

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 122 and 124**

[FRL-5182-8]

RIN 2040-AC60

Amendment to Requirements for National Pollutant Discharge Elimination System (NPDES) Permits for Storm Water Discharges Under Section 402(p)(6) of the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Today, EPA is promulgating changes to its National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations under the Clean Water Act (CWA) to establish a sequential application process for all phase II storm water discharges. (Phase II storm water discharges include all discharges composed entirely of storm water, except those specifically classified as phase I discharges. Phase I discharges include discharges issued a permit before February 4, 1987; discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 100,000 or more; and discharges that EPA or an NPDES State/Indian Tribe determine to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States.) Application deadlines are in two tiers. This action will provide the NPDES permitting authority (either a State/Indian Tribe or EPA) flexibility to target those phase II dischargers that are contributing to a water quality impairment or are a significant contributor of pollutants for permitting within the next six years. All other phase II dischargers are required to apply for a permit only after six years, and only if the phase II regulatory program in place at that time requires such applications.

EPA has also initiated a process by inviting its partners who are stakeholders in this matter to assist in the development of additional phase II rules, which will be finalized by March 1, 1999. These rules will determine the nature and extent of requirements, if any, that will apply to the various types of phase II facilities. Both the changes to the rules issued today as well as the development of the comprehensive phase II program through an inclusionary process is a response by

EPA to the direction of the President on February 21, 1995, regarding regulatory reform.

DATES: This final rule will be effective on August 2, 1995 unless significant adverse or critical comments that would cause the Agency to change its position are received by June 6, 1995. In accordance with 40 CFR 23.2, this rule shall be considered final for purposes of judicial review at 1 p.m. (Eastern time) on August 2, 1995.

ADDRESSES: Written comments on this rule may be submitted using one of two different methods. See **SUPPLEMENTARY INFORMATION** for information on submitting comments.

FOR FURTHER INFORMATION CONTACT: Nancy Cunningham, Office of Wastewater Management, Permits Division (4203), Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 260-9535.

SUPPLEMENTARY INFORMATION:**Submission of Comments**

First, comments may be sent to the Comment Clerk, Water Docket (Storm Water Phase II Direct Final Rule), MC-4101, Environmental Protection Agency, 401 M Street, SW, Washington DC 20460. It is requested that an original and one copy of the comments be provided to this address. Comments will be considered to be timely if they are postmarked by June 6, 1995. Commenters who would like acknowledgment of receipt of their comments should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted.

In the alternative, EPA will accept comments electronically; EPA is experimenting with electronic commenting. Comments should be addressed to the following Internet address: SWPH2-DFR@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Electronic comments will be transferred into a paper version for the official record. EPA will attempt to clarify electronic comments if there is an apparent error in transmission. Comments provided electronically will be considered timely if they are submitted electronically by 11:59 p.m. (Eastern time) June 6, 1995. Since this is still experimental, commenters may want to submit both electronic comments and duplicate paper comments. This document has also been placed on the Internet for public review and downloading at the following location: gopher.epa.gov.

A copy of the supporting information for this rule is available for review at

EPA's Water Docket, Room L-102, 401 M Street, SW, Washington, DC 20460. For access to the docket materials, call (202) 260-3027 between 9 a.m. and 3:30 p.m. (Eastern time) for an appointment.

I. Overview of Today's Action

Today, EPA is promulgating changes to its NPDES storm water permit application regulations under the CWA to establish a commonsense approach which will provide for a sequential application process for all phase II storm water discharges. Application deadlines are in two tiers. To obtain real environmental results earlier, the highest priority is being assigned to those phase II dischargers that the NPDES permitting authority (either a State/Indian Tribe or EPA) determines are contributing to a water quality impairment or are a significant contributor of pollutants. These dischargers will be required to apply for a permit to the permitting authority within 180 days of receipt of notice, unless permission for a later date is granted. This process will allow the permitting authority to focus their current efforts on those facilities that will produce the greatest environmental benefit earlier. All phase II facilities that are not designated shall apply to the permitting authority no later than six years from the effective date of this regulation, and only if the phase II regulatory program in place at that time requires such applications. EPA is also establishing application requirements for these discharges, as well as making other conforming changes to other portions of its NPDES regulations.

