Resources Defense Council, et al. v. U.S. Environmental Protection Agency*, No. CV-0408307-GH (C.D. Cal.) (Permanent Injunction and Judgment, December 5, 2006). EPA projects that the Agency may publish a proposed rule ahead of the court-ordered deadlines. If EPA publishes the proposed rule ahead of schedule, this may allow the Agency to promulgate a final rule ahead of schedule as well. The Agency currently hopes to promulgate a final rule as early as the end of this calendar year. However, completion of the tasks necessary to do so is dependent on the timing of numerous future activities and factors associated with the effluent guidelines rulemaking process.

EPA believes it will be appropriate to propose a revised CGP once EPA has issued C&D effluent guidelines. The maximum two-year duration for this permit is intended to coincide with the court-ordered deadlines for the C&D rule. EPA intends to propose and finalize a new, revised CGP sooner, if the C&D rule is promulgated earlier than the date directed by the court.

#### D. Why Is EPA Using Requirements That Are Nearly Identical to the 2003 CGP?

The expiration of the 2003 CGP on July 1, 2008, made it incumbent upon EPA to make available a similar general permit that provided coverage for the estimated 4,000 new dischargers per year commencing construction in the areas where EPA is the permitting authority. Without such a permit vehicle, the only other available option for construction site operators is to obtain coverage under an individual permit. As has been described in the past, issuance of individual permits for every construction activity disturbing one acre or more is infeasible given the resources required for the Agency to issue individual permits. EPA is issuing a CGP that adopts the same limits and conditions as the previous permit (the 2003 CGP) for a limited period of time. This action is appropriate for several

reasons. First, as discussed above, EPA is working on the development of a new effluent guideline that will address stormwater discharges from the same industrial activities (i.e., construction activities disturbing one or more acres) as the CGP. Because the development of the C&D rule and the issuance of the CGP are on relatively similar schedules, and the C&D rule will establish national technology-based effluent limitations and standards for construction activities, EPA believes that it is more appropriate to proceed along two tracks to permit construction discharges. The first track entails issuing the 2008 CGP for a limited period of time, not to exceed 2 years, that contains the 2003 CGP limits and conditions, but for only operators of new and unpermitted ongoing projects, so that such entities can obtain valid permit coverage for their discharges. The second track involves proposing and issuing a revised 5-year CGP that incorporates the requirements of the new C&D rule shortly after the rule is promulgated.

Second, EPA believes that issuing a substantially revised CGP by July 1, 2008, would have been impracticable given the number of unknowns concerning the outcome of the C&D rule. EPA does not believe that it would be appropriate to issue a permit containing technology-based limitations that would be outdated so quickly, given the fact that the C&D rule may be promulgated only a few months after permit issuance. For similar reasons, if EPA had attempted to approximate the requirements of the new C&D rule and incorporate such limits into a new CGP, such a permit would presuppose the outcome of the C&D rule and potentially conflict with the scope and content of the effluent limitation guideline prior to full consideration of public comments. Instead, the Agency believes it is a much better use of Agency resources to wait the short time until after the C&D rule promulgation to issue a revised CGP that is fully reflective of the new effluent limitation guideline. In the meantime, during this relatively short period of time prior to the C&D rule's promulgation and prior to the issuance of the revised CGP that incorporates those standards, EPA is using the permit limits and conditions from the 2003 CGP as an effective vehicle to control new discharges. EPA notes that it has minimized the amount of time during which the 2008 CGP will remain effective in order to underscore the Agency's intention to issue a revised CGP once the C&D rule is finalized.

Third, EPA found the alternative of allowing the 2003 CGP to expire without a replacement, relying instead

on an enforcement discretion approach prior to the issuance of the next permit (similar to the practice used for the NPDES Multi-Sector General Permit (MSGP) for stormwater discharges from industrial activities), to be an unacceptable option for stormwater discharges from construction activities. The CGP potentially has an estimated 4,000 new dischargers per year that seek coverage. EPA has made progress with the regulated community in terms of compliance assistance that would be compromised if a permit is not in place during the interim period prior to the promulgation of the C&D rule. For instance, EPA Regional offices have led substantial efforts to boost compliance with the CGP, resulting in an increased rate of compliance among construction operators. EPA anticipated that such efforts would have been undermined, and the compliance rate would have declined, if a new permit were not issued by July 1, 2008. Additionally, the enforcement discretion approach would leave construction operators without a reasonable way to obtain authorization to discharge and would expose them to liability from third party lawsuits for violating the Clean Water Act for unpermitted discharges. A short-term permit that mirrors the existing 2003 CGP addresses these concerns by providing a Federal permit with provisions that have already been reviewed in the previous permit issuance process, and by avoiding any period of time during which dischargers are not able to obtain permit coverage.

### III. Scope and Availability of the 2008 CGP

#### A. Geographic Coverage

This permit provides coverage for discharges from construction sites that occur in areas not covered by an approved State NPDES program. EPA Regions 1, 3, 6, 7, 8, 9, and 10 are issuing the 2008 CGP to replace the expiring 2003 CGP for operators of new and unpermitted ongoing construction projects. The geographic coverage and scope of the 2008 CGP is listed in Appendix B of the permit. The only change from the scope of coverage in the 2003 CGP is that the State of Maine is now the permitting authority for all discharges in the state, including operators in Tribal Lands, and as such, discharges in the State of Maine are no longer eligible for coverage under EPA's CGP. In addition, because certifications required by section 401 of the Clean Water Act, and for a few states, certifications required by the Coastal Zone Management Act, were not received in time, new and unpermitted

ongoing construction projects in the following areas are not yet eligible for coverage under this permit:

- The State of New Hampshire;
- Indian country within the State of New York;
- The Commonwealth of Puerto Rico;
- Indian country within the State of Michigan;
- Indian country within the State of Minnesota;
- Indian country within the State of Wisconsin, except the Sokaogon Chippewa (Mole Lake) Community;
- Indian country within the State of Oklahoma;
- Indian country within the State of New Mexico;
- Oil and gas, or geothermal energy, operations in Texas;
- Oil and gas operations, or certain point source discharges associated with agriculture and silviculture in Oklahoma;
- Federal Facilities in the State of Colorado, except those located on Indian country;
- Indian country within the State of Colorado, as well as the portion of the Ute Mountain Reservation located in New Mexico; and
- Indian country within the State of Montana.

EPA will announce the availability of coverage under the CGP for these areas in separate **Federal Register** notice(s) as soon as possible after the certifications are completed. In the meantime, EPA has decided to make administrative or civil enforcement for lack of permit coverage against dischargers in the above areas a low priority because the 2008 CGP will not yet apply to those areas. The Agency's position is outlined in a memorandum from EPA's Office of Enforcement and Compliance Assurance, available in the docket for this permit. This low enforcement priority does not apply to criminal violations or to situations where there are egregious circumstances, such as those resulting in serious actual harm or which may present an imminent and substantial endangerment to public or the environment, or where no control measures are in place to protect public health or the environment. The Office of Enforcement and Compliance Assurance also reserves the right, at any time, to initiate an appropriate enforcement response with respect to a specific discharger should circumstances warrant. Under this low enforcement priority approach, EPA will not pursue actions against dischargers that lack a permit but are meeting the obligations that would have been imposed by the expired 2003 CGP. These obligations include, but are not limited to,

complying with the required effluent limitations, Stormwater Pollution Prevention Plan development and implementation, inspections, and proper installation and maintenance of storm water control measures.

#### *B. Summary of Significant Changes From the 2003 CGP.*

As discussed above, EPA is issuing the 2008 CGP for a period not to exceed two years. This permit includes the same limits and conditions as the 2003 CGP with the following differences:

- *Type of Construction Projects That Can Be Covered:* Eligibility for coverage under the 2008 CGP is limited to operators of new and unpermitted ongoing construction projects. However, dischargers from existing dischargers, otherwise referred to as ongoing permitted construction projects, are not eligible for coverage under the 2008 CGP.

- *Distinction Between Effluent Limits and SWPPP Documentation*

*Requirements:* In response to comments, the permit was clarified to clearly distinguish between the effluent limits from the documentation requirements relating to the development of the SWPPP. The effluent limitations (in Part 3) are permit requirements to which all permittees are subject in order to minimize the discharge of pollutants from the site, while the SWPPP (in Part 5) is a planning document that must be prepared by all construction operators that describes the site and the pollutants discharged, and documents the control measures selected, installed, and maintained to meet the effluent limitations in Part 3. Additionally, the inspection requirements, which were previously included in the SWPPP section, have been moved to a separate section (Part 4) to highlight their importance. EPA emphasizes that though the permit has been reorganized, the requirements themselves have not been substantially changed. However, in response to recommendations received by two commenters, EPA included the following two new requirements: (1) A requirement to educate employees or subcontractors as necessary so that they understand their role in implementing stormwater controls (Part 3.6), and (2) a requirement to remove sediment from silt fences before the deposit reaches fifty percent of the above-ground fence height.

