

preclude the institution of legal action or relieve permittees from any responsibilities, liabilities, or penalties for other, unauthorized discharges of oil and hazardous materials that are covered by section 311 of the Act.

#### *Endangered Species Act*

The Endangered Species Act (ESA) imposes important requirements upon, federal agencies regarding endangered species of fish, wildlife, or plants that have been designated as critical. Its implementing regulations (50 CFR Part 402) require the Regional Administrator to ensure, in consultation with the Secretaries of Interior and Commerce, that any action authorized, funded or carried out by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat [40 CFR 122.49(c)]. Implementing regulations for the ESA establish a process by which agencies consult with one another to ensure that issues and concerns of both the NMFS and the USFWS collectively are addressed. The NMFS and USFWS have responded to EPA's initiation of the coordination process under the regulations set forth by section 7 of the Endangered Species Act. The species identified by NMFS and USFWS as threatened or endangered species within the permit coverage area have been assessed for potential effects from the activities covered by the proposed permit in a biological assessment incorporated in the draft SEIS. This biological assessment was submitted to the NMFS and USFWS along with the proposed permit for consistency review and concurrence on the Region's finding of no adverse effect. This coordination is appended to the final EIS. Concurrence from the USFWS and the NMFS was received on October 10, 2004, and November 16, 2004, respectively. Both agencies stated that EPA's proposed action to reissue the general permit is not likely to affect resources protected under the ESA.

The NMFS, in association with the Gulf of Mexico Fishery Management Council, administers the Essential Fish Habitat (EFH) requirements established by the Magnuson-Stevens Fishery Conservation and Management Act. Federal agencies are required to consult with NMFS on any activity that may adversely affect fisheries. EFH coordination with NMFS occurred in conjunction with the SEIS which contains the EFH assessment information. EPA requested comments from NMFS on the EFH assessment and finding of minimal effects. The NMFS offered comments which included

recommendations for minimizing potential adverse impacts of the discharges. Comments were fully considered and responded to by EPA in the FSEIS.

#### *Ocean Discharge Criteria Evaluation*

For discharges into waters located seaward of the inner boundary of the territorial seas, the CWA Section 403 requires that NPDES permits consider guidelines for determining the potential degradation of the marine environment. The guidelines, or Ocean Discharge Criteria (40 CFR Part 125, subpart M), are intended to "prevent unreasonable degradation of the marine environment and to authorize imposition of effluent limitations, including a prohibition of discharge, if necessary, to ensure this goal" (45 FR 65942, October 3, 1980).

A final ODCE determination of no unreasonable degradation has been made by Region 4 based comments and information submitted during the public comment period for the proposed general permit. The potential effects of discharges under the proposed permit limitations and conditions are assessed in this document available from Region 4. The ODCE states that, based on the available information, the permit limitations are sufficient to determine that no unreasonable degradation should result from the permitted discharges.

#### *Marine Protection, Research, and Sanctuaries Act*

No marine sanctuaries as designated by the Marine Protection, Research, and Sanctuaries Act exist in the area to which the OCS permit applies.

#### *Regulatory Flexibility Act*

After review of the facts presented above, I hereby certify, pursuant to the provisions of 5 U.S.C. 605(b), that these proposed general permits will not have a significant impact on a substantial number of small entities. This certification is based on the fact that the vast majority of the parties regulated by this permit have greater than 500 employees and are not classified as small businesses under the Small Business Administration regulations established at 49 FR 5024 *et seq.* (February 9, 1984). For those operators having fewer than 500 employees, this permit issuance will not have significant economic impact. These facilities are classified as Major Group

13—Oil and Gas Extraction SIC Crude Petroleum and Natural Gas.

**James D. Giattina,**

*Director, Water Management Division.*

[FR Doc. 04-27987 Filed 12-21-04; 8:45 am]

**BILLING CODE 6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

[FRL-7851-6]

### **Final Modification of National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities; Notice**

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

**ACTION:** Notice of general permit modification.

**SUMMARY:** Today's action provides notice of modification of permit conditions specific to construction activities covered under EPA's National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities. The general permit is available for use where EPA is the NPDES permitting authority in EPA Regions 1-3 and 5-10. Coverage under the general permit authorizes the discharge of storm water from construction activities consistent with the terms of the permit. The revisions clarify that only sites covered by this permit can be subject to noncompliance with the permit. In addition, this modification includes correction of a typographical error in the permit and a corresponding error in the fact sheet.

