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Part VI

Environmental Protection Agency

40 CFR Part 122

**Modification of National Pollutant
Discharge Elimination System (NPDES)
Permit Deadline for Storm Water
Discharges for Oil and Gas Construction
Activity That Disturbs One to Five Acres
of Land; Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[FRL-7433-9]

RIN 2040-AC82

Modification of National Pollutant Discharge Elimination System (NPDES) Permit Deadline for Storm Water Discharges for Oil and Gas Construction Activity That Disturbs One to Five Acres of Land

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Today's action proposes to postpone until March 10, 2005, the permit authorization deadline for National Pollutant Discharge Elimination System (NPDES) storm water permits for oil and gas construction activity that disturbs one to five acres of land. On December 8, 1999 (64 FR 68722), the U.S. Environmental Protection Agency (EPA) published a final rule expanding the then-existing NPDES permitting program to require permit coverage by March 10, 2003 for, among other things, construction sites that disturb one to five acres. As part of that rulemaking, EPA assumed that few, if any, oil and gas exploration, production, processing, or treatment operations or transmission facilities would be affected by the rule. Since rule promulgation, information has become available indicating that close to 30,000 oil and gas sites per year may be affected by the December 8, 1999, storm water regulations.

EPA is proposing a two-year postponement of the deadline from March 10, 2003, to March 10, 2005, in order to allow time for EPA to analyze and better evaluate the impact of the permit requirements on the oil and gas industry, the appropriate best management practices for preventing contamination of storm water runoff resulting from construction associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, and the scope and effect of 33 U.S.C. 1342 (l)(2) and other storm water provisions of the Clean Water Act.

DATES: Comments on the proposed rule must be received on or before January 29, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Send written comments to: Water Docket, Environmental Protection Agency, Mail Code 4101T, 1200 Pennsylvania Ave.,

NW., Washington, DC 20460, Attention Docket ID No. OW-2002-0068. For other types of delivery, see the detailed instructions in section I.C.

FOR FURTHER INFORMATION CONTACT: Wendy Bell, Office of Wastewater Management, Office of Water, Environmental Protection Agency, at 202-564-0746 or e-mail: bell.wendy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Regulated Entities. Entities Potentially Regulated by This Action Include:

Category	Examples of regulated entities
Industry	Oil and gas producers constructing drilling sites disturbing one to five acres of land, construction site operators associated with oil and gas construction projects disturbing one to five acres of land.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility or company is regulated by this action, you should carefully examine the applicability criteria in 40 CFR 122.26(b)(15). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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-2002-0068. The official public docket is the collection of materials that are available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 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 submit or 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's 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.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

i. *EPA Dockets.* EPA's preferred method for receiving comments is through use of the Agency's electronic public docket. To access this docket, go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in Docket ID No. OW-2002-0068. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to ow-docket@epa.gov, Attention Docket ID No. OW-2002-0068. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system

automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send the original and three copies of your comments to: "Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW-2002-0068.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW-2002-0068. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Background

Section 405 of the Water Quality Act of 1987 (WQA) added section 402(p) of the Clean Water Act (CWA), which directs EPA to develop a phased approach to regulate storm water discharges under the National Pollutant Discharge Elimination System (NPDES) program. EPA published a final

regulation on the first phase of this program on November 16, 1990, establishing permit application requirements for "storm water discharges associated with industrial activity." EPA defined the term "storm water discharge associated with industrial activity" in a manner that covered a wide variety of facilities. Construction activities that disturb five acres of land and greater are considered "industrial activity" under 40 CFR 122.26(b)(14)(x).

Phase II of the storm water program regulations were published in the **Federal Register** on December 8, 1999. Phase II requires storm water permits for sites disturbing equal to or greater than one acre of land and less than five acres. 40 CFR 122.26(b)(15)(i). Discharges from these sources require permit authorization by March 10, 2003 (40 CFR 122.26(e)(8)).

In developing the Phase II storm water regulations, EPA conducted an analysis of the potential impacts of the regulation on the national economy and also analyzed impacts on small businesses. These impacts are associated with implementation of sediment and erosion control practices or best management practices to reduce pollutants commonly associated with construction storm water discharges. In performing these analyses, EPA considered affected industrial sectors, including the oil and gas industry. Based on information provided, EPA assumed that few, if any, oil and gas exploration, production, processing, or treatment operations, or transmission facilities would be affected by Phase II. Therefore, EPA did not include oil and gas exploration sites in the Economic Analysis of the Phase II Final Rule.

