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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 450**

[EPA-HQ-OW-2010-0884; FRL-9222-2]

**Direct Final Rule Staying Numeric Limitation for the Construction and Development Point Source Category**

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to stay the numeric effluent limitation of 280 NTU and associated monitoring requirements for the Construction and Development Point Source Category. This action is necessary so that EPA can reconsider the record basis for calculating the numeric effluent limitation. EPA expects to move expeditiously with its reconsideration, and will remove the stay when such reconsideration is completed.

**DATES:** This rule is effective on January 4, 2011 without further notice, unless EPA receives adverse comment by December 6, 2010 for 40 CFR 450.22(a) and (b), which are stayed indefinitely. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2010-0884, by one of the following methods:

- <http://www.regulations.gov>: This is EPA's preferred approach, although you

may use the alternatives presented below. Follow the on-line instructions for submitting comments.

- *E-mail:* [OW-Docket@epa.gov](mailto:OW-Docket@epa.gov).
- *Mail:* USEPA Docket Center, Environmental Protection Agency, Docket Number EPA-HQ-OW-2010-0884, Mailcode 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* USEPA Docket Center, Public Reading Room, 1301 Constitution Ave., NW., Room 3334, EPA West Building, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-OW-2010-0884. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in

the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the USEPA Docket Center, Public Reading Room, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is 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 EPA Docket Center is (202) 566-2426.

**FOR FURTHER INFORMATION CONTACT:** Janet Goodwin, USEPA Office of Water, by phone at (202) 566-1060 or by e-mail at [goodwin.janet@epa.gov](mailto:goodwin.janet@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**A. Does this action apply to me?**

*Regulated Entities*

Entities potentially regulated by this action include:

Category	Examples of regulated entities	North American industry classification system (NAICS) code
Industry .....	Construction activities required to obtain NPDES permit coverage and performing the following activities: Construction of buildings, including building, developing and general contracting.	236
	Heavy and civil engineering construction, including land subdivision .....	237

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 entities that EPA is now aware could potentially be

regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in 40 CFR 450.10

(74 FR 62995) and the definition of "storm water discharges associated with industrial activity" and "storm water discharges associated with 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 site, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

## B. Background

On December 1, 2009, EPA published in the **Federal Register** (74 FR 62995) effluent limitations guidelines and new source performance standards (ELGs) for the Construction and Development Point Source category. These ELGs control the discharge of pollutants from construction sites and require construction site owners and operators to implement a range of erosion and sediment control measures and pollution prevention practices to control pollutants in discharges from construction sites. These control measures became effective on February 1, 2010. In addition, the rule subjected discharges from certain larger construction sites to a numeric effluent limitation of 280 NTU starting in August of 2011 (for sites 20 acres or more) and February of 2014 (for sites 10 acres or more). These regulations are located at 40 CFR part 450.

Subsequent to the promulgation of the construction and development ELGs, EPA received two petitions for reconsideration of the rule. These petitions pointed out a potential error in the calculation of the numeric limitation. Based on EPA's examination of the dataset underlying the 280 NTU limit, EPA has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280 NTU effluent limitation. EPA intends to expeditiously conduct a separate rulemaking to correct the numeric effluent limitation. EPA plans to publish a proposed correction rule in December 2010 for public comment, and take final action on the proposal by May 30, 2011 so that the revised limitation will be effective by June 29, 2011. An effective date for any revised limitation of June 29, 2011 is necessary in order for EPA to incorporate the corrected numeric limitation in its next Construction General Permit by June 30, 2011.

In 2010 and 2011, EPA estimates that 16 states will incorporate the new construction and development ELG requirements, including the numeric limitation, in their construction general permits. Since EPA acknowledges an error in calculating the 280 NTU limit, it would be inappropriate for states to incorporate the current numeric limitation in construction and

development permits. Consequently, EPA believes a stay of the 280 NTU effluent limitation and associated monitoring requirements is appropriate until EPA can correct its error in calculating the numeric limitation. EPA plans to initiate a limited rulemaking to correct the numeric limitation, and plans to take final action on the proposal by May 30, 2011. This direct final rule stays the numeric limitation in 40 CFR 450.22(a) and (b) and associated monitoring requirements until the new rulemaking is effective. States issuing permits between effective date of the stay and the effective date of the new rule need not incorporate the 280 NTU numeric limitation into their permits.

## C. Description of This Action

EPA is staying Section 22(a) and (b) of 40 CFR part 450 until it can complete a new rulemaking to correct the 280 NTU numeric limitation. Otherwise, compliance with the 280 NTU numeric limitation based on an inadequate administrative record would be required. This stay provides certainty to dischargers, which would need to comply with the numeric limitation and associated monitoring requirements, and to permitting agencies, which would need to incorporate the numeric limitation and associated monitoring requirements in construction permits. This is especially critical for the 16 states that are expected to issue new construction general permits in 2010 and 2011. Pursuant to 5 U.S.C. 553(b), EPA has determined for the reasons stated above that good cause exists for issuing this stay without notice and public comment procedures because in this context, for the reasons discussed above, such procedures are unnecessary and not in the public interest. EPA is not staying any other provision of 40 CFR part 450.