**DATES:** This permit modification is effective on January 21, 2005. In accordance with 40 CFR 23.2, this action is considered issued for purposes of judicial review as of 1 p.m. eastern standard time (e.s.t.) on January 5, 2005. Under section 509(b)(1) of the Clean Water Act (CWA), judicial review of the Agency's actions relating to the issuance or denial of an NPDES permit is available in the United States Court of Appeals within 120 days after the decision is final for the purposes of judicial review. Under CWA section 509(b)(2), the modifications issued today may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

**FOR FURTHER INFORMATION CONTACT:** Jack Faulk: telephone 202-564-0768 or e-mail [faulk.jack@epa.gov](mailto:faulk.jack@epa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### A. How Can I Get Copies of This Document and Other Related Materials?

1. *Docket.* EPA has established an official public docket for the Construction General Permit under Docket ID Number OW-2002-0055. The official public docket consists of the documents specifically referenced in the Construction General Permit, any public comments received, the proposed modification, and other information related to the permit. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B135, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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.

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/>.

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.epa.gov/edocket/> 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. 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.A.1. Once in the system, select "search," then key in the appropriate docket identification number.

### B. Who Are the EPA Regional Contacts for This Permit?

For EPA Region 1, contact Thelma Murphy: telephone number (617) 918-1615 or e-mail [murphy.thelma@epa.gov](mailto:murphy.thelma@epa.gov).

For EPA Region 2, contact Stephen Venezia: telephone number (212) 637-3856 or e-mail [venezia.stephen@epa.gov](mailto:venezia.stephen@epa.gov) or, for Puerto Rico, Sergio Bosques: telephone number (787) 977-5838 or e-mail [bosques.sergio@epa.gov](mailto:bosques.sergio@epa.gov).

For EPA Region 3, contact Paula Estornell: telephone number (215) 814-5632 or e-mail [estornell.paula@epa.gov](mailto:estornell.paula@epa.gov).

For EPA Region 5, contact Brian Bell: telephone (312) 886-0981 or e-mail [bell.brianc@epa.gov](mailto:bell.brianc@epa.gov).

For EPA Region 6, contact Brent Larsen: telephone (214) 665-7523 or e-mail [larsen.brent@epa.gov](mailto:larsen.brent@epa.gov).

For EPA Region 7, contact Mark Matthews: telephone (913) 551-7635 or e-mail [matthews.mark@epa.gov](mailto:matthews.mark@epa.gov).

For EPA Region 8, contact Greg Davis: telephone (303) 312-6082 or e-mail [davis.gregory@epa.gov](mailto:davis.gregory@epa.gov).

For EPA Region 9, contact Eugene Bromley: telephone (415) 972-3510 or e-mail [bromley.eugene@epa.gov](mailto:bromley.eugene@epa.gov).

For EPA Region 10, contact Misha Vakoc: telephone (206) 553-6650 or e-mail [vakoc.misha@epa.gov](mailto:vakoc.misha@epa.gov).

## II. Background

### A. Why Is This Information Being Published in the **Federal Register**?

EPA issues NPDES permits under the authority of Clean Water Act (CWA) section 402, 33 U.S.C. section 1342. Consistent with that authority, EPA Regions 1-3 and 5-10 issued their final NPDES construction general permits (commonly referred to collectively as the CGP) for discharges from large (five acres or more) and small (one to five acres) construction activities on July 1, 2003 (68 FR 39087) and August 4, 2003 (68 FR 45817). The CGP and accompanying fact sheet are available on EPA's Internet Web site at: <http://www.epa.gov/npdes/cgp>. Operators of both large and small construction sites in areas where EPA is the NPDES permitting authority may be eligible to obtain coverage under the CGP for allowable storm water and non-storm water discharges. See Section II.B.

The NPDES regulations at 40 CFR 124.5(a) specify that permits may be modified at the request of any interested person (including the permittee) or upon the Director's (in this instance, EPA's) initiative. As discussed in more detail below, the modifications EPA is making through this notice are due in part to a settlement agreement with certain petitioners that filed suit in response to EPA's July 1, 2003 issuance of the CGP.

Where EPA decides to modify a permit under 40 CFR 122.62, a draft permit, incorporating the proposed changes, is generally prepared and subjected to public notice and an opportunity for public comment consistent with 40 CFR 124.10. During the public comment period, any interested person may submit written comments on the draft permit and may request a public hearing. Any request for public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments will be considered in making the final decision with responses

documented in the administrative record and available to the public.

EPA provided public notice in the **Federal Register** of its proposed modifications to the CGP. (69 FR 55818, September 16, 2004). Comments on the proposed modifications were due to EPA no later than October 18, 2004. EPA did not receive a request for public hearing.

Pursuant to 40 CFR 124.5(c)(2), when a permit is modified, only those conditions subject to modification are reopened. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. As such, EPA reviewed and considered comments submitted in response to the modifications proposed in the September 16, 2004 **Federal Register** notice.

