

Docket No.	File date	Presenter or requester
3. P-2210-169	2-9-09	T. Rogers ² .

¹ Summary of Telephone conference.

² Record of e-mail exchange.

Kimberly D. Bose,
Secretary.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-8772-1; EPA-HQ-OW-2005-0007]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final permit issuance of the 2008 Multi-Sector General Permit for Alaska, Idaho, federal facilities in Washington, and Indian Country in the states of Idaho, Oregon and Washington.

SUMMARY: EPA previously announced the issuance of the NPDES general permit for stormwater discharges from industrial activity, also referred to as the Multi-Sector General Permit (MSGP), in the **Federal Register** of September 29, 2008 (73 FR 56572). Today's action provides notice of final MSGP issuance for the states of Alaska and Idaho; for federal facilities in Washington; and for Indian Country in the states of Idaho, Oregon and Washington.

DATES: Today's action is effective on February 26, 2009. This effective date is necessary to provide dischargers with the immediate opportunity to comply with Clean Water Act requirements in light of the expiration of the previous version of the MSGP on October 30, 2005. In accordance with 40 CFR Part 23, this permit shall be considered issued for the purpose of judicial review on March 12, 2009. Under section 509(b) of the Clean Water Act, judicial review of this general permit can be had by filing a petition for review in the United States Court of Appeals with 120 days after the permit is considered issued for purposes of judicial review. Under section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, this permit may not be challenged in other agency proceedings. Deadlines for submittal of Notices of Intent from

facilities located in the areas listed above are provided as part of this action.

FOR FURTHER INFORMATION CONTACT: For information about the issuance of the MSGP in Alaska; Idaho; for federal facilities in Washington; and in Indian Country in Idaho, Oregon and Washington, contact Misha Vakoc, EPA Region 10, Office of Water and Watersheds at (206) 553-6650 or vakoc.misha@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

If a discharger chooses to seek coverage under this MSGP to be authorized to discharge stormwater from industrial activities, the MSGP provides specific requirements for preventing contamination of stormwater discharges from industrial facilities listed in the sectors shown below:

Sector A—Timber Products
Sector B—Paper and Allied Products Manufacturing
Sector C—Chemical and Allied Products Manufacturing
Sector D—Asphalt Paving and Roofing Materials Manufactures and Lubricant Manufacturers
Sector E—Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing
Sector F—Primary Metals
Sector G—Metal Mining (Ore Mining and Dressing)
Sector H—Coal Mines and Coal Mining-Related Facilities
Sector I—Oil and Gas Extraction and Refining
Sector J—Mineral Mining and Dressing
Sector K—Hazardous Waste Treatment Storage or Disposal
Sector L—Landfills and Land Application Sites
Sector M—Automobile Salvage Yards
Sector N—Scrap Recycling Facilities
Sector O—Steam Electric Generating Facilities
Sector P—Land Transportation
Sector Q—Water Transportation
Sector R—Ship and Boat Building or Repairing Yards
Sector S—Air Transportation Facilities
Sector T—Treatment Works
Sector U—Food and Kindred Products
Sector V—Textile Mills, Apparel, and other Fabric Products Manufacturing
Sector W—Furniture and Fixtures
Sector X—Printing and Publishing

Sector Y—Rubber, Miscellaneous Plastic Products, and Miscellaneous Manufacturing Industries
Sector Z—Leather Tanning and Finishing
Sector AA—Fabricated Metal Products
Sector AB—Transportation Equipment, Industrial or Commercial Machinery
Sector AC—Electronic, Electrical, Photographic and Optical Goods
Sector AD—Reserved for Facilities Not Covered Under Other Sectors and Designated by the Director

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

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. OW-2005-0007. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

Electronic versions of this final permit and fact sheet are available at EPA's stormwater Web site <http://www.epa.gov/npdes/stormwater/msgp>.

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

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other

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

II. Background

EPA proposed the MSGP for public comment on December 1, 2005 (70 FR 72116). On September 29, 2008 (73 FR 56572), EPA announced the availability of the MSGP for industrial facilities located in the States of Massachusetts, New Hampshire, New Mexico; the Commonwealth of Puerto Rico; the District of Columbia; the Territories of Johnson Atoll, American Samoa, Guam, the Commonwealth of Northern Mariana Islands, Midway and Wake Islands; Indian Country in Alaska, Arizona, Connecticut, Massachusetts, Louisiana, Michigan, Minnesota, Nevada, New Mexico, Oklahoma, Texas, Wisconsin, Rhode Island; for certain facilities in the states of Oklahoma and Texas not on Indian Country lands; and for Federal facilities located in Delaware and Vermont.

EPA Region 10 did not issue the final MSGP for the States of Alaska and Idaho; for Federal facilities in Washington; and for Indian Country in the States of Idaho, Oregon and Washington because it had not yet received the Clean Water Act 401 certifications. Now that EPA Region 10 has received the required Clean Water Act 401 certifications, it is issuing the final MSGP, as described more fully below, in the States of Alaska and Idaho; for Federal facilities in Washington; and for Indian Country in the States of Idaho, Oregon and Washington.

The MSGP provides coverage for 29 sectors of industrial point source discharges that occur in areas not covered by an approved State NPDES program. EPA summarized the MSGP permit conditions, as well as changes from the previous version of the MSGP, in the September 29, 2008, **Federal Register** notice.

Since September 2008, EPA received final certifications under the Clean Water Act Section 401 from the States of Alaska and Idaho; the Lummi Tribe, the Confederated Tribe of the Umatilla Indians; and the Puyallup Tribe of

Indians. Accordingly, permit coverage under the MSGP is now available to dischargers in the following areas:

- The State of Alaska, except Indian Country lands;
- The State of Idaho, except Indian Country lands;
- Indian Country lands within the State of Idaho, except Duck Valley Reservation lands;
- Indian Country lands within the State of Oregon, except Fort McDermitt Reservation lands;
- Indian Country lands within the State of Washington; and
- Federal facilities in the State of Washington, except those located on Indian Country lands.

Pursuant to CWA section 401(d), the limitations and requirements contained in these certifications are now conditions of the MSGP and are included in Part 9.10 of the permit. In addition, EPA has specified the deadline for submittal of Notices of Intent from dischargers in these areas in Table 9.10–1.

The MSGP effective date is February 26, 2009. Operators of facilities discharging within the areas listed above must submit their Notice of Intent to EPA no later than May 27, 2009. The permit and the authorization to discharge will expire at midnight on September 29, 2013. As previously noted, the complete text of the updated MSGP can be obtained through EPA's Web site at <http://www.epa.gov/npdes/stormwater/msgp>.

Permit Appeal Procedures

In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review on March 12, 2009.

III. 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 the 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 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 hereby commits 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 MSGP permitting 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 MSGP proceeding as well as in the Agency’s 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.¹

IV. Quantitative Analysis of Economic Impacts of the MSGP

EPA has determined, in consideration of the discussion in Section IV above, that the issuance of the MSGP potentially could affect a substantial number of small entities. Therefore, to determine what, if any, economic impact this permit may have on small businesses, EPA conducted an economic assessment of this general permit. Based on this assessment, EPA concludes that this permit will not have a significant economic impact on a substantial number of businesses, including small businesses. The estimated increased compliance cost per permittee ranges from a low of \$8.37 per year to a high of \$28.27 per year. All cost estimates are presented in 2005 dollars. As a percentage of annual sales, the expected incremental burden of these estimated costs is small. The cost-to-sales ratios are small across all MSGP sectors, with the largest impacts observed in Sectors I (0.003 percent) and P (0.003 percent).

These cost estimates reflect the incremental monitoring, documentation and reporting costs imposed by this permit, relative to the comparable costs for compliance with MSGP 2000. They do not include the costs of additional control measures that may be required as a result of more rigorous documentation and reporting requirements (*e.g.*, for corrective action). EPA recognizes that these costs may be significant for some facilities, but believes that relatively few facilities will have significantly increased costs relative to MSGP 2000 because in most cases the underlying standards of control have not changed. EPA was unable to quantify these costs because EPA is not able to predict what site-specific additional control measures may be necessary in these limited cases.

¹ 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.

Based on EPA’s analysis, the Agency concludes that this permit will not result in a significant economic impact on a substantial number of small businesses. The factual basis for this conclusion is included in the economic analysis for the permit, available as part of the docket for this permit, and summarized above.

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

Dated: January 29, 2009.

Michael A. Bussell,

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

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ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–1196; FRL–8772–3]

Recent Postings of Broadly Applicable Alternative Test Methods

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the broadly applicable alternative test method approval decisions the EPA has made under and in support of New Source Performance Standards (NSPS) and the National Emission Standards for Hazardous Air Pollutants (NESHAP) in 2008.

FOR FURTHER INFORMATION CONTACT: An electronic copy of each alternative test method approval document is available on EPA’s Web site at <http://www.epa.gov/ttn/emc/approalt.html>. For questions about this notice, contact Jason M. DeWees, Air Quality Assessment Division, Office of Air Quality Planning and Standards (E143–02), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: 919–541–9724; fax number: 919–541–0516; e-mail address: deweese.jason@epa.gov. For technical questions about individual alternative test method decisions, refer to the contact person identified in the individual approval documents.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Notice Apply to Me?

This notice will be of interest to entities regulated under 40 CFR parts 60, 61, and 63, and State, local, Tribal agencies, and EPA Regional Offices responsible for implementation and enforcement of regulations under 40 CFR parts 60, 61, and 63.