- *Eligibility for Tribal Lands in Maine:* Because the State of Maine now has permit authority over Tribal Lands in its state, EPA removed eligibility for operators in Tribal Lands in Maine from the list of areas in Appendix B where this permit is effective.

These changes are discussed in greater detail in the 2008 CGP fact sheet.

#### *C. Permit Appeal Procedures*

In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review on July 28, 2008. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be had by filing a petition for review in the United States Court of Appeals with 120 days after the permit is considered issued for purposes of judicial review. Under section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings. In addition, rather than submitting an NOI to be covered under this permit, persons may apply for an individual permit as specified at 40 CFR 122.21 (and authorized at 40 CFR 122.28), and then petition the Environmental Appeals Board to review any conditions of the individual permit (40 CFR 124.19 as modified on May 15, 2000, 65 FR 30886).

#### **IV. Qualified Local Programs**

EPA requested comments in the proposal on a draft set of criteria to use in determining which local erosion and sediment control requirements satisfy the 40 CFR 122.44(s) requirements for incorporating qualified local programs (QLPs) into future CGPs. The Agency received several comments relating to the draft QLP criteria. EPA appreciates the feedback provided by these comments. EPA's responses are included in the response to comment document associated with this **Federal Register** notice. EPA clarifies that the draft criteria were not intended to be promulgated as changes to the NPDES regulations. The purpose of the proposal was to share with the public the Agency's current thinking with regard to factors that would be taken into account when proposing to incorporate a QLP into future CGPs. In addition, should the Agency propose to incorporate a QLP into the CGP, it will first need to propose such a modification for public comment as a permit modification.

#### **V. Compliance With the Regulatory Flexibility Act**

##### *A. EPA's Approach to Compliance With the Regulatory Flexibility Act for General Permits*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment

rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

The legal question of whether a general permit (as opposed to an individual permit) qualifies as a "rule" or as an "adjudication" under the Administrative Procedure Act (APA) has been the subject of periodic litigation. In a recent case, the court held that the CWA Section 404 Nationwide general permit before the court did qualify as a "rule" and therefore that the issuance of that general permit needed to comply with the applicable legal requirements for the issuance of a "rule." *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1284–85 (DC Cir. 2005) (Army Corps general permits under Section 404 of the Clean Water Act are rules under the APA and the Regulatory Flexibility Act; "Each NWP [nationwide permit] easily fits within the APA's definition 'rule.' \* \* \* As such, each NWP constitutes a rule \* \* \*").

As EPA stated in 1998, "the Agency recognizes that the question of the applicability of the APA, and thus the RFA, to the issuance of a general permit is a difficult one, given the fact that a large number of dischargers may choose to use the general permit." 63 FR 36489, 36497 (July 6, 1998). At that time, EPA "reviewed its previous NPDES general permitting actions and related statements in the **Federal Register** or elsewhere," and stated that "[t]his review suggests that the Agency has generally treated NPDES general permits effectively as rules, though at times it has given contrary indications as to whether these actions are rules or permits." *Id.* at 36496. Based on EPA's further legal analysis of the issue, the Agency "concluded, as set forth in the proposal, that NPDES general permits are permits [i.e., adjudications] under the APA and thus not subject to APA rulemaking requirements or the RFA." *Id.* Accordingly, the Agency stated that "the APA's rulemaking requirements are inapplicable to issuance of such permits," and thus "NPDES permitting is not subject to the requirement to publish a general notice of proposed rulemaking under the APA or any other law \* \* \* [and] it is not subject to the RFA." *Id.* at 36497.