Based on recent information from the U.S. Department of Energy, EPA now estimates that on average there are 30,000 oil and gas starts per year, including exploration and development activities. Initially, EPA assumed that very few of these starts would incur compliance costs associated with the Phase II rule because most of them would be less than one acre. However, based on new information, EPA now believes that a significant number of such sites may exceed one acre. In addition, EPA had assumed that the oil and gas industry would use best management practices (BMPs) similar to those in other industrial sectors involved in construction and development, if affected. EPA estimated the costs of these BMPs to range from \$1,206 to \$8,709 depending on the size, slope and soil characteristics of a given site. EPA plans to gather more data on the BMPs used by the oil and gas

industry to determine if this cost range is accurate.

Title 33 U.S.C. 1342(l)(2) exempts certain storm water discharges from oil and gas exploration, production, processing, or treatment operations or transmission facilities from the NPDES permit requirement. The statute provides that “[t]he Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for *discharges of stormwater runoff from * * * oil and gas exploration, production, processing, or treatment operations or transmission facilities*, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which *are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.*” Emphasis added. The NPDES storm water regulations repeat this exemption at 40 CFR 122.26(a)(2). However, as noted above, those regulations also currently require NPDES permits for storm water discharges from “[c]onstruction activity including clearing, grading, and excavation except operations that result in the disturbance of less than five acres of total land area.” 40 CFR 122.26(b)(14)(x). In addition, as currently written, these regulations will require NPDES permits by March 10, 2003, for storm water discharges from construction sites disturbing at least one acre, and less than five acres. 40 CFR 122.26(b)(15)(i).

III. Today's Action

In today's action, EPA is proposing to postpone until March 10, 2005, the permit authorization deadline for National Pollutant Discharge Elimination System (NPDES) storm water permits for oil and gas construction activity that disturbs one to five acres of land and sites disturbing less than one acre that are part of a larger common plan of development or sale that disturbs one to five acres. Since January 2002, information has become available indicating that close to 30,000 oil and gas sites may be affected by the Phase II storm water regulations. In the spirit of Executive Order 13211, which directs EPA to consider the impact of its actions on energy-related production activities, the Agency believes it is important to review this new information in light of the Phase II rule to determine the impact on the oil and

gas industry. During the proposed two-year postponement of this deadline, EPA plans to gather information about the area of land disturbed during construction of oil and gas exploration and production facilities.

In evaluating the impact, the Agency will work with states, industry, and other entities to gather and evaluate data on the development and use of appropriate best management practices for the oil and gas industry. As part of today's rulemaking, EPA is seeking additional information on size, location and other site characteristics to better evaluate compliance costs, as well as technical and cost data to evaluate best management practices appropriate to controlling storm water runoff from oil and gas starts. EPA will also evaluate the applicability of the exemption at 33 U.S.C. 1342(l)(2) to construction activity at oil and gas exploration, production, processing, or treatment operations or transmission facilities. EPA will use the additional data and analyses produced during the two-year period to determine the appropriate NPDES requirements, if any, for construction of oil and gas exploration and production facilities of one to five acres.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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 rule is not a “significant regulatory action” under the terms of Executive Order

12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* It merely postpones implementation of an existing rule deadline.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information; processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, 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.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business based on SBA size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic

impact on a substantial number of small entities. It merely postpones the permit authorization deadline for oil and gas construction activities that disturb one to five acres.

D. 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. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule does not impose any costs. It merely postpones the permit authorization deadline for oil and gas construction activities that disturb one to five acres. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has

determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. It merely postpones the permit authorization deadline for oil and gas construction activities that disturb one to five acres. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have Tribal implications. It will not have

substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. It merely postpones the permit authorization deadline for oil and gas construction activities that disturb one to five acres. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under Executive Order 12866.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866. The only effect of this proposed rule would be to delay the permit authorization requirement for affected small oil and gas operations by two years. As noted above, EPA will use the two-year delay to analyze the broader question of whether the imposition of storm water permitting requirements on construction of oil and gas facilities of one to five acres would result in a significant energy impact, and will factor the results of this analysis into its final determination regarding

appropriate requirements for such facilities.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore,

EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: December 24, 2002.

Christine Todd Whitman,
Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

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

2. Revise § 122.26(e)(8) to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * * * *

(e) *Application deadlines.* * * *

(8) For any storm water discharge associated with small construction activity identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources, other than discharges associated with small construction activity at oil and gas exploration, production, processing, and treatment operations or transmission facilities, require permit authorization by March 10, 2003, unless designated for coverage before then. Discharges associated with small construction activity at such oil and gas sites require permit authorization by March 10, 2005.

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