### B. Who Is Covered Under This Modified Permit?

The CGP is available only in those areas where EPA is the NPDES permitting authority. Coverage is obtained by meeting all eligibility criteria and submission of a complete and accurate Notice of Intent (NOI) to EPA as detailed in the CGP.

Specifically, operators of large and small construction activities within the areas listed below may be eligible to obtain coverage under this permit for allowable storm water and non-storm water discharges and as such may be affected by this notice:

*EPA Region 1:* The States of Massachusetts and New Hampshire; Indian Country in the States of Connecticut, Massachusetts, and Rhode Island; and Federal facilities in Vermont.

*EPA Region 2:* The Commonwealth of Puerto Rico and Indian Country in the State of New York.

*EPA Region 3:* District of Columbia; and Federal facilities in the State of Delaware.

*EPA Region 5:* Indian Country in the States of Michigan, Minnesota, and Wisconsin, except the Sokaogon Chippewa (Mole Lake) Community.

*EPA Region 6:* The State of New Mexico; Indian Country in the States of Louisiana, Oklahoma, Texas, and New Mexico (except Navajo Reservation Lands [see EPA Region 9] and Ute Mountain Reservation Lands (see EPA Region 8)); discharges in the State of Oklahoma that are not under the authority of the Oklahoma Department of Environmental Quality, including activities associated with oil and gas exploration, drilling, operations, and pipelines (includes SIC Groups 13 and 46, and SIC codes 492 and 5171), and point source discharges associated with

agricultural production, services, and silviculture (includes SIC Groups 01, 02, 07, 08, 09); and discharges in the State of Texas that are not under the authority of the Texas Commission on Environmental Quality (formerly the Texas Natural Resource Conservation Commission), including activities associated with the exploration, development, or production of oil or gas or geothermal resources, including transportation of crude oil or natural gas by pipeline.

*EPA Region 7:* Indian Country in the States of Iowa, Kansas, and Nebraska (except Pine Ridge Reservation Lands (see EPA Region 8)).

*EPA Region 8:* Federal facilities in Colorado; Indian Country in Colorado (as well as the portion of the Ute Mountain Reservation located in New Mexico), Montana, North Dakota (as well as that portion of the Standing Rock Reservation located in South Dakota and excluding the portion of the lands within the former boundaries of the Lake Traverse Reservation, which is covered under the permit for areas of South Dakota), South Dakota (as well as the portion of the Pine Ridge Reservation located in Nebraska and the portion of the lands within the former boundaries of the Lake Traverse Reservation located in North Dakota and excluding the Standing Rock Reservation which is covered under the permit for areas of North Dakota), Utah (except Goshute and Navajo Reservation lands (see EPA Region 9)), and Wyoming.

*EPA Region 9:* The Islands of American Samoa and Guam, Johnston Atoll, Midway/Wake Islands and Commonwealth of the Northern Mariana Islands; Indian Country in Arizona (as well as Navajo Reservation lands in New Mexico and Utah), California, and Nevada (as well as the Duck Valley Reservation in Idaho, the Fort McDermitt Reservation in Oregon, and the Goshute Reservation in Utah).

*EPA Region 10:* The States of Alaska and Idaho; Indian Country in Alaska, Idaho (except Duck Valley Reservation (see EPA Region 9)), Washington, and Oregon (except for Fort McDermitt Reservation (see EPA Region 9)); and Federal facilities in Washington.

### III. Today's Action

#### A. What Are the Final Permit (and Fact Sheet) Modifications?

EPA has considered all comments received and is modifying the permit and fact sheet consistent with the changes proposed in the **Federal Register** at 69 FR 55818 (September 16, 2004). Modifications described in

III.A.1, III.A.2, and III.A.3 are identical to those proposed. As originally issued on July 1, 2003, the CGP suggested that construction site operators could be said to be violating the permit even in those instances when the operator is not covered, or not yet covered, by that permit (*e.g.*, before the operator submits a Notice of Intent (NOI) to be covered). As discussed in III.B., EPA is modifying this permit language to be consistent with the Agency's intent and its goals regarding protection of water quality. Two technical corrections, identified in III.A.4. and III.A.5., are modified as proposed. EPA received no comments on those two corrections. Accordingly, EPA hereby notices the following modifications:

1. On page 7, in section 2.3.D of the CGP, Late Notifications, third sentence, strike the phrase "or permit noncompliance" so that section 2.3.D now reads: "Late Notifications: Operators are not prohibited from submitting NOIs after initiating clearing, grading, excavation activities, or other construction activities. When a late NOI is submitted, authorization for discharges occurs consistent with Subpart 2.1. The Agency reserves the right to take enforcement action for any unpermitted discharges that occur between the commencement of construction and discharge authorization."