However, the Agency went on to explain that, even though EPA had concluded that it was not legally

required to do so, the Agency would voluntarily perform the RFA's small-entity impact analysis. *Id.* EPA explained the strong public interest in the Agency following the RFA's requirements on a voluntary basis: "[The notice and comment] process also provides an opportunity for EPA to consider the potential impact of general permit terms on small entities and how to craft the permit to avoid any undue burden on small entities." *Id.* Accordingly, with respect to the NPDES permit that EPA was addressing in that **Federal Register** notice, EPA stated that "the Agency has considered and addressed the potential impact of the general permit on small entities in a manner that would meet the requirements of the RFA if it applied." *Id.*

Subsequent to EPA's conclusion in 1998 that general permits are adjudications rather than rules, as noted above, the DC Circuit recently held that Nationwide general permits under section 404 are "rules" rather than "adjudications." Thus, this legal question remains "a difficult one" (*supra*). However, EPA continues to believe that there is a strong public policy interest in EPA applying the RFA's framework and requirements to the Agency's evaluation and consideration of the nature and extent of any economic impacts that a CWA general permit could have on small entities (e.g., small businesses). In this regard, EPA believes that the Agency's evaluation of the potential economic impact that a general permit would have on small entities, consistent with the RFA framework discussed below, is relevant to, and an essential component of, the Agency's assessment of whether a CWA general permit would place requirements on dischargers that are appropriate and reasonable. Furthermore, EPA believes that the RFA's framework and requirements provide the Agency with the best approach for the Agency's evaluation of the economic impact of general permits on small entities. While using the RFA framework to inform its assessment of whether permit requirements are appropriate and reasonable, EPA will also continue to ensure that all permits satisfy the requirements of the Clean Water Act.

Accordingly, EPA has committed to operating in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency has committed that it will apply the RFA in its issuance of general permits as if those permits do qualify as "rules" that are subject to the RFA). In satisfaction

of this commitment, during the course of this CGP proceeding, the Agency conducted the analysis and made the appropriate determinations that are called for by the RFA. In addition, and in satisfaction of the Agency's commitment, EPA will apply the RFA's framework and requirements in any future issuance of other NPDES general permits. EPA anticipates that for most general permits the Agency will be able to conclude that there is not a significant economic impact on a substantial number of small entities. In such cases, the requirements of the RFA framework are fulfilled by including a statement to this effect in the permit fact sheet, along with a statement providing the factual basis for the conclusion. A quantitative analysis of impacts would only be required for permits that may affect a substantial number of small entities, consistent with EPA guidance regarding RFA certification.<sup>1</sup>

#### *B. Application of RFA Framework to Issuance of 2008 CGP*

EPA has concluded, consistent with the discussion in Section IV.A above, that the issuance of the 2008 CGP could affect a substantial number of small entities. In the areas where the CGP is effective (see Section III.A), an estimated 4,000 construction projects per year were authorized under the 2003 CGP, a substantial number of which could be operated by small entities. However, EPA has concluded that the issuance of the 2008 CGP is unlikely to have an adverse economic impact on small entities. The 2008 CGP includes substantially the same requirements as those of the 2003 CGP. EPA intends to include an updated economic screening analysis with the issuance of the next CGP. EPA concludes that this action will not have a significant economic impact on a substantial number of small entities.

**Authority:** Clean Water Act, 33 U.S.C. 1251 *et seq.*

<sup>1</sup> EPA's current guidance, entitled Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement and Fairness Act, was issued in November 2006 and is available on EPA's Web site: <http://www.epa.gov/sbrefa/documents/rfafinalguidance06.pdf>. After considering the Guidance and the purpose of CWA general permits, EPA concludes that general permits affecting less than 100 small entities do not have a significant economic impact on a substantial number of small entities.

Dated: June 30, 2008.

**Robert W. Varney,**  
Regional Administrator, EPA Region 1.

Dated: June 30, 2008.

**Jon M. Capacasa,**  
Director, Water Protection Division, EPA Region 3.

Dated: June 30, 2008.

**Miguel I. Flores,**  
Director, Water Quality Protection Division, EPA Region 6.

Dated: June 30, 2008.

**William A. Spratlin,**  
Director, Wetlands and Pesticides Division, EPA Region 7.

Dated: June 30, 2008.

**Stephen S. Tuber,**  
Assistant Regional Administrator, Office of Partnerships & Regulatory Assistance, EPA Region 8.

Dated: June 30, 2008.

**Nancy Woo,**  
Acting Director, Water Division, EPA Region 9.

Dated: June 30, 2008.

**Michael F. Gearheard,**  
Director, Office of Water and Watersheds, EPA Region 10.

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## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Approved by the Office of Management and Budget

July 8, 2008.

**SUMMARY:** The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

**FOR FURTHER INFORMATION CONTACT:** For additional information contact Cathy Williams, Performance and Evaluation Records Management Division, Office of the Managing Director, at (202) 418-2918 or at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

#### SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0009.