Today's action is the first step in EPA's approach to develop a comprehensive phase II program under Clean Water Act (CWA) section 402(p)(6) and is consistent with President Clinton's February 21, 1995, direction on regulatory reform as well as the Office of Water's "National Program Agenda for the Future." EPA cannot deal with all storm water issues in today's action. Some issues raised by stakeholders, such as funding for storm water best management practices and certain issues with regard to compliance with water quality standards, can only be resolved by legislative action. In fact, EPA supported certain statutory changes or clarifications to the storm water program last year in President Clinton's Clean Water Initiative. Some issues, such as the nature and extent of requirements, if any, that will apply to the various types of phase II sources, can be resolved through rulemaking. EPA has initiated a process of inviting its partners who are stakeholders to participate in development of

expectations and requirements for more comprehensive phase II rules, as well as revisions and refinements to phase I. EPA expects stakeholders will consider the lessons learned from the phase I storm water program in relooking at the phase I application process and requirements. EPA intends to propose those rules by September 1, 1997, and finalize those rules by March 1, 1999. If the CWA is amended in a manner to deal with these storm water issues, EPA will move to expeditiously implement the statutory changes. Today's rulemaking will promote the public interest by relieving dischargers of the requirement to apply for permits until (1) a phase II program is in place that can be defined by regulation or changes to the statute or (2) the permitting authority makes an affirmative finding of the need for a permit to protect water quality.

II. Background

A. Phase I of the Storm Water Program

The Clean Water Act

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act) prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by a NPDES permit. While water pollution control measures in the United States for industrial process wastewater and municipal sewage have had major success, urban and agricultural runoff continue to contribute to our Nation's remaining water quality problems. EPA's Report to Congress under section 305(b) entitled The National Water Quality Inventory, 1992 Report to Congress, provides a national assessment of surface water impacts associated with runoff from various land uses. The latest report concludes that storm water runoff from a number of diffuse sources, including municipal separate storm sewers and urban runoff is a leading cause of water quality impairment cited by States.

Section 402(p) was added to the CWA in 1987 to require implementation of a comprehensive two-phased approach for addressing storm water discharges under the NPDES program. Section 402(p)(1) currently prohibits EPA or NPDES States (including Indian Tribes authorized to operate the NPDES program) from requiring permits for discharges composed entirely of storm water (storm water discharges) until October 1, 1994, except for the following five classes of phase I storm water discharges specifically listed under section 402(p)(2):

(a) discharges issued a permit before February 4, 1987,

(b) discharges associated with industrial activity,

(c) discharges from a municipal separate storm sewer system serving a population of 250,000 or more,

(d) discharges from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000,

(e) discharges that EPA or an NPDES State [or Tribe authorized to be treated as a State for this purpose] determine to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States. (EPA issued guidance on August 8, 1990 that included a discussion of designation authority.)

Under CWA section 402(l)(2), permits are not required for certain dischargers, specifically, storm water runoff from mining operations or oil and gas facilities * * * if the storm water discharge is not contaminated by contact with * * * any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations. CWA section 502(14) excludes agricultural storm water discharges from the definition of point source, thereby excluding these discharges from the NPDES permit requirement.

Section 402(p)(3) established requirements for permits issued under phase I of the storm water program while section 402(p)(4) established statutory deadlines for the initial steps in implementing the phase I program.

Phase I Regulatory Program

EPA promulgated regulations defining application requirements in 40 CFR 122.26 for phase I storm water discharges on November 16, 1990 (55 FR 47990). Permits are required for large (over 250,000 population served) and medium (100,000–250,000 population served) municipal separate storm sewer systems (MS4); storm water discharges issued a permit before February 4, 1987; storm water discharges "associated with industrial activity," which are identified in the regulations by 11 specific categories; and those dischargers designated by the NPDES State or EPA.

EPA amended the November 1990 application regulations in various respects in 1992 in response to a court ruling in *NRDC v. EPA*, 966 F.2d 1292 (9th Cir., 1992) in which EPA established generally applicable permit issuance deadlines. In addition, EPA noted that the Agency was not requiring permit applications from the two categories of storm water discharges associated with industrial activity

(construction activities disturbing less than 5 acres and light industry without exposure to storm water) until application requirements were established by regulation. (57 FR 60444, December 18, 1992.)

Phase I Implementation Activities

The efforts of EPA and the authorized NPDES States to implement the phase I storm water program have focused on (1) issuing general permits for industrial storm water discharges, (2) reviewing group applications for industrial storm water dischargers, (3) publishing a proposed multi-sector general permits for storm water discharges from 29 industrial sectors, (4) reviewing applications and issuing permits for municipal separate storm sewer systems, and (5) conducting outreach activities.