2. On page D-3 in Appendix D of the CGP, section D.3, second sentence, strike the phrase "or permit noncompliance" so that section D.3 of Appendix D now reads: "Late Notifications: Operators are not prohibited from submitting waiver certifications after initiating clearing, grading, excavation activities, or other construction activities. The Agency reserves the right to take enforcement for any unpermitted discharges that occur between the time construction commenced and waiver authorization is granted."

3. On page D-3 in Appendix D of the CGP, in the paragraph following section D.3, third sentence, strike the phrase "or permit noncompliance" so that section D.3 of Appendix D now reads: "Submittal of a waiver certification is an optional alternative to obtaining permit coverage for discharges of storm water associated with small construction activity, provided you qualify for the waiver. Any discharge of storm water associated with small construction activity not covered by either a permit or a waiver may be considered an unpermitted discharge under the Clean Water Act. As mentioned above, EPA reserves the right to take enforcement for any unpermitted discharges that

occur between the time construction commenced and either discharge authorization is granted or a complete and accurate waiver certification is submitted. EPA may notify any operator covered by a waiver that they must apply for a permit. EPA may notify any operator who has been in non-compliance with a waiver that they may no longer use the waiver for future projects. Any member of the public may petition EPA to take action under this provision by submitting written notice along with supporting justification."

4. On page 11, in section 3.11.B of the CGP, strike the phrase "the discharges" so that section 3.11.B now reads: "The SWPPP must be amended if during inspections or investigations by site staff, or by local, state, tribal, or federal officials, it is determined that the SWPPP is ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site."

5. In section 3.11 of the CGP fact sheet, strike the phrase "discharges are" and replace it with "SWPPP is" so that the sentence now reads: "The plan must also be amended if inspections or investigations by site staff, or by local, state, tribal, or federal officials determine that the SWPPP is ineffective in eliminating or significantly minimizing pollutants in storm water discharges from the construction site."

#### B. What Comments Were Received on the Proposed Modification and How Did EPA Respond to Those Comments?

In response to the modifications proposed in the **Federal Register** at 69 FR 55818 (September 16, 2004), EPA received comments from seven parties: The Associated General Contractors of America (AGC); Centex Homes; Lennar Corporation; National Association of Homebuilders (NAHB); Pulte Homes, Inc.; Richmond American Homes of Colorado; and a unified submission from the State of New York and the New York State Department of Environmental Conservation (hereinafter, "New York" or "the State"). All commenters except New York supported the modifications as proposed although several of these parties did comment on EPA's rationale for the modification.

Details of comments on the proposed modification and EPA's responses follow.

#### 1. One Commenter Believes EPA Failed To Provide a Sound and Reasoned Basis for the Proposed Modification

New York claims that EPA has failed to provide a sound and reasoned basis for the proposed modification to the

CGP. The State argues that by allowing the late filing of NOIs and by conditioning discharge authorization upon subjecting the operator to potential liability for past permit violations, EPA chose the "less drastic alternative" to prohibiting late NOIs and CGP coverage altogether for the late notifier. The State further asserts that EPA provided clear notice to late filing operators that coverage under the CGP would come at the price of being vulnerable to liability for past permit violations. According to the State, nothing would then prevent those operators from opting to apply for an individual permit if the CGP's liability conditions are considered unfair or onerous.

Against the backdrop of what the State views as EPA's valid interest in preserving its enforcement authority for past permit noncompliance, the State asserts that the Agency's proposed modification is not supported by a well-founded justification. The State appears to disagree with EPA's characterization of the SWPPP as an eligibility criterion, and the Agency's conclusion that "permit requirements do not apply prior to the submission of an NOI and prior to the operator's obtaining authorization to discharge storm water." See 69 FR 55820 (September 16, 2004). They first allege that § 2.3.D of the CGP makes it clear that violations occurring between commencement of construction and discharge authorization constitute permit noncompliance. The State next cites the omission of the SWPPP preparation requirements from the CGP eligibility sections (§ 1.2, 1.3, Appendices A and B, Part 3) to support the view that the requirement to prepare a SWPPP is not an eligibility criterion, but rather a permit condition. Lastly, the State recalls one of EPA's specific responses to a comment that defended the importance of retaining enforcement authority against late notifiers: "\* \* \* significant discharges of sediment can occur during the initial days of a construction project, making the need to have a SWPPP in place an[d] operational critical for the protection of water resources."

EPA does not disagree with the State that the Agency's choice in allowing late filers to seek coverage under the CGP constituted a less severe alternative than a complete ban for such operators, and that the permit served to alert late filers that they will not be relieved of prior Clean Water Act violations. However, EPA disagrees with the State's contention that the Agency does not have a sound and reasoned basis for today's modification. First, EPA disagrees with the State's implicit

suggestion that retention of the widest possible enforcement discretion for late filers is advisable or even necessary. It was not EPA's original intent in retaining the availability of CGP coverage for late notifiers to retain the widest enforcement discretion possible. Rather, EPA has attempted to strike an appropriate balance between (a) encouraging late filers to adhere to the terms of the CGP despite their failure to file the NOI in a timely manner, and (b) the commands of the CWA and its implementing regulations, including the prohibition against certain discharges without a permit, and the requirement for certain potential dischargers to seek permit coverage. It is by this strategy that EPA hopes to provide helpful incentives for late filers to seek coverage under the permit and to initiate as soon as possible on-site storm water controls critical to minimizing construction-related runoff. It is EPA's opinion that the 2003 CGP, which suggested the possibility of retroactive enforcement of any permit noncompliance that occurred prior to filing the late NOI, had the potential to have the opposite effect and may have discouraged late filers from instituting important pollution prevention measures. In this sense, EPA acknowledges that it did not fully account for the potential negative effect of the CGP's original "permit noncompliance" language on encouraging after-the-fact compliance with the CGP.

In addition, it is EPA's expectation that the CGP will continue to be the primary tool for covering thousands of construction discharge sources with permits. Individual permits will of course continue to be an option for the permit authority and the operator. Considering the large number of sources that will need to be permitted in the coming years, however, EPA fully anticipates that the CGP will remain the primary permitting vehicle. Today's permit modifications represent an important step in reducing EPA's concern that retaining the current "permit noncompliance" language would potentially make the CGP option more unpalatable to late filing operators than necessary, thus, driving late filing operators towards either individual permits or attempts to evade regulation altogether by declining to notify EPA of their construction activities.

In addition, if EPA had decided to retain the "permit noncompliance" language, which the Agency views as pushing many late filers towards seeking coverage under individual permits, EPA is concerned that further delays in permit coverage and the environmental benefits associated with

implementation of the best management practices would likely result. The NPDES regulations provide that individual permit applications for storm water discharges associated with construction activity be submitted 90 days or more in advance of commencement of construction activities. Among the challenges with late filers is the fact that construction at these sites has already commenced and discharges may already have occurred. As such, EPA believes it is generally in the best interest of protecting the receiving waters to encourage operators to conduct their activities in conformance with the CGP as expeditiously as practicable.

Second, EPA did not mean to suggest, through these modifications, that the Agency does not take recalcitrant operators seriously. Late notifiers, i.e., construction site operators that fail to obtain timely permit coverage, may be liable under CWA Sections 301 (e.g., unpermitted discharges) and 308 (records and reporting, inspections). As EPA indicated in the September 16, 2004 **Federal Register** Notice, failure to make a timely submission for permit coverage may constitute a violation of 40 CFR 122.21(c)(1). Although EPA would exercise its discretion in deciding which situations warrant enforcement of this provision, the Agency does not view filing of a late NOI as a shield from the requirements of 40 CFR 122.21(c)(1). Moreover, the modifications EPA is making to the CGP do not limit operator liability to violations for discharging without a permit.

Third, EPA is not convinced by New York's arguments opposing EPA's rationale for making the modifications discussed herein. In the proposal, EPA explained that the Agency did not intend for operators who fail to meet the eligibility requirements of the CGP to be subject simultaneously to actions asserting improper failure to obtain necessary permit coverage and for violations of the CGP itself for the same period of time. Therefore, as EPA further clarified, the fact that an operator fails to make itself eligible for CGP coverage should not make it subject to potential enforcement action for noncompliance with a permit to which it was never subject. EPA disagrees with the State's characterization of several of the CGP's provisions and one of the Agency's quoted response to comment as offering any real substantive or convincing reasons to abandon today's permit modification. First, the State interprets § 2.3.D's reservation of enforcement authority for permit noncompliance as a statement

supporting its belief that any violation of the permit's requirements during this period constitute "permit noncompliance." By relying on this statement, however, the State appears to have forgotten that this is one of the very provisions EPA proposed to modify. Regardless of the authority EPA may have reserved for itself in the previous CGP, EPA has decided that, for the reasons stated above, this language should be changed. The State offers no argument suggesting that the position it believes EPA should take is compelled by any legal authority.

EPA also disagrees with the State's characterization of the SWPPP preparation requirement as a permit condition, and not an eligibility criterion. The State references several sections which address permit eligibility (*i.e.*, CGP § 1.2, 1.3, Appendices A and B). It is true that most of these provisions do not specifically describe the preparation of a SWPPP as an eligibility condition for coverage under the CGP. However, the State appears to have overlooked sections 1.3.A.3.c, 1.3.C.5 and 1.3.C.6. Each of these provisions refer to eligibility requirements that must be satisfied through the SWPPP. Nor does the State reference § 3.1.A which specifies that "[a] SWPPP must be prepared prior to submission of an NOI", or Section IV of the NOI form which asks whether "the SWPPP has been prepared in advance of filing this NOI." The failure to prepare a SWPPP prior to submission of an NOI makes the operator ineligible for permit coverage, in the same way that the operator's failure to abide by any of the other requirements in § 1.2, 1.3, and Appendix B prohibit coverage. Therefore, EPA considers § 3.1.A to act as an eligibility requirement for coverage under the CGP. This is not to say that EPA would not also treat the SWPPP provisions as permit requirements after authorization under the CGP has been obtained. The point here is that the State's reading of the CGP terms is more cramped than EPA's preferred reading, and the Agency declines to follow the State's suggestion on this matter.

In addition, EPA does not agree with the State's reading of EPA's response to comment concerning the critical importance of having a SWPPP "in place an[d] operational." The original comment sought some "reasonable" grace period (*e.g.*, the commenter suggested 30 days) during which EPA would not seek enforcement action against late notifiers in order to avoid discouraging them from filing an NOI. EPA responded that enforcement

actions are discretionary, not mandatory for each violation; that the Agency takes into account the "reasonableness of the violator's action" when determining its response; and that the SWPPP being in place and operational prior to discharge is critical to the protection of water resources since "significant discharges of sediment can occur during the initial days of a construction project." CGP Comment Response Document at 42 (ID # 294). This response was intended to stand for the principle that the existence or absence of a SWPPP is an important indicator of the reasonableness of a late notifier's actions and will affect how and whether enforcement action is taken. For instance, the fact that a late notifier had not yet developed a SWPPP may result in EPA seeking a higher penalty level for a CWA violation for failure to obtain a permit prior to discharge, as compared to a situation where a SWPPP appears to have been developed in good faith. Again, EPA generally views the requirement to complete the development of a SWPPP prior to NOI submission as an eligibility criterion for coverage under the CGP, as opposed to a potential violation of the permit itself. The State appears to believe that this comment response as suggesting that EPA intended to retain authority to pursue enforcement against the failure to prepare a SWPPP as a permit violation in addition to the failure to obtain discharge authorization. The State has read too much into this response. Indeed, there is nothing in this comment response that is incompatible with the action EPA is taking today.

#### 2. One Commenter Noted That the Proposed Modification Is the Product of a Settlement of Litigation

New York notes in its comments that the proposed modification is the product of a settlement between EPA and "Construction Industry Petitioners" in *Wisconsin Builders Ass'n v. EPA*, United States Court of Appeals for the Seventh Circuit, Case No. 03-2908 (and consolidated cases). The commenter is correct in stating that EPA modified its settlement agreement with these petitioners in response to objections by the State and the Natural Resources Defense Council (NRDC). In its original settlement agreement, EPA planned to modify the CGP consistent with procedures for minor permit modifications [40 CFR 122.63(a)]. That is, EPA believed that the use of the term "permit noncompliance" had been included in the CGP inadvertently and inappropriately and that a minor modification was appropriate to correct this sort of error. Consistent with 40

CFR 122.63, minor modifications do not require public notice.

Subsequent to the State and NRDC's objection to the settlement, EPA opted to prepare a draft permit and public notice that permit consistent with 40 CFR 122.62 rather than debate whether the proposed changes were minor, as defined in 122.63.

#### 3. Concerns Regarding "Double Jeopardy"

Several commenters suggested that as currently worded, the CGP puts dischargers in "double jeopardy" for failing to obtain a storm water permit before commencement of construction. Commenters argue that a facility could then be fined both for failure to obtain permit coverage and failure to comply with permit requirements. EPA generally agrees with the commenters' concern to the extent that the Agency did not (and does not) intend to enforce against an operator for failure to obtain permit coverage while at the same time asserting permit violations for the same period during which the operator is not covered by the CGP. EPA retains the discretion, however, to bring an enforcement action for failure to obtain permit coverage while simultaneously bringing an action against the same operator for any discharges that occur while the operator lacks such permit coverage.

#### 4. Comments Suggesting That EPA's Rationale for Violations Associated With Failure To Obtain Permit Coverage Is Incomplete

Several commenters expressed their concern that the proposed modification suggests that operators who fail to submit a timely NOI under the CGP would be in violation of 40 CFR 122.21(c)(1) for failure to submit a permit application at least 90 days before the date on which construction is to commence." Commenters believe this rationale is incomplete in that the CGP provides an alternative permit option, one for which a notice of intent is due only seven days prior to commencement of construction activity, consistent with general permit regulations at 122.28(b)(2)(i). Commenters are generally correct in noting that the Federal regulations provide that a notice of intent offers an option to the individual permit application. However, an operator who fails to submit a general permit notice of intent should not assume that s/he will be treated as if s/he were going to be following terms of the general permit. In fact, failure to submit a timely notice of intent may imply instead that an operator has opted not to be covered by that general permit.

Regardless, it was not EPA's intent to define every aspect of future enforcement actions through today's permit modifications. The concerns raised by commenters described immediately above are outside the scope of today's action. Although EPA may provide guidance addressing these specific concerns in the future, EPA declines to provide further response through today's notice.

#### 5. Comments Asserting That Entities Cannot Be in Violation of the CWA or 40 CFR 122.21(c)(1) if They Have No Discharge of Storm Water

Various commenters asserted that operators cannot be said to be in violation of the CWA or 40 CFR 122.21(c)(1) in the absence of an actual discharge of storm water. These assertions are outside the scope of today's action. Although EPA may provide guidance addressing these specific concerns in the future, EPA declines to respond to this issue through today's notice.

#### C. Can I Apply for an Individual Permit? Can I Appeal the Permit Decision?

Yes. Persons affected by this permit action may apply for an individual permit as specified at 40 CFR 122.21 (and authorized at 40 CFR 122.28), and then petition the Environmental Appeals Board to review any condition of the individual permit (40 CFR 124.19).

#### D. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this final rule is not a significant regulatory action under the terms of Executive

Order 12866 and is therefore not subject to OMB review.

#### E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rule-making requirements under the Administrative Procedures 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. Issuance of an NPDES general permit is not a rulemaking and, accordingly, is not subject to rulemaking requirements, under APA section 553 or any other law. Therefore, it is thus not subject to the RFA requirements. The APA defines two broad, mutually exclusive categories of agency action—"rules" and "orders." Its definition of "rule" encompasses "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency \* \* \*" APA section 551(4). Its definition of "order" is residual: "a final disposition \* \* \* of an agency in a matter other than rule making but including licensing." APA section 551(6) (emphasis added). The APA defines "license" to "include \* \* \* an agency permit \* \* \*" APA section 551(8). The APA thus categorizes a permit as an order, which by the APA's definition is not a rule. Section 553 of the APA establishes "rule making" requirements. The APA defines "rule making" as "the agency process for formulating, amending, or repealing a rule." APA section 551(5). By its terms, then, section 553 applies only to "rules" and not also to "orders," which include permits.

#### F. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their "regulatory actions" on State, local, and tribal governments and the private sector. UMRA uses the term "regulatory actions" to refer to regulations. (See, e.g., UMRA section 201, "Each agency shall \* \* \* assess the effects of Federal regulatory actions \* \* \* (other than to the extent that such regulations incorporate requirements specifically set forth in law)" (emphasis added)). UMRA section 102 defines "regulation" by reference to 2 U.S.C. 658 which in turn defines "regulation"

and "rule" by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines "rule" as "any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of [the Administrative Procedure Act (APA)], or any other law. \* \* \*" As discussed in the RFA section of this notice, NPDES general permits are not "rules" under the APA and thus not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the CWA. While EPA publishes a notice to solicit public comment on draft general permits, it does so pursuant to the CWA section 402(a) requirement to provide "an opportunity for a hearing." Thus, NPDES general permits and modifications thereto are not "rules" for RFA or UMRA purposes.

#### G. Paperwork Reduction Act

EPA has reviewed the requirements imposed on regulated facilities resulting from the final modification of the construction general permit under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The information collection requirements of the construction general permit for small and large construction activities have already been approved by the Office of Management and Budget (OMB) (OMB Control Nos. 2040-0211 and 2040-0188, respectively) in previous submissions made for the NPDES permit program under the provisions of the Clean Water Act.

Signed and issued this 15th day of December, 2004.

**Linda M. Murphy,**

*Director, Office of Ecosystem Protection, Region I.*

Signed and issued this 14th day of December, 2004.

**Walter Mugdan,**

*Director, Division of Environmental Planning and Protection, Region II.*

Signed and issued this 14th day of December, 2004.

**Carl Soderberg,**

*Director, Caribbean Environmental Protection Division, Region II.*

Signed and issued this 14th day of December, 2004.

**Jon M. Capacasa,**

*Director, Water Protection Division, Region III.*

Signed and issued this 13th day of December, 2004.

**Timothy C. Henry,**

*Acting Director, Water Division, Region V.*

Signed and issued this 14th day of December, 2004.

**Jane B. Watson,**

*Acting Director, Water Quality Protection Division, Region VI.*

Signed and issued this 15th day of December, 2004.

**Leo J. Alderman,**

*Director, Water, Wetlands, and Pesticides Division, Region VII.*

Signed and issued this 14th day of December, 2004.

**Judy Wong,**

*Director, Water Program, Region VIII.*

Signed and issued this 10th day of December, 2004.

**Alexis Strauss,**

*Director, Water Division, Region IX.*

Signed and issued this 13th day of December, 2004.

**Michael J. Lidgard,**

*Acting Director, Office of Water and Watersheds, Region X.*

[FR Doc. 04-27995 Filed 12-21-04; 8:45 am]

**BILLING CODE 6560-50-P**

## **EXPORT-IMPORT BANK OF THE UNITED STATES**

### **Economic Impact Policy**

This notice is to inform the public that the Export-Import Bank of the United States has received an application to finance the export of approximately \$27 million in U.S. equipment, technology and services to a facility in Greece that will fabricate photovoltaic modules. The U.S. exports

will enable the Greek facility to fabricate modules that will generate a total of approximately 5 megawatts of electricity per year. Initial production is expected to commence in 2005. Available information indicates that this new production will be consumed primarily in Europe. Interested parties may submit comments on this transaction by e-mail to [economic.impact@exim.gov](mailto:economic.impact@exim.gov) or by mail to 811 Vermont Avenue, NW., Room 1238, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

**Helene S. Walsh,**

*Director, Policy Oversight and Review.*

[FR Doc. 04-27931 Filed 12-21-04; 8:45 am]

**BILLING CODE 6690-01-P**

## **FEDERAL HOUSING FINANCE BOARD**

[No. 2004-N-12]

### **Federal Home Loan Bank Members Selected for Community Support Review**

**AGENCY:** Federal Housing Finance Board.

**ACTION:** Notice.

**SUMMARY:** The Federal Housing Finance Board (Finance Board) is announcing the Federal Home Loan Bank (Bank) members it has selected for the 2004-05 fourth quarter review cycle under the Finance Board's community support requirements regulation. This notice also prescribes the deadline by which Bank members selected for review must submit Community Support Statements to the Finance Board.

**DATES:** Bank members selected for the review cycle under the Finance Board's community support requirements regulation must submit completed Community Support Statements to the Finance Board on or before March 4, 2005.

**ADDRESSES:** Bank members selected for the 2004-05 fourth quarter review cycle under the Finance Board's community support requirements regulation must submit completed Community Support Statements to the Finance Board either by regular mail at the Federal Housing Finance Board, Office of Supervision, Community Investment and Affordable Housing, 1777 F Street, NW., Washington, DC 20006, or by electronic mail at [FITZGERALDE@FHFB.GOV](mailto:FITZGERALDE@FHFB.GOV).

**FOR FURTHER INFORMATION CONTACT:** Emma J. Fitzgerald, Program Analyst, Office of Supervision, Community Investment and Affordable Housing, by telephone at (202) 408-2874, by electronic mail at

[FITZGERALDE@FHFB.GOV](mailto:FITZGERALDE@FHFB.GOV), or by regular mail at the Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

### **SUPPLEMENTARY INFORMATION:**

#### **I. Selection for Community Support Review**

Section 10(g)(1) of the Federal Home Loan Bank Act (Bank Act) requires the Finance Board to promulgate regulations establishing standards of community investment or service Bank members must meet in order to maintain access to long-term advances. See 12 U.S.C. 1430(g)(1). The regulations promulgated by the Finance Board must take into account factors such as the Bank member's performance under the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. 2901 *et seq.*, and record of lending to first-time homebuyers. See 12 U.S.C. 1430(g)(2). Pursuant to section 10(g) of the Bank Act, the Finance Board has promulgated a community support requirements regulation that establishes standards a Bank member must meet in order to maintain access to long-term advances, and review criteria the Finance Board must apply in evaluating a member's community support performance. See 12 CFR part 944. The regulation includes standards and criteria for the two statutory factors—CRA performance and record of lending to first-time homebuyers. 12 CFR 944.3. Only members subject to the CRA must meet the CRA standard. 12 CFR 944.3(b). All members, including those not subject to CRA, must meet the first-time homebuyer standard. 12 CFR 944.3(c).

Under the rule, the Finance Board selects approximately one-eighth of the members in each Bank district for community support review each calendar quarter. 12 CFR 944.2(a). The Finance Board will not review an institution's community support performance until it has been a Bank member for at least one year. Selection for review is not, nor should it be construed as, any indication of either the financial condition or the community support performance of the member.

Each Bank member selected for review must complete a Community Support Statement and submit it to the Finance Board by the March 4, 2005 deadline prescribed in this notice. 12 CFR 944.2(b)(1)(ii) and (c). On or before January 31, 2005, each Bank will notify the members in its district that have been selected for the 2004-05 fourth quarter community support review cycle that they must complete and submit to the Finance Board by the deadline a Community Support