## D. Statutory and Executive Order Reviews

Under Executive Order 12866, 58 FR 51735 (October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. Because the Agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) Public Law 104-4. In addition, this action does not significantly or uniquely affect small governments or impose a significant

intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175. 65 FR 67249 (November 9, 2000). This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. 64 FR 43255 (August 10, 1999). This rule also is not subject to Executive Order 13045, 62 FR 19885 (April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995, 15 U.S.C. 272, do not apply. This rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898, 59 FR 7629 (February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988, 61 FR 4729 (February 7, 1996). EPA has complied with Executive Order 12630, 53 FR 8859 (March 15, 1988), by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. EPA's compliance with these statutes and Executive Orders for the underlying rule is discussed in the December 1, 2009 **Federal Register** notice. 74 FR 62995.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made a good cause finding to forego public notice and comment procedures. Today's stay eliminates a numeric limitation for which the record is inadequate and any opportunity for confusion. Any additional delay in correcting the calculation error would only increase the potential confusion and could require states to incorporate an incorrect numeric limitation in their construction permits. EPA sets an effective date to make the stay effective 60 days after publication in the **Federal Register**. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 450

Environmental protection, Construction industry, Land development, Erosion, Sediment, Stormwater, Water pollution control.

Dated: November 1, 2010.

**Lisa P. Jackson**,  
Administrator.

■ For the reasons set forth in the preamble, EPA is amending 40 CFR part 450 as follows:

#### PART 450—CONSTRUCTION AND DEVELOPMENT POINT SOURCE CATEGORY

■ 1. The authority citation for part 450 is revised to read as follows:

**Authority:** 33 U.S.C. 101, 301, 304, 306, 308, 401, 402, 501 and 510.

■ 2. Section 450.22(a) and (b) are stayed indefinitely.

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## DEPARTMENT OF ENERGY

### 48 CFR Part 970

RIN 1991-AB91

#### Acquisition Regulation: Agency Supplementary Regulations

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) on DOE Management and Operating Contracts to make changes to conform to the Federal Acquisition Regulation (FAR), remove out-of-date coverage, and update references. Today's rule does not alter substantive rights or obligations under current law.

**DATES:** *Effective Date:* December 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Barbara Binney at (202) 287-1340 or by e-mail, [barbara.binney@hq.doe.gov](mailto:barbara.binney@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Comments and Responses
- III. Procedural Requirements
  - A. Review Under Executive Order 12866
  - B. Review Under Executive Order 12988
  - C. Review Under the Regulatory Flexibility Act
  - D. Review Under the Paperwork Reduction Act
  - E. Review Under the National Environmental Policy Act
  - F. Review Under Executive Order 13132
  - G. Review Under the Unfunded Mandates Reform Act of 1995
  - H. Review Under the Treasury and General Government Appropriations Act, 1999
  - I. Review Under Executive Order 13211
  - J. Review Under the Treasury and General Government Appropriations Act, 2001
  - K. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996
  - L. Approval by the Office of the Secretary of Energy

#### I. Background

This final rule amends the existing Department of Energy Acquisition Regulation (DEAR) Subchapter I. The purpose of this rule is to update DEAR Subchapter I—Agency Supplementary Regulations, Part 970—DOE Management and Operating Contracts to conform it to the FAR. None of today's changes are substantive or of a nature to cause any significant expense for DOE or its contractors.

#### II. Comments and Responses

DOE published a notice of proposed rulemaking on June 9, 2010 (75 FR 32719), with a public comment period ending on July 9, 2010. DOE received no comments.

DOE amends the DEAR as follows:

1. Section 970.0100 is amended to add the references for the Code of Federal Regulation (CFR) chapters 1 and 9.

2. Section 970.0103 is revised to remove "DEAR" before 970.0309 and remove "FAR" before 3.9 and add in its place "48 CFR subpart" in paragraph (a)(3).

3. Section 970.0404-2 is amended to update the DOE Order to 475.1, Counterintelligence Program.

4. Section 970.19 is amended to revise the subpart heading and the 970.1907 section heading to conform to the FAR.

5. Section 970.1907-1 is redesignated as 970.1907-4 to conform to the FAR.

6. Part 970 is revised by adding a new subpart "970.25 Foreign Acquisition" and section "970.2570 Contract clauses" which provides instructions on when to insert and how to modify the clauses at FAR 52.225-1, Buy American Act—Supplies, and FAR 52.225-9, Buy American Act—Construction Materials, in management and operating contracts.

7. Section 970.3102-05-6 paragraphs (a)(7)(i) and (ii) are amended to clarify that the contract will set forth the reimbursable costs for compensation for personal services, it removes the reference to the personnel appendix. Paragraph (p)(1) revises the reference to the FAR from the "Federal Acquisition Regulation" to "48 CFR."

8. Subpart 970.34 is amended by redesignating 970.3400 as 970.3405 and 970.3400-1 as 970.3405-2 to conform with the FAR.

9. Subpart 970.37 is revised to add the new section "970.3706 Performance-based acquisition" and "970.3706-1 General" which references 970.1100 for policy and guidance on performance-based contracting for management and operating (M&O) contracts.

10. Section 970.3770-1 is amended by adding that the use of DOE directives is prescribed in 970.0470.

11. Section 970.5204-1 is amended by revising the date of the clause and removing "DOE Order 5670.3, Counterintelligence Program" in paragraph (a) of the clause and adding in its place "DOE Order 475.1, Counterintelligence Program, or its successor".

12. Section 970.5223-3 is amended by revising the date of the provision and adding that DOE may grant an extension to the notification or implementation period if necessary as per 10 CFR 707.5 (g) in paragraph (b). This change will provide the contracting officer the authority to extend the time needed for the contractor to submit the workplace substance abuse program plan.