B. Phase II of the Storm Water Program.

Water Quality Act of 1987 and Later Amendments

The 1987 amendments established a process for EPA to evaluate potential phase II sources and designate sources for regulation to protect water quality.

Section 402(p)(5) requires EPA, in consultation with the States, to conduct two studies of storm water discharges other than phase I sources (i.e., potential phase II sources). The first study, under section 402(p)(5) (A) and (B) (to be completed by October 1, 1988), was to identify storm water discharges not covered under phase I and determine, to the maximum extent practicable, the nature and extent of pollutants in such discharges. The second study, under section 402(p)(5)(C) (to be completed by October 1, 1989), was to establish procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality.

Section 402(p)(6) of the CWA requires EPA, in consultation with State and local officials and based on the findings of the reports required under section 402(p)(5), to issue regulations that designate additional storm water discharges to be controlled to protect water quality under phase II of the program and to establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, establish priorities, requirements for State storm water management programs, and expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate. These regulations were to be issued by October 1, 1993. EPA did

not issue these regulations by the statutory deadline. Today's action is a common sense approach which defines and establishes application submittal requirements for phase II of the NPDES program for storm water. As noted below, EPA will be revising these requirements over the next several years in partnership with its numerous stakeholders.

September 9, 1992 Notice — Phase II Issues

On September 9, 1992, EPA published a notice requesting information and public comment on the phase II program (57 FR 41344). The notice identified three sets of issues associated with developing phase II regulations, including (1) how sources should be identified, (2) types of control strategies for these sources, and (3) deadlines for implementing the requirements. The notice presented a range of alternatives under each issue in an attempt to illustrate, and obtain input on, the full range of potential approaches for a phase II strategy. EPA received more than 130 comments on the notice from municipalities, trade groups or industries, State or Federal agencies, and other miscellaneous sources. No comments were received from environmental groups.

Rensselaerville Phase II Effort

In early 1993, the Rensselaerville Institute and EPA held public and expert meetings to assist in developing and analyzing options for identifying phase II sources and controls. One of the options most favored by the various groups participating included use of a tiered approach that would provide for EPA selection of high priority sources for control by NPDES permits and State selection of other sources for control under a State program other than the NPDES program.

Storm Water Reports to Congress

EPA is transmitting to Congress concurrently with this action, its first report required under sections 402(p)(5)(A) and (B). This report is contained in the record for this rule. This report was broadly circulated in November 1993 by the Agency to the States, trade groups, environmental groups, Congressional staff, other interested parties, and all people who requested a copy. EPA received comments from various States and other groups and made changes, as appropriate, to respond to those comments.

Section 402(p)(5)(C) requires a second study of storm water discharges for the purpose of establishing procedures and methods to control storm water

discharges that were not addressed as part of the first phase of the NPDES storm water program to the extent necessary to mitigate impacts on water quality. President Clinton's Clean Water Initiative, which was released on February 1, 1994, contains the Agency's recommendations for phase II and is considered by EPA to be the second Report to Congress. EPA has included these materials in its report that is being submitted to Congress.

President Clinton's Clean Water Initiative

President Clinton's Clean Water Initiative addresses a number of issues associated with NPDES requirements for storm water discharges, including (1) establishing a phased approach for compliance of discharges from municipal separate storm sewer systems with water quality standards with a focus on controlling discharges from growth and development areas, (2) clarifying that the Maximum Extent Practical standard should be applied in a site specific, flexible manner taking into account cost considerations as well as water quality effects, (3) providing for an exemption from the storm water program for industrial facilities with no activities or no significant materials exposed to storm water, (4) providing for deadline extensions for phase II of the storm water program, (5) providing for a targeted approach for phase II storm water program requirements, including regulation of storm water from industrial facilities by municipalities, and (6) providing for control of discharges from inactive and abandoned mines located on Federal lands in a more targeted, flexible manner.

Several bills to reauthorize the CWA which include amendments to NPDES requirements for storm water were introduced in the House and Senate in the 103rd Congress; however, substantive changes to the CWA were not made. Provisions contained in the President's Initiative, as well as the other bills, will be considered by the Agency in its comprehensive rulemaking involving stakeholders, to the extent the Agency is authorized to make changes discussed there under existing law.

The Agency recognizes that there may be action in the 104th Congress to change storm water requirements. Stakeholders have raised some issues that go well beyond the scope of EPA's regulatory authority and can only be addressed by legislation. Certain parties have requested that the Agency delay issuance of this regulation until Congress acts. EPA is obligated to

implement the current law and is taking this action to provide certainty to phase II dischargers as to when their permit applications are due if relief is not provided through regulatory or legislative action. EPA is willing to work with affected parties on statutory issues and, if the law is changed, will move to expeditiously implement the changes.

October 1, 1994, Deadline for Permits under Phase II

On October 18, 1994, EPA issued guidance interpreting the October 1, 1994, statutory deadline pertaining to phase II storm water dischargers. The memorandum recognized that EPA had not issued regulations implementing the requirements of section 402(p)(6) before October 1, 1994; and the Agency and approved NPDES States are unable to waive the statutory requirement that point source discharges of pollutants to waters of the United States need an NPDES permit. The memorandum also recognized that at the time of the guidance, EPA had completed a draft study identifying potential point source discharges of storm water for regulatory consideration under the requirements of section 402(p)(6) (as noted, EPA is transmitting the Reports to Congress); and the Agency had initiated a process to develop implementing regulations (of which today's action is a part). The guidance also referred to the general application requirements for the NPDES program and the Agency's January 12, 1994, storm water enforcement strategy.

EPA Instituting Federal Advisory Committee Effort

The Agency has established a Federal Advisory Committee Act advisory committee to provide advice on various wet weather issues. EPA will work with a subcommittee of this advisory committee to form a partnership to specifically address phase II storm water issues. This action will complement the specific regulatory action EPA is taking today. Both actions are part of the Agency's response to the President's direction on regulatory reform. EPA wants to develop a common sense approach to allow EPA and the States/Indian Tribes to manage for results in developing a phase II storm water program that will provide ecosystem protection. EPA believes there is considerable latitude and flexibility within the existing language contained in section 402(p)(6) in establishing the scope and extent of the phase II program and the nature of the controls used. Some questions EPA will advance build upon the input the Agency has received earlier on phase II, including questions

addressing (1) the scope, mechanisms and timing of phase II, (2) how EPA can work more effectively with the varying interests to provide outreach and technical assistance for phase II, and (3) consideration of lessons learned from phase I. EPA would be receptive to including in the inclusionary process other issues that have developed broad-based support; these issues may include research, cost-effective solutions and expedited implementation. EPA is in the early stages of development of the specifics of the phase II program, which can and will include revisions and refinements to phase I, including relooking at the phase I application process and requirements. EPA recognizes that many of the municipalities and industrial facilities that are subject to the phase I requirements believe there is a need to make major changes to phase I.

EPA is committed to conducting this phase II process, including improvements to limited portions of phase I, in an inclusionary manner, inviting representatives of affected stakeholders "to the table" to discuss their respective interests.

Today's regulatory action is being taken as a common sense approach to provide a framework under existing law for these actions to be undertaken in an orderly fashion, as well as certainty regarding the status of phase II discharges. This approach will allow the permitting authority to manage for results by providing the flexibility to call certain phase II dischargers into the program based upon a finding of water quality impact.

III. Today's Action

Regulation Changes

Today, EPA is promulgating changes to its NPDES storm water permit application regulations to establish a sequential application process for all phase II storm water discharges. Application deadlines are in two tiers. To obtain real environmental results earlier, the highest priority is being assigned to those phase II dischargers that the NPDES permitting authority (either a State/Indian Tribe or EPA) determines are contributing to a water quality impairment or are a significant contributor of pollutants. These dischargers will be required to apply for a permit within 180 days of receipt of notice from the permitting authority, unless permission for a later date is granted. All other phase II facilities will be required to apply to the permitting authority no later than six years from the effective date of this regulation if the phase II regulatory program in place at

that time requires such applications. EPA is also establishing application requirements for these discharges, as well as making other conforming changes to other portions of its NPDES regulations. The specifics of the changes follow.

First, to codify the already existing statutory requirement upon the expiration of the moratorium for phase II storm water discharges, EPA is adding 40 CFR 122.26(a)(9) to bring into the NPDES program, as of October 1, 1994, discharges composed entirely of storm water that are not otherwise already required by the phase I regulations to obtain a permit. EPA considers the portions of the two phase I categories that were remanded by the court in *NRDC v. EPA* to be covered by these phase II requirements, as are the facilities owned by municipalities that were otherwise excluded from phase I by the Intermodal Surface Transportation Efficiency Act of 1991 (Transportation Act). These phase II storm water dischargers will be required to apply for a permit according to the application requirements in new § 122.26(g). This provision continues to recognize the applicability of statutory NPDES exemptions provided by CWA sections 402(l) and 502(14).

Second, EPA is adding 40 CFR 122.26(g), which will contain the regulatory requirements for discharges composed entirely of storm water under section 402(p)(6). Any operator of a point source required to obtain a permit under § 122.26(a)(9) shall submit an application in accordance with the following requirements.

Section 122.26(g)(1) contains the application deadlines. If a phase II discharger complies with these application deadlines, the facility will not be subject to enforcement action for discharge without a permit or for failure to submit a permit application. First, if the permitting authority (the regulations use the term "Director" which means either the NPDES State/Indian Tribe Director or EPA Regional Administrator, or authorized representative) determines and notifies the discharger that a discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, the operator shall apply for a permit to the permitting authority within 180 days of receipt of notice, unless permission for a later date is granted (see 40 CFR 124.52(c)). This provision will allow the NPDES permitting authority to manage for environmental results by providing the flexibility to bring certain phase II sources within the NPDES program at this time, as determined necessary by

the State/Indian Tribe or EPA. This determination can be done on a watershed or class basis where the permitting authority determines there is a significant impact or contribution. In addition, the NPDES permitting authority may find the information contained in the Storm Water Reports to Congress useful in determining the location and nature of such impacts. The August 9, 1990, guidance EPA issued on designation authority may be useful in making this determination. The 180 day time period provided for submission of an application is consistent with the time period provided for other situations in the NPDES program where a facility is asked to submit an application (40 CFR 122.21(c)(1) and (2)) and the time period generally provided for applications for permit renewal (40 CFR 122.21(d)). EPA recognizes that this time period is longer than that provided by existing regulations for those phase I storm water dischargers designated into the program (40 CFR 122.26(e)(5)). EPA is establishing this longer time period to provide an opportunity for the phase II discharger to communicate with the permitting authority about necessary information, as well as to collect and submit the application information.

All other phase II facilities shall apply to the State/ Indian Tribe or EPA Region no later than six years from the effective date of this regulation. EPA may change this application deadline for at least certain categories of dischargers in the future as part of the rulemaking process involving its various partners dealing with the scope, nature and extent to the phase II program. However, if changes are not made, all phase II storm water dischargers will have to submit applications by August 2, 2001.

Section 122.26(g)(2) contains provisions for application requirements for phase II discharges. At this time, the existing phase I individual industrial application requirements in § 122.26(c)(1) or application requirements for municipal separate storm sewer discharges contained in § 122.26(d) will be the requirements for phase II discharges, unless otherwise modified by the permitting authority. As noted earlier, EPA will be relooking at the application requirements as part of the advisory committee on wet weather issues.

EPA is also specifically providing for and encouraging the use of general permits for phase II discharges and would require submission of a notice of intent to be covered by the general permit, consistent with the current requirements of 40 CFR 122.28(b)(2) for phase I storm water discharges. EPA and

the authorized States have effectively and efficiently used general permits for phase I storm water discharges and EPA believes general permits also will be an effective mechanism to use in phase II, when NPDES permits are required. Group applications for phase II discharges are not provided for because the general permit process will be available to almost all phase II discharges.

In developing phase II permits, the permitting authority may apply the requirements contained in section 402(p)(3), which are the requirements for phase I permits, on a case-by-case basis at this time using best professional judgment.

EPA is also making several conforming changes to other portions of 40 CFR 122.26. First, EPA is changing the date for the permit moratorium contained in § 122.26(a)(1) to October 1, 1994, to reflect the change in this date provided by the Water Resources Development Act of 1992. Second, EPA is amending the title to § 122.26(e) to read "Application deadlines under paragraph (a)(1)" to make clear that these are phase I requirements and application deadlines, as interpreted by EPA. Third, EPA is amending § 122.26(e)(1)(ii) which are the permit application requirements for those municipally owned facilities for whom application deadlines were postponed by the Transportation Act to reflect the fact that these are now phase II facilities. (Section 1068(c) of the Transportation Act amended the CWA to provide that EPA shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any storm water discharge associated with industrial activity other than an airport, power plant, or uncontrolled sanitary landfill owned or operated by such municipalities before October 1, 1992.) Because EPA is not making available the group application process in phase II, similar changes are not being made to § 122.26(e)(2).

EPA is also making changes to other applicable NPDES regulatory provisions. EPA is modifying the requirements of 40 CFR 122.21(c)(1) to clarify that new phase II storm water discharges do not have to submit a permit application until six years after the effective date of this regulation, or earlier if designated by the permitting authority. EPA is making conforming changes to 40 CFR 124.52(c) to clarify the application of these provisions to both phase I and phase II storm water discharges.

Basis of Regulations

Today's action is the first step of EPA's approach to develop a comprehensive phase II program under section 402(p)(6), and is consistent with President Clinton's February 21, 1995, direction on regulatory reform and the Office of Water's December 30, 1994, "National Water Program Agenda for the Future." EPA has initiated an inclusionary process involving its partners to develop more comprehensive phase II rules; EPA intends to propose those rules by September 1, 1997, and finalize those rules by March 1, 1999. In the comprehensive phase II rulemaking, EPA will consider input from all stakeholders, as well as the input that has already been provided to the Agency on the phase II September 1992 notice and the 1993 Rensselaerville Institute phase II effort discussed earlier in this notice. EPA will also consider the information in the Storm Water Reports to Congress, and the recommendations in President Clinton's Clean Water Initiative. Finally, EPA will implement any statutory changes that are enacted during program development. Today's action is based on recommendations in those documents to the extent they envision an orderly, tiered process for regulation of storm water, allowing the NPDES permitting authority to manage for results at this time. EPA is considering making other changes to improve its operation of the phase I storm water program in the comprehensive phase II rulemaking action, including revising phase I municipal application requirements.

The regulation issued today fulfills, in part, the requirements contained in section 402(p)(6) of the CWA. It is being issued by EPA today after consultation with State, local officials, Indian Tribes, and parts of the regulated and environmental community. The regulation, which is the first of a sequential process, is consistent with the information contained in the Storm Water Reports to Congress and the President's Initiative as it is providing the framework of a tiered implementation of phase II requirements, allowing the NPDES permitting authority current flexibility to manage for results. The application requirements allow the NPDES permitting authority to bring within the phase II program at this time those phase II discharges impacting water quality or who are a significant contributor of pollutants and, if EPA does not take action to change its regulations, will require a permit

application from all phase II storm water discharges in 6 years.

The regulations also establish a comprehensive program containing current permit application requirements. The permitting authority will be able to establish appropriate permit requirements on a case-by-case basis at this time. This first portion of the phase II program establishes priorities and deadlines for permit applications, which, as currently structured, will be a part of the NPDES program. These requirements and changes to 40 CFR 122.26 and conforming changes to other NPDES requirements in part 122 are required parts of State/Tribal NPDES programs (see 40 CFR 123.25). The initial portion of the phase II program which is being established today does not contain a comprehensive set of performance standards, guidelines, guidance, management practices, and treatment requirements. These conditions can be established by the permitting authority on a case-by-case basis upon permit issuance to designated phase II discharges. Finally, these conditions may be further defined by EPA when it revises the phase II program regulations as described above.

Today's action adopts a tiered approach for selection of high priority sources to be controlled by NPDES permits, which was the lead option presented for public comment in the September 1992 notice, and one of the options most favored by the various groups participating in the effort conducted in early 1993 by the Rensselaerville Institute and EPA, as well as the Storm Water Reports to Congress and the President's Clean Water Initiative. In its rulemaking effort, EPA believes there will be discussion with its partners of other approaches that will provide flexibility to the States to deal with sources that are not of as high a priority using other frameworks and approaches.

In the September 1992 phase II notice, EPA invited comment on various issues regarding phase II of the storm water program, including the appropriate deadlines for implementing phase II requirements. The comments EPA received on this issue generally recommended implementation of phase II in stages and reiterated the need for time to prepare regulations and to conduct outreach to implement the program, as well as the need to wait and study the results of implementation of phase I of the program. The actions EPA is taking today are consistent with these comments.

Supporting Documentation

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant," and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations, of recipients thereof;
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this rulemaking significantly reduces the current regulatory burden imposed on phase II facilities. This rule was submitted to OMB for review.

B. Executive Order 12875

Under Executive Order 12875, entitled "Enhancing the Intergovernmental Partnership", issued by the President on October 26, 1993, the Agency is required to develop an effective process to allow elected officials and other representatives of State and Tribal governments to provide meaningful and timely input in the development of regulatory proposals.

EPA fully supports this objective and has initiated a consultation process with both States and Tribes which will be continued through public comment period on these actions.

