

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 the general permit needed to comply with the applicable legal requirements for the issuance of a "rule." *National Ass'n of Home Builders v. US 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 of a '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 that the Agency will operate in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency commits 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 general offshore oil and gas exploration, development and production operations permit 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>

G. Analysis of Economic Impacts of the General Permit for Offshore Oil and Gas Exploration, Development and Production Operations off Southern California. EPA determined, in consideration of the discussion in Section F above, the issuance of the general permit for offshore oil and gas exploration, development and production operations off Southern California would not have a significant economic impact on a substantial number of small entities. There are only 22 offshore platforms which could be affected by the proposed general permit modification. EPA concludes since this general permit affects less than 100 small entities, EPA believes it does not have a significant economic impact on a substantial number of small entities. Accordingly, EPA concludes a quantitative analysis of impacts is not required for this permit.

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

Dated: March 12, 2009.

**Alexis Strauss,**

*Director, Water Division, Region 9.*

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## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

March 30, 2009.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden

<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.

invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by 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 control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Persons wishing to comment on this information collection should submit comments June 2, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), (202) 395–5887, or via fax at 202–395–5167, or via the Internet at [Nicholas.A.Fraser@omb.eop.gov](mailto:Nicholas.A.Fraser@omb.eop.gov) and to [Judith-B.Herman@fcc.gov](mailto:Judith-B.Herman@fcc.gov), Federal Communications Commission (FCC). To submit your comments by e-mail send them to: [PRA@fcc.gov](mailto:PRA@fcc.gov).

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the Web page called “Currently Under Review”, (3) click the downward-pointing arrow in the “Select Agency” box below the “Currently Under Review” heading, (4) select “Federal Communications Commission” from the list of agencies presented in the “Select Agency” box, (5) click the “Submit” button to the right of the “Select Agency” box and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information, send an e-mail to Judith B. Herman at 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0690.

*Title:* Section 101.17, Performance Requirements for the 38.6–40.0 GHz Frequency Band.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit; not-for-profit institutions; Federal Government; and State, local or tribal government.

*Number of Respondents:* 67 respondents; 975 responses.

*Estimated Time per Response:* 2 hours.

*Frequency of Response:* Reporting requirement at the end of the 10-year license term.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for these information collections are contained in 47 U.S.C. 4(i), 303(c), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended.

*Total Annual Burden:* 1,950 hours.

*Total Annual Cost:* \$260,000.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* There may be a need for confidentiality. Applicants may request confidentiality and request confidential treatment in connection with their substantial service showings, pursuant to 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting requirement) of this information collection. The Commission is reporting a change in the estimated number of respondents/responses, burden hours and annual costs. The Commission is adjusting the total annual burden estimate by +1,590 hours. This adjustment reflects the revised respondent and responses estimates based on updated licensing data and the increase number of licenses that will be due for renewal in the next three years. The Commission is also adjusting the estimated annual cost burden by an increase of \$208,000 which is due to an increase in the number of responses; and is also due to the estimated number of respondents (licensees) using outside consultants to discuss and prepare the information.

Section 101.17 requires that all 38.6–40.0 GHz band licensees demonstrate

substantial service at the time of license renewal (at the end of the ten year license term). A licensee's substantial service showing should include, but not limited to, the following information for each channel for which the hold a license, in each Economic Area (EA) or portion of the EA covered by their license, in order to qualify for renewal of that license. The information is used by Commission staff to satisfy requirements for licensees to demonstrate substantial service at the time of license renewal. Without this information, the Commission not be able to carry out its statutory responsibilities. Also the information is used by the Commission to determine whether the licensee is providing service which rises to the level of “substantial” requires the following information:

(1) A description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage;

(2) A description of the licensee's current service in terms of population served, as well as any additional service provided during the license term; and

(3) A description of the licensee's investment in its system(s) (type of facilities constructed and their operational status is required).

Any licensees adjudged not to be providing substantial service will not have their license renewed.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

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## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

March 27, 2009.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) 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 control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid