Federal Register

Monday
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Part II

Environmental Protection Agency

40 CFR Parts 122 and 124

Storm Water Discharges; Amendment to Requirements for National Pollutant Discharge Elimination System Permits; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 124

[FRL–5271–7]

Amendment to Requirements for National Pollutant Discharge Elimination System (NPDES) Permits for Storm Water Discharges Under Section 402(p)(6) of the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; withdrawal of direct final rule.

SUMMARY: Today, EPA is withdrawing the storm water phase II direct final rule published on April 7, 1995 (60 FR 17950) and promulgating a final rule in its place based on an identical proposal published that same day (60 FR 17958). By today's action, EPA is promulgating changes to the National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations under the Clean Water Act (CWA) for phase II dischargers. Phase II dischargers generally include all point source discharges of storm water from commercial, retail and institutional facilities and from municipal separate storm sewer systems serving populations of less than 100,000.

Today's rule establishes a sequential application process in two tiers for all phase II storm water discharges. The first tier provides the NPDES permitting authority flexibility to require permits for those phase II dischargers that are determined to be contributing to a water quality impairment or are a significant contributor of pollutants to waters of the United States. ("Permitting authority" refers to EPA or States and Indian Tribes with approved NPDES programs.) EPA expects this group to be small because most of these types of dischargers have already been included under phase I of the storm water program. The second tier includes all other phase II dischargers. This larger group will be required to apply for permits by the end of six years, but only if the phase II regulatory program in place at that time requires permits. As discussed in more detail below, EPA is open to, and committed to, exploring a number of non-permit control strategies for the phase II program that will allow efficient and effective targeting of real environmental problems. As part of this commitment, EPA has initiated a process to include stakeholders in the development of a supplemental phase II rule under the Federal Advisory Committee Act (FACA). This rule will be finalized by March 1, 1999 and will determine the nature and extent of requirements, if any, that will apply to the various types of phase II facilities prior to the end of the six-year application period defined by today's rule.

DATES: The direct final rule published on April 7, 1995 at 60 FR 17950 and corrected on April 18, 1995 at 60 FR 19464 is withdrawn and this final rule is effective on August 7, 1995. In accordance with 40 CFR 23.2, EPA is explicitly providing that this rule shall be considered final for purposes of judicial review at 1 p.m. (Eastern time) on August 7, 1995.

ADDRESSES: The docket for this rulemaking is available for public inspection at EPA's Water Docket, Room L–102, 401 M Street, SW, Washington, DC 20460. For access to the docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m. (Eastern time) for an appointment. Please indicate that the docket to be accessed is for the April 7, 1995 **Federal Register** notice on the storm water phase II regulations. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Nancy Cunningham, Office of Wastewater Management, Permits Division (4203), Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 260–9535.

SUPPLEMENTARY INFORMATION:

I. Overview of Today's Action

Today, EPA is promulgating the phase II storm water application regulations as proposed on April 7, 1995 (60 FR 17958). EPA also is withdrawing the direct final rule published on that same date (60 FR 17950); corrected at 60 FR 19464, April 18, 1995. The direct final and proposed rules contained identical requirements. By today's rule, EPA promulgates changes to the NPDES storm water permit application regulations under the CWA to establish a common sense approach for all phase II storm water dischargers. Phase II storm water dischargers include those storm water discharges not addressed under phase I of the storm water program.[1]. Generally, phase II dischargers are point source discharges of storm water from commercial, retail, light industrial and institutional facilities, construction activities under five acres, and from municipal separate storm sewer systems serving populations of less than 100,000.

Today's rulemaking will promote the public interest by relieving most phase II dischargers of the immediate requirement to apply for permits. Consequently, this rule relieves most phase II dischargers from citizen suit liability for failure to have an NPDES permit over the next six years. If a phase II discharger complies with the application deadlines established by today's rule, the facility will not be subject to enforcement action for discharge without a permit or for failure to submit a permit application.

Under today's rule, application deadlines are in two tiers. The first tier allows the permitting authority to focus current efforts on those facilities that will produce the greatest environmental benefit. The first tier is for those phase II dischargers that the NPDES permitting authority determines are contributing to a water quality impairment or are a significant contributor of pollutants to waters of the U.S. Those dischargers that have been so designated are required to obtain a permit and must submit permit applications to the permitting authority within 180 days of being notified that such an application is required. The permitting authority has the flexibility to extend this deadline. Under the second tier, all remaining phase II facilities must apply for permits by August 7, 2001, but only if the phase II regulatory program in place at that time requires permits. EPA is actively exploring alternative control strategies with broad stakeholder involvement. EPA is also establishing application requirements for phase II dischargers, as well as making other conforming changes to other portions of the NPDES regulations in today's rule.

EPA is subject to a court order to propose supplemental rules for phase II sources by September 1, 1997, and finalize them by March 1, 1999. *Natural Resources Defense Council, Inc.* v. *Browner,* Civ. No. 95–634 PLF (D.D.C., April 6, 1995). However, if the CWA is amended prior to these dates to address some of these storm water issues, EPA will, of course, move to expeditiously implement the statutory changes.

II. Background

EPA provided an extensive discussion of the statutory and regulatory background of the storm water program in the direct final rule published in the April 7, 1995, **Federal Register** notice (60 FR 17950). For the sake of brevity, EPA refers the reader to that notice and

[1] Phase I dischargers include: dischargers issued a permit before February 4, 1987; discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 100,000 or more; and discharges that the permitting authority determines to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States.

only briefly repeats the background necessary to explain the need for today's final rule.

As explained in CWA section 101, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. CWA section 301 prohibits the discharge of pollutants from a point source except in compliance with certain other sections of the Act. One of those sections, section 402, established the National Pollutant Discharge Elimination System (NPDES), the permitting program for control of point source discharges including storm water.

In the 1987 amendments to the CWA, Congress enacted section 402(p). Section 402(p)(1) relieved certain storm water dischargers (commonly referred to as phase II dischargers) from the requirement to obtain a permit until October 1, 1992. Section 402(p)(6) provided that EPA was to publish regulations by October 1, 1992. Congress later extended the date for the permitting moratorium until October 1, 1994, and the date for publication of phase II regulations until October 1, 1993. See Water Resources Development Act of 1992, Public Law No. 102–580, section 364, 106 Stat. 4797, 4862 (1992).

Though the relief from the permit requirement lapsed on October 1, 1994, EPA had not published phase II storm water regulations. On October 18, 1994, EPA issued guidance explaining that regulations had not yet been promulgated for the phase II storm water program, and that the Agency was unable to waive the statutory prohibition against unpermitted discharges of pollutants to waters of the United States in the absence of such regulations. EPA is not attempting to extend the CWA deadlines in today's rule, but rather is establishing the phase II storm water program under section 402(p)(6). (See Response to Comment section below for further discussion of this issue.)

III. Regulation Changes

In today's rule, EPA is designating under section 402(p)(6) all phase II sources as being part of the phase II program. EPA is establishing permit application deadlines for these dischargers in two tiers in today's rule. To obtain real environmental results early, the first tier applies to those phase II dischargers that the NPDES permitting authority determines are contributing to a water quality impairment or are a significant contributor of pollutants. Those dischargers that have been so designated by the permitting authority are required to obtain a permit and must submit a permit application within 180 days of being notified that such an application is required. The permitting authority has the flexibility to extend this deadline. Under the second tier, all other phase II facilities must apply for permits by August 7, 2001, but only if the phase II regulatory program in place at that time requires permits.

EPA also is establishing application requirements for phase II dischargers, as well as making other conforming changes to other portions of its NPDES regulations in today's rule. For example, EPA is providing flexibility to the permitting authority to modify the specific application requirements for phase II dischargers. Again EPA believes this is a common sense approach to alleviate unnecessary burden on phase II dischargers. The specifics of the application requirements and other conforming changes are explained in the April 7, 1995, notice published at 60 FR 17950. EPA has not changed the regulatory text in today's final rule from that notice.

IV. Responses to Public Comment

A comprehensive "response to comment" document is available in the administrative record for this rulemaking. Many significant comments, and EPA's responses, are summarized below.

Many commenters disagreed with EPA's interpretation of section 402(p) of the CWA in which EPA determined that section 402(p) sets a statutory deadline for the issuance of permits to phase II storm water dischargers. The commenters argued that 402(p) does not require permits for all discharges of storm water after October 1, 1994, rather it prohibits the need for such permits before this date.

EPA disagrees. CWA section 301(a) states that it is illegal to discharge pollutants to waters of the U.S. except in compliance with Section 402. The current regulations under section 402 establish a permit program for point source discharges. In the 1987 amendments to the CWA, Congress added Section 402(p) to ensure the orderly evolution of the NPDES storm water program. Section 402(p)(1) did not alter the basic underlying prohibition in Section 301(a) as it applied to storm water discharges. Section 402(p)(1) did, however, establish temporary relief from permitting requirements for certain storm water discharges for a specified period of time. Section 402(p)(6) provided EPA with the authority to consider alternative control strategies for the phase II program. Because EPA had not established alternatives under section 402(p)(6), the existing permitting requirements under section 402 applied to phase II dischargers after October 1, 1994.

The legislative history behind 402(p) supports EPA's position that when the date lapsed, phase II sources became subject to the pre-existing statutory requirement to obtain a NPDES permit. The Congressional Record from October 15, 1986 includes the following statements from the House of Representatives:

> The relief afforded by this provision extends only to October 1, 1992. After that date, all municipal separate storm sewers are subject to the requirements of 301 and 402.
>
> After October 1, 1992, the permit requirements of the Clean Water Act are restored for municipal separate storm sewer systems serving a population of fewer than 100,000.

132 Cong. Rec. H10532 (Oct. 15, 1986)

More recent Congressional actions provide even clearer support for EPA's interpretation of Section 402(p). The original deadline for permits for phase II storm water discharges was October 1, 1992. At the time of this original deadline, the Agency was not ready to issue regulations for implementation of the phase II program. When Congress recognized the severe liability problem this would create for phase II discharges, Congress decided to extend the relief deadline in section 402(p)(1) to October 1, 1994. At the same time, Congress extended the deadline for phase II regulations in section 402(p)(6) to October 1, 1993, to allow EPA more time to develop phase II regulations. If phase II dischargers were not subject to enforcement for violations of section 301(a) until EPA promulgated the phase II regulations, Congress would not have extended sections 402(p)(1) and 402(p)(6) with differing deadlines. If Congress had not intended unregulated phase II sources to be liable for violations of section 301(a) on October 1, 1992, there would have been no need to amend section 402(p)(1) at all.

In related comments, concern was expressed that if such statutory deadlines are valid, EPA does not have the authority to extend statutory permit deadlines. In response, EPA disagrees that this regulation extends statutory deadlines. The statutory deadline lapsed on October 1, 1994. EPA recognized that fact, as well as the consequences thereof, when it issued the October 18, 1994, guidance. The Agency's authority to act under these circumstances arises from the clear text of section 402(p)(6). That section directs EPA to issue regulations which (1) designate storm

water discharges to be regulated to protect water quality and (2) establish a comprehensive program to regulate those sources, including, among other things, expeditious deadlines. In today's rule, EPA relies on section 402(p)(6) to designate all phase II discharges for regulation under a comprehensive program which, for most of those dischargers, does not require permits for 6 years. During the six-year period, EPA will investigate alternative control strategies for the phase II program and will develop supplemental regulations through the FACA process.

Commenters also raised concern regarding the potential for citizen suits. As explained above, today's final rule effectively protects most phase II dischargers from citizen suit liability for failure to have an NPDES permit for up to six years.

A few commenters criticized EPA for the delay in publishing a Report to Congress on storm water discharges not covered under phase I. Further, they did not believe that President Clinton's Clean Water Initiative adequately addressed procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. The Agency believes that the Storm Water Report to Congress, which incorporates the President's Initiative, fulfills the requirements of section 402(p)(5). The Report to Congress cites to data confirming the continuing threat to surface waters caused, in significant part, by unregulated storm water discharges. The Administration's Clean Water Initiative proposed a variety of procedures and methods through which permitting authorities could most flexibly address remaining unregulated discharges of storm water to the extent necessary to mitigate impacts on water quality.

Several commenters questioned whether State and local officials had been consulted in developing the proposed rule as directed by CWA section 402(p)(6). In a September 9, 1992, **Federal Register** notice, EPA invited public comment on reasonable, alternative approaches for the phase II storm water program. Prior to publication of the direct final and proposed rules on April 7, 1995, EPA met with representatives of key municipal organizations to discuss the content of the rule and to gather feedback and input. EPA will continue its outreach efforts by seeking additional public input through FACA subcommittee participation, and other means, in developing supplemental regulations for the phase II program.

Commenters expressed their opinion that the proposed rule should be considered an unfunded mandate as described under the Unfunded Mandate Reform Act of 1995. That is, the commenters believed that the estimated cost of the regulation to State, local, or tribal governments, or to the private sector, will be $100 million or more in any one year. EPA disagrees. This rulemaking actually reduces the immediate regulatory burden imposed on phase II facilities. EPA believes that the cost to phase II dischargers that are immediately designated under tier 1 will be small due to the extremely few designations that are anticipated. Furthermore, EPA has the authority to modify permit application requirements to require less information and alleviate unnecessary burden on all phase II facilities. Because of these reasons, costs are expected to be well below $100 million for each of the next six years. EPA believes that any costs that might be imposed after the sixth year will still be below $100 million because of the application flexibility, but in any event, those costs will not exceed existing costs (multiplied by the rate of inflation) because of the current statutory requirement that phase II dischargers apply for permits immediately, absent promulgation of today's rule.

The costs of a "comprehensive" phase II program after the sixth year will be more fully characterized through additional rulemaking as a result of the FACA process. Under a judicial consent order in *Natural Resources Defense Council, Inc.* v. *EPA*, Civ. No. 95–0634 PLF (D.D.C. April 6, 1995), EPA is required to propose by September 1, 1997, and take final action by March 1, 1999, supplemental rules which clarify the scope of coverage and control mechanisms for the phase II program. The cost to potential dischargers of this action will be identified in the subsequent rulemaking and cannot be accurately predicted in today's final rule. However, EPA does not expect that regulation to cost over $100 million in any one year.

Commenters questioned EPA's justification to designate all phase II dischargers to protect water quality. Many commenters argued that construction sites that disturb less than 5 acres should not be so designated because they do not present significant water quality concerns. In response, EPA relies on the Report to Congress to conclude that unregulated storm water discharges remain a significant threat to the health of surface water quality. While EPA recognizes that individual facilities within the total phase II universe may not represent equal threats, EPA believes that there is sufficient information concerning water quality problems to designate the entire class of phase II dischargers as an interim matter pending further study in the context of the rulemaking described above. EPA will make more specific designations in the context of that rulemaking. In response to comments about small construction sites, EPA notes that these commenters did not present any data to support a conclusion that small construction presents only negligible water quality concerns. As explained in the earlier notice, the FACA subcommittee will explore the appropriate scope of the phase II program.

Today's rule states that permit applications are required within 180 days from receipt of notice for those phase II discharges that the NPDES permitting authority determines are contributing to a water quality impairment or are a significant contributor of pollutants. Commenters requested and suggested further clarification on both of these determinations. EPA purposefully did not provide explicit definitions of these phrases in order to provide flexibility to permitting authorities. Interpretive flexibility is warranted due to climatic and geographic differences across the United States. EPA published guidance for designations under phase I of the storm water program. Such guidance is also applicable for the phase II program designations and is included in the record of this rulemaking.

One commenter took issue with the 180-day deadline for permit applications, particularly for municipal separate storm sewer systems that are designated under tier 1. The commenter felt that such a short period of time would not be sufficient to prepare and submit a municipal application. In response, EPA reminds the commenter that the Director has the authority to grant permission to submit the application at a later date. Some municipalities may not need more time because they may be able to simply reference information already submitted for an adjacent or nearby large or medium municipality under phase I. Additionally, the permitting authority is able to modify the permit application requirements and may require much less information than what was required for phase I dischargers.

Another commenter asked that the period during which a permitting authority may designate a facility be limited to one year. EPA is not limiting the time frame for designations because the permitting authority will need to account for changing conditions and new information that becomes available over time.

Some commenters stated that the "direct final rule" is not specifically provided for in the Administrative Procedure Act (APA) nor has EPA demonstrated "good cause" to issue a "direct final rule" under 5 U.S.C. section 553. This comment is no longer relevant because EPA is withdrawing the direct final rule and instead issuing a final rule that responds to comments received.

One commenter disputed the assertion that urban storm water runoff is a cause of real water quality use impairment in the United States. The commenter also believed that it is inappropriate to base the implementation of phase II requirements on exceedance of water quality standards associated with urban storm water runoff. The commenter believed that water quality criteria were not developed to regulate many of the chemical constituents in urban storm water runoff. EPA disagrees. The fact that urban runoff is a real cause of water quality use impairment is very well supported throughout the literature and is summarized by EPA in the Water Quality Inventory: Reports to Congress prepared on a biannual basis under section 305(b) of the CWA. EPA believes that basing the implementation of phase II requirements on exceedance of water quality standards is appropriate because attainment of water quality standards is one of the explicit goals of the NPDES program. EPA further disagrees that water quality criteria have not been developed for many of the chemical constituents in urban storm water. To the contrary, water quality criteria exist for many such constituents, particularly heavy metals and oil and grease.

A few commenters argued that comments received on the rule are unrepresentative of the groups affected because small cities and commercial establishments were unaware of the direct final and proposed rules. In response, EPA believes that the 60-day comment period was sufficient for small entities to formulate their comments and/or review those drafted by their representative associations. Many of the comments received were from national organizations representing such small cities and businesses, including, National Association of Counties, National Association of Convenience Stores, Society of Independent Gasoline Marketers of America, National Association of Flood and Stormwater Management Agencies, American Petroleum Institute, National Association of Home Builders, and American Car Rental Association.

One commenter disagreed that this rulemaking significantly reduces the immediate regulatory burden imposed on phase II facilities because phase II municipalities would have the same burden imposed on phase I municipalities. In response, EPA points out that today's rule provides the Director with discretion to modify the application requirements for phase II dischargers. EPA expects Directors to exercise this discretion to reduce the application burden to both municipalities and individual facilities.

Several commenters questioned the types of permits that will be available to dischargers in 2001. Currently, the permitting authority has the option of individual or general permits. However, EPA does not anticipate that permits will be necessary for all phase II dischargers in 2001. The Agency is committed to promulgate supplemental rules that further consider the scope of the phase II program as well as alternative control mechanisms.

Many commenters made suggestions for the second tier of the phase II regulations such as to allow and encourage phase II municipalities to join phase I municipalities in the same watershed, standardize procedures across the United States, and delegate construction permitting to local governments. Such suggestions will be provided to the FACA subcommittee and will be taken into consideration when developing the subsequent phase II regulations. Commenters also made suggestions for representation on the FACA subcommittee. Such suggestions are being considered in formulating the subcommittee.

Supporting Documentation

A. Executive Order 12866

Under Executive Order 12866, the Agency must determine whether the regulatory action is "significant," and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affecting 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;

(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.

EPA has determined that this rulemaking significantly reduces the current regulatory burden imposed on phase II facilities. The proposed rule was submitted to OMB for review. OMB cleared the proposed rule with minor changes. Review of this final rule was waived by OMB under the provisions of Executive Order 12866.

B. Executive Order 12875

Under Executive Order 12875, entitled "Enhancing the Intergovernmental Partnership", issued by the President on October 26, 1993, the Agency is required to develop an effective process to allow elected officials and other representatives of State and Tribal governments to provide meaningful and timely input in the development of regulatory proposals.

EPA fully supports this objective and has initiated a consultation process with both States and Tribes which will be continued through the development of additional phase II rules. Specifically, EPA has discussed this action with the representatives of the States, local governments, the Agency's American Indian Environmental Office (AIEO), and parts of the regulated community.

The reaction of the States is positive. The States and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) support the approach that is being taken under existing law; the States and ASIWPCA also support concurrent changes to the law. ASIWPCA has submitted a letter to the Agency dated March 3, 1995, which is included in the record for this matter. EPA has responded to many of ASIWPCA's comments in this preamble.

The reaction of many municipalities is that they prefer a statutory change now to clarify the issue once and for all. Municipalities' representatives (National Association of Counties, National League of Cities, U.S. Conference of Mayors, and the National Association of Flood and Stormwater Management Agencies) have raised many issues to the Agency and have submitted a letter dated February 16, 1995, which is contained in the record for this matter. The municipalities believe that it is inappropriate for EPA to act now when Congress may act on this matter, that the action taken by EPA is not in conformance with the law, and that EPA did not consult with local officials on this matter. EPA has responded to many of the municipalities' concerns in this preamble. EPA did consult with various

representatives of local governments early in the development of this regulation as well as more comprehensively in February 1995.

This rule was also coordinated with EPA's American Indian Environment Office (AIEO). The Office of Water will work through the AIEO to provide for a Tribal representative to participate in the FACA process.

EPA believes that it has developed an effective process to obtain input from State, Tribal and local governments before issuing this rule, as well as receiving comments on the direct final rule and accompanying proposed rulemaking, and has met the consultation requirements for States, federally recognized Tribes and localities under the terms of Executive Order 12875.

C. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget.

EPA's existing information collection request (ICR) entitled "Application for NPDES Discharge Permit and Sewage Sludge Management Permit" (OMB Number 2040–0086) contains information that responds to this issue for all storm water discharges, including those facilities designated into the program under this regulation as causing water quality problems. The burden of similar water quality designations, utilized under the phase I storm water program, were accounted for in the ICR and remain applicable to the designations that may be made under this rule. EPA will review and revise the estimates contained in this ICR, as appropriate, in its renewal process.

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities, and defines them as follows:

(1) Small governmental jurisdictions—any government of a district with a population of less than 50,000.

(2) Small business—any business which is independently owned and operated and not dominant in its field, as defined by the Small Business Administration regulations under the Small Business Act.

(3) Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

EPA has determined that today's rule would not have a significant impact on a substantial number of small entities, and that a Regulatory Flexibility Analysis therefore is unnecessary. Through today's action EPA is benefiting small entities by (1) adopting a common sense approach to deal with the issue of storm water phase II requirements, (2) providing the ability for the permitting authority to manage for results by providing flexibility to deal with storm water phase II permitting at this time based on water quality violations or significant contribution of pollutants, and (3) clarifying and reducing applicable burdens for those facilities currently subject to phase II requirements. The rule provides additional time for EPA to work with all stakeholders, including small entities, to develop additional phase II regulations under a FACA process. The Agency is committed to issue these supplemental phase II regulations by March 1, 1999; in that rulemaking EPA will reconsider its Regulatory Flexibility Act analysis.

E. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a written statement to accompany proposed rules where the estimated costs to State, local, or tribal governments, or to the private sector, will be $100 million or more in any one year. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of such a rule and that is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly and uniquely affected by any rule.

EPA estimates that the costs to State, local, or tribal governments, or the private sector, from this rule will be less than $100 million. This rulemaking significantly reduces the immediate regulatory burden imposed on phase II facilities. EPA has determined that an unfunded mandates statement therefore is unnecessary.

Although not required to make a finding under section 206, EPA concludes that this rule is cost-effective and a significant reduction in burden for State and local governments. In a September 9, 1992, **Federal Register** notice, EPA invited public consideration of and comment on reasonable alternative approaches for the phase II storm water program. Today's rule provides for the first step for many of those alternatives by providing for an orderly process for developing supplemental regulations. By establishing regulatory relief until development of those alternative approaches, today's rulemaking itself provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule at this stage, consistent with statutory requirements.

