

the Draft SWEIS in preparing the Final SWEIS.

The alternatives evaluated in the Final SWEIS represent a range of operational levels from the minimal reasonable activity levels (Reduced Operations Alternative) to the highest reasonable activity levels that could be supported by current facilities combined with expansion and construction of new facilities (Expanded Operations Alternative). The No Action Alternative would continue current mission support work at LANL and includes actions, facility construction, and other activities for which NEPA analyses have already been completed. All alternatives assumed that NNSA will continue to operate LANL as a national security laboratory for the foreseeable future.

**Subsequent Document Preparation:** NNSA will consider the environmental impact analysis presented in the Final LANL SWEIS, along with other information, in making decisions regarding the continued operation of LANL. NNSA will wait to issue a ROD for at least 30 days following publication in the **Federal Register** of this notice of availability. It is anticipated that several RODs may be issued based on the Final SWEIS over the next several years. NNSA will publish all RODs in the **Federal Register**.

Signed in Washington, DC, this 4th day of April, 2008.

**Thomas P. D'Agostino,**

*Administrator, National Nuclear Security Administration.*

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL-8567-1, EPA-HQ-OW-2008-0238]

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

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

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

**SUMMARY:** EPA Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10 today are proposing for public comment the issuance of 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. This draft 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. As proposed, 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.

In addition to proposing this draft CGP, EPA is also requesting comments on the criteria to be used by the Agency to incorporate, by reference, "qualifying local program requirements" for erosion and sediment control as provided for in EPA's regulations. Approved qualifying local program requirements can then be incorporated by reference into the Agency's construction general permit. A construction site operator with construction activities within the jurisdiction of the qualifying local program can follow local erosion and sediment control requirements in lieu of complying with comparable erosion and sediment control requirements in EPA's CGP.

**DATES:** Comments on EPA's proposal, including the draft permit, must be postmarked by June 16, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2008-0238, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* [ow-docket@epa.gov](mailto:ow-docket@epa.gov).
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA Headquarters West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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:** A copy of the draft 2008 CGP and its accompanying fact sheet is available at [www.epa.gov/npdes/stormwater/cgp](http://www.epa.gov/npdes/stormwater/cgp). Direct your comments to Docket ID No. EPA-HQ-OW-2008-0238. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](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 [www.regulations.gov](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.

**Docket:** All documents in the docket are listed in the [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 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 Water Docket is (202) 566-2426.

**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?*

*The 2008 construction general permit ("2008 CGP") would potentially apply to 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 would be 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 proposal is limited to those areas where EPA is the permitting authority. A list of eligible areas is included in Appendix B of the draft 2008 CGP.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or

CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

*C. Public Hearings*

EPA has not scheduled any public hearings to receive public comment concerning the proposed permit. All persons will continue to have the right to provide written comments during the public comment period. However, interested persons may request a public

hearing pursuant to 40 CFR 124.12 concerning the proposed permit. Requests for a public hearing must be sent or delivered in writing to the same address as provided above for public comments prior to the close of the comment period. Requests for a public hearing must state the nature of the issues proposed to be raised in the hearing. Pursuant to 40 CFR 124.12, EPA shall hold a public hearing if it finds, on the basis of requests, a significant degree of public interest in a public hearing on the proposed permit. If EPA decides to hold a public hearing, a public notice of the date, time and place of the hearing will be made at least 30 days prior to the hearing. Any person may provide written or oral statements and data pertaining to the proposed permit at the public hearing.

*D. Finalizing the Permit*

After the close of the public comment period, EPA will issue a final permit. This permit will not be issued until after all public comments have been considered and appropriate changes made to the permit. EPA's response to public comments received will be included in the docket as part of the final permit decisions. Once the final permit becomes effective, operators of new and unpermitted ongoing construction projects may seek authorization to discharge by filing a NOI to be covered under the new 2008 CGP. Under EPA's regulations at 40 CFR 122.6, any construction site operator obtaining permit coverage prior to the July 1, 2008 expiration date of the 2003 CGP, automatically remains covered under that permit until the earliest of:

- The operator submits a Notice of Termination, or;
- EPA issues an individual permit or denies coverage under an individual permit for the site's stormwater discharges, or;
- EPA issues a new general permit that establishes procedures for covering

these existing dischargers to obtain coverage under the new general permit and the operator obtains coverage consistent with the procedures detailed in that new general permit.