Specifically, EPA has discussed this action with the representatives of the States, local governments, the Agency's American Indian Environmental Office (AIEO), and parts of the regulated community.

The reaction of the States is positive. The States and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) support the approach that is being taken under existing law; the States and ASIWPCA also support concurrent changes to the law. ASIWPCA has submitted a letter to the Agency dated March 3, 1995, which is included in the record for this matter.

EPA has responded to many of ASIWPCA's comments in this preamble.

The reaction of the municipalities is that they prefer a statutory change now to clarify the issue once and for all. Municipalities' representatives (National Association of Counties, National League of Cities, U.S. Conference of Mayors, and the National Association of Flood and Stormwater Management Agencies) have raised many issues to the Agency and have submitted a letter dated February 16, 1995, to the Agency which is contained in the record for this matter. The municipalities believe that it is inappropriate for EPA to act now when Congress may act on this matter, that the action taken by EPA is not in conformance with the law, and that EPA did not consult with local officials on this matter. EPA has responded to many of the municipalities' concerns including the legal basis of its action and potential changes to the statute in this preamble. EPA did consult with various representatives of local governments early in the development of this regulation as well as more comprehensively in February.

The reaction of EPA's AIEO is positive; the Office of Water will work through the AIEO to provide for a Tribal representative to participate in the inclusionary process.

EPA believes that it has developed an effective process to obtain input from State, Tribal and local governments before issuance of this rule, as well as receiving comments on the direct final rule and accompanying proposed rulemaking, and has met the consultation requirements for States, federally recognized Tribes and localities under the terms of Executive Order 12875.

C. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget.

EPA's existing information collection request (ICR) entitled "Application for NPDES Discharge Permit and Sewage Sludge Management Permit" (OMB Number 2040-0086) contains information that responds to this issue for all storm water discharges, including those facilities designated into the program. EPA will review and revise the

estimates contained in this ICR, as appropriate, in its renewal process.

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities, and defines them as follows:

(1) Small governmental jurisdictions—any government of a district with a population of less than 50,000.

(2) Small business—any business which is independently owned and operated and not dominant in its field, as defined by the Small Business Administration regulations under the Small Business Act.

(3) Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

EPA has determined that today's rule would not have a significant impact on a substantial number of small entities, and that a Regulatory Flexibility Analysis therefore is unnecessary. The basis for this determination is through today's action EPA is benefiting small entities as this action (1) adopts a common sense approach to deal with the issue of storm water phase II requirements, (2) provides the ability for the State/Tribe or EPA to manage for results by providing flexibility to the permitting authority to deal with storm water phase II permitting at this time based on water quality violations or significant contribution of pollutants, and (3) clarifies and reduces currently applicable burdens for those facilities current subject to phase II statutory requirements. Finally, the Agency is committed to issue its comprehensive storm water phase II program regulations by March 1, 1999; in that rulemaking EPA will reconsider its Regulatory Flexibility Act analysis.

E. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a written statement to accompany proposed rules where the estimated costs to State, local, or tribal governments, or to the private sector, will be \$100 million or more in any one year. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of such a rule and that is consistent with statutory requirements. Section 203 requires EPA to establish a

plan for informing and advising any small governments that may be significantly and uniquely affect by any rule.

EPA estimates that the costs to State, local, or tribal governments, or the private sector, from this rule will be less than \$100 million. This rulemaking significantly reduces the immediate regulatory burden imposed on phase II facilities. EPA has determined that an unfunded mandates statement therefore is unnecessary.

Although not required to make a finding under section 206, EPA concludes that this rule is cost-effective and a significant reduction in burden for State and local governments. In a September 9, 1992, **Federal Register** notice, EPA invited comment process for public consideration of reasonable alternative approaches for the phase II storm water program. Today's rule provides for the first step for any of those alternatives by providing for an orderly process for development of regulations. By establishing regulatory relief until development of those alternative approaches, today's rulemaking itself provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule at this stage, consistent with statutory requirements.

As discussed previously, EPA initiated consultation with representative organizations of small governments under Executive Order 12875. In doing so, EPA provided notice to potentially affected small governments to enable them to provide meaningful and timely input. EPA plans to inform, educate, and advise small governments on compliance with any requirements that may be developed in further development of storm water phase II rules in the course of the wet weather advisory committee convened for this purpose. That committee will also provide advice related to reconsideration of existing application requirements that already affect small governments.

F. Administrative Procedure Requirements

The Agency is publishing this action as a "direct final" rule. A direct final rule is not an "interim final" rule (*i.e.* a rule which provides for public comment *after* it has gone into effect); rather it is a rule which is published with a delayed effective date allowing for the receipt of and response to public comment before the rule goes into effect. A response to all comments received will be placed in the docket for this rulemaking prior to the effective date. This rulemaking thus fully complies

with notice-and-comment requirements under the Administrative Procedure Act (APA). EPA has chosen to use the direct final approach for this rule because the Agency does not expect to receive significant adverse or critical comment and to allow for the most expeditious implementation possible, consistent with the APA. Because in the absence of this rule, thousands of municipalities and other storm water dischargers are currently operating in violation of the CWA, EPA believes that prompt implementation of this rule is very important.

However, consistent with APA requirements, if EPA does receive significant adverse or critical comment, EPA will withdraw this rule prior to its effective date and proceed with a normal rulemaking process. As a result, elsewhere in today's **Federal Register**, EPA is also *proposing* this rule. If EPA decides to withdraw the direct final rule based on public comment, EPA will proceed with rulemaking based on this proposal. There will not be an additional comment period, so parties interested in commenting on the proposed rule should do so at this time.

List of Subjects

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: March 29, 1995.

Carol M. Browner,
Administrator.

For the reasons set forth in this preamble, parts 122 and 124 of title 40 of the Code of Federal Regulations are amended as follows:

PART 122—[AMENDED]

1. The authority citation for part 122 continues to read as follows:

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

2. Section 122.21 is amended by adding a sentence to the end of paragraph (c)(1) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

* * * * *

(c) *Time to apply.*

(1) * * * New discharges composed entirely of storm water, other than those dischargers identified by § 122.26(a)(1), shall apply for and obtain a permit according to the application requirements in § 122.26(g).

* * * * *

3. Section 122.26 is amended as follows:

a. In paragraph (a)(1) introductory text by revising "October 1, 1992" to read "October 1, 1994".

b. By adding paragraph (a)(9) as set forth below.

c. By revising the title of paragraph (e) introductory text as set forth below;

d. In paragraph (e)(1)(ii) by revising the phrase "permit applications requirements are reserved" to read "permit application requirements are contained in paragraph (g) of this section".

e. By adding paragraph (g) as set forth below.

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) * * *

(9) On and after October 1, 1994, discharges composed entirely of storm water, that are not otherwise already required by paragraph (a)(1) of this section to obtain a permit, shall be required to apply for and obtain a permit according to the application requirements in paragraph (g) of this section. The Director may not require a permit for discharges of storm water as provided in paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at §§ 122.2 and 122.3.

* * * * *

(e) *Application deadlines under paragraph (a)(1).* * * *

* * * * *

(g) *Application requirements for discharges composed entirely of storm water under Clean Water Act section 402(p)(6).* Any operator of a point source required to obtain a permit under paragraph (a)(9) of this section shall submit an application in accordance with the following requirements.

(1) *Application deadlines.* The operator shall submit an application in accordance with the following deadlines:

(i) A discharge which the Director determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States shall apply for a permit to the Director within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see 40 CFR 124.52(c)); or

(ii) All other discharges shall apply to the Director no later than August 2, 2001.

(2) *Application requirements.* The operator shall submit an application in accordance with the following requirements, unless otherwise modified by the Director:

(i) *Individual application for non-municipal discharges.* The requirements contained in paragraph (c)(1) of this section.

(ii) *Application requirements for municipal separate storm sewer discharges.* The requirements contained in paragraph (d) of this section.

(iii) *Notice of intent to be covered by a general permit issued by the Director.*

The requirements contained in 40 CFR 122.28(b)(2).

PART 124—[AMENDED]

4. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 3901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

5. Section 124.52 is amended by revising the parenthetical statement in paragraph (c) to read as follows:

§ 124.52 Permits required on a case-by-case basis.

* * * * *

(c) * * * (see 40 CFR 122.26 (a)(1)(v), (c)(1)(v), and (g)(1)(i)) * * *

6. Section 124.52 is amended by revising the next to the last sentence in paragraph (c) to read as follows:

§ 124.52 Permits required on a case-by-case basis.

* * * * *

(c) * * * The discharger must apply for a permit under 40 CFR 122.26 (a)(1)(v) and (c)(1)(v) within 60 days of notice or under 40 CFR 122.26(g)(1)(i) within 180 days of notice, unless permission for a later date is granted by the Regional Administrator. * * *

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