As discussed previously, EPA initiated consultation with representative organizations of small governments under Executive Order 12875. In doing so, EPA provided notice to potentially affected small governments to enable them to provide meaningful and timely input. EPA plans to inform, educate, and advise small governments on compliance with any requirements that may arise in further development of the storm water phase II rules.

F. Procedural Requirements and Effective Date

Today's rule is effective on August 7, 1995. Section 553 of the APA provides that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date except, as relevant here, (1) for a substantive rule which grants or recognizes an exemption or relieves a restriction or (2) when the agency finds and publishes good cause for foregoing delayed effectiveness. Today's rule relieves phase II dischargers from the immediate requirement to obtain a permit. Additionally, the Agency has determined that good cause exists for making this regulation effective immediately because today's final rule does not differ from the withdrawn direct final rule which would have become effective on August 7, 1995.

List of Subjects

40 CFR Part 122

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

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: July 31, 1995.

Carol M. Browner,

Administrator.

For the reasons set forth in this preamble, parts 122 and 124 of Title 40 of the Code of Federal Regulations are amended as follows:

PART 122—[AMENDED]

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

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

2. Section 122.21 is amended by adding a sentence to the end of paragraph (c)(1) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see 123.25).

* * * * *

(c) *Time to apply.*

(1) * * * New discharges composed entirely of storm water, other than those dischargers identified by § 122.26(a)(1), shall apply for and obtain a permit according to the application requirements in § 122.26(g).

3. Section 122.26(a)(1) is amended as follows:

a. In paragraph (a)(1) the introductory text is amended by revising the date "October 1, 1992" to read "October 1, 1994";

b. By adding paragraph (a)(9) as set forth below;

c. By revising the title of paragraph (e) as set forth below;

d. In paragraph (e)(1)(ii), by revising the phrase "permit application requirements are reserved" to read "permit application requirements are contained in paragraph (g) of this section"; and

e. By adding paragraph (g) as set forth below.

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

(a) * * *

(9) On and after October 1, 1994, dischargers composed entirely of storm water, that are not otherwise already required by paragraph (a)(1) of this section to obtain a permit, shall be required to apply for and obtain a permit according to the application requirements in paragraph (g) of this section. The Director may not require a permit for discharges of storm water as provided in paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at §§ 122.2 and 122.3.

* * * * *

(e) *Application deadlines under paragraph (a)(1).* * * *

* * * * *

(g) *Application requirements for discharges composed entirely of storm water under Clean Water Act section 402(p)(6).* Any operator of a point source required to obtain a permit under paragraph (a)(9) of this section shall submit an application in accordance with the following requirements.

(1) *Application deadlines.* The operator shall submit an application in accordance with the following deadlines:

(i) A discharger which the Director determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States shall apply for a permit to the Director within 180 days of receipt of notice, unless permission for a later date is granted by the Director (*see* 40 CFR 124.52(c)); or

(ii) All other dischargers shall apply to the Director no later than August 7, 2001.

(2) *Application requirements.* The operator shall submit an application in accordance with the following requirements, unless otherwise modified by the Director:

(i) *Individual application for non-municipal discharges.* The requirements contained in paragraph (c)(1) of this section.

(ii) *Application requirements for municipal separate storm sewer discharges.* The requirements contained in paragraph (d) of this section.

(iii) *Notice of intent to be covered by a general permit issued by the Director.* The requirements contained in 40 CFR 122.28(b)(2).

PART 124—[AMENDED]

4. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 3901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

5. Section 124.52(c) is amended by revising the parenthetical statement and the next to the last sentence to read as follows:

§ 124.52 Permits required on a case-by-case basis.

* * * * *

(c) * * * (*see* 40 CFR 122.26 (a)(1)(v), (c)(1)(v), and (g)(1)(i)) * * * The discharger must apply for a permit under 40 CFR 122.26 (a)(1)(v) and (c)(1)(v) within 60 days of notice or under 40 CFR 122.26(g)(1)(i) within 180 days of notice, unless permission for a later date is granted by the Regional Administrator. * * *

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