*E. Who Are the EPA Regional Contacts for This Proposed 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 Proposal

### 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 the 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.

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).

The NPDES regulations, at 40 CFR 122.44(s), authorize EPA to recognize local erosion and sediment control requirements that meet or exceed the requirements in that section as a "qualifying local program" ("QLP"). EPA can incorporate any such QLP requirements meeting or exceeding regulatory criteria into the CGP consistent with procedures for permit modifications established at 40 CFR 124.5. Following final incorporation of any QLP into the CGP, construction site operators that are subject to the requirements of the CGP and who are operating within the jurisdiction of a QLP, would then be directed (in the CGP) to follow those qualified local erosion and sediment control requirements in lieu of otherwise applicable erosion and sediment control requirements detailed in the CGP. Other CGP requirements, such as meeting eligibility criteria and standard NPDES permit conditions would still apply to that construction site operator. EPA has

not incorporated QLPs into any of its previously issued construction general permits. However, in the interest of implementing this regulation, consistent with the Office of Water's May 8, 2006 memorandum entitled "Qualifying Local Programs for Construction Site Stormwater Runoff" (available at [www.epa.gov/npdes/stormwater](http://www.epa.gov/npdes/stormwater)), EPA is today proposing draft criteria for incorporating QLPs into this or any future CGPs.

### B. Summary of Permit Proposal

EPA proposes to issue the 2008 CGP for a period of not to exceed two years. As proposed, the 2008 CGP will include conditions and limits that would be 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") would 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 will be required to submit a complete and accurate NOI for a new project under the 2008 CGP.) Although the existing permit expires 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 draft permit proposed here will only apply 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.

As stated, EPA proposes to issue 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 is appropriate to propose a revised CGP once EPA has issued C&D effluent guidelines, and therefore proposes a maximum two-year duration for this permit 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. EPA solicits comments on the proposed 2-year duration of this permit.

#### *C. What Is EPA's Rationale for This Permit Proposal?*

Since the 2003 CGP expires on July 1, 2008, it is incumbent upon EPA to make available a similar general permit that provides 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 proposing to issue a CGP that adopts the same limits and conditions of 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 a 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 be 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 proposing to use the permit limits and conditions in 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. If no permit is made available by July 1, 2008, EPA anticipates that such efforts will be undermined, and the compliance rate may decline. 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.

#### *D. Significant Changes From 2003 CGP*

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

1. Clarification that eligibility for coverage under the 2008 CGP is limited to operators of new and unpermitted ongoing construction projects.
2. Clarification that operators of ongoing permitted construction projects are not eligible for coverage under the 2008 CGP.
3. Removal of eligibility for operators in Tribal Lands in Maine from the list of areas in Appendix B where this permit is effective.

#### *E. Geographic Coverage*

EPA is only authorized to provide permit coverage for classes of discharges that are outside the scope of a State's NPDES program authorization. EPA Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10 are proposing to issue 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 are listed in Appendix B of the draft 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.

### **III. Proposed QLP Approval Criteria**

EPA is requesting public comment on a set of criteria for use in approving QLPs. EPA developed the criteria based

on the QLP regulatory elements identified in 40 CFR 122.44(s). *These regulatory elements include the following:*

(i) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(ii) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(iii) Requirements for construction site operators to develop and implement a stormwater pollution prevention plan. (A stormwater pollution prevention plan includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-stormwater discharges);

(iv) Requirements to submit a site plan for review that incorporates consideration of potential water quality impacts; and

(v) For large construction activities only, any additional requirements necessary to achieve the applicable technology-based standards of “best available technology” and “best conventional technology” based on the best professional judgment of the permit writer.

Using these regulatory elements, EPA has developed a draft set of criteria to review local erosion and sediment control requirements in an objective and systematic manner. EPA is proposing to use the following list of criteria to determine whether local programs meet the basic elements in 122.44(s). EPA notes that these criteria are presented in a summary format. During the actual evaluation of candidate local programs, EPA will need to assess in greater detail whether the local requirements meet or exceed the requirements in the applicable section of the CGP that is in effect at the time of the evaluation.

#### I. Erosion and Sediment Control

a. Sediment controls (e.g., perimeter controls, protection of storm drain inlets, location of stockpiles away from storm drainage conveyance), collection of sediment on paved areas to prevent it from entering storm drains.

b. Off-site, vehicle tracking of sediments (e.g., establish site entrances and exits).

c. Sediment pond, or similar level of control, for sites greater than 10 acres.

d. Erosion controls (e.g., minimize disturbed areas, phase construction activity, blankets, mulches, divert

stormwater flowing onto and through property away from disturbed areas).

e. Temporary stabilization (e.g., stabilize areas of exposed soil where construction activity has temporarily ceased).

f. Final stabilization.

II. *Control of Other Wastes*—To prevent contamination of construction stormwater, the following wastes must be controlled:

g. Solid waste management (e.g., trash cans, dumpsters, material handling, and storage areas).

h. Concrete truck washout (e.g., designate concrete controlled washout areas).

i. Sanitary waste (e.g., portable toilets).

j. Spill prevention and response procedures (e.g., for petroleum products, chemicals, etc.).

#### III. *Develop a Stormwater Pollution Prevention Plan*

k. Project description (e.g., nature of construction, dates and sequence of construction, site operator information, identification of potential pollutant sources).

l. Site map(s).

m. Description of all erosion, sediment, other waste controls.

n. Operation and maintenance procedures for erosion and sediment controls.

o. Routine self-inspections.

p. Train employees and subcontractors on the implementation of controls.

#### IV. *Submit Site Plan for Review*

q. Submit site plan or entire SWPPP to the qualified local program for review.

EPA anticipates that although a program may not meet all of the criteria listed above, it still may be approved as a QLP for those parts of the program that do meet the criteria. In such a situation, the CGP would specify which requirements would be included in the QLP requirements and which ones would be subject to the CGP requirements.

EPA invites comments on the draft criteria for approving QLPs. EPA specifically encourages commenters to suggest modifications to the wording of the criteria, where necessary, and/or to recommend other criteria that EPA should use. In addition, EPA invites the public to suggest candidate local programs that could be considered as a QLP. EPA also asks for recommendations on how the process for identifying, approving, and implementing QLPs can work effectively.

## IV. 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).

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

EPA has concluded, consistent with the discussion in Section IV.A above, that the proposed issuance of the 2008 CGP could affect a substantial number of small entities. In the areas where the CGP is effective (see Section II.E), (those areas where EPA is the permit authority), 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 proposed issuance of the 2008 CGP is unlikely to have an adverse economic impact on small entities. The draft 2008 CGP includes the same requirements as those of the 2003 CGP. Additionally, an operator’s use of the CGP is volitional (*i.e.*, a discharger could apply for an individual permit rather than for coverage under this general permit) and is less burdensome than an individual NPDES permit. EPA intends to include an updated economic screening analysis with the issuance of the next CGP.

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

Dated: May 7, 2008.

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*Acting Regional Administrator, EPA Region 1.*

Dated: May 8, 2008.

**Walter Mugden,**  
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Dated: May 6, 2008.

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Dated: May 7, 2008.

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Dated: May 8, 2008.

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Dated: May 8, 2008.

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Dated: May 6, 2008.

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Dated: May 7, 2008.

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## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-6698-9]

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2) (c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202-564-7167.

An explanation of the ratings assigned to draft environmental impact