

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5848-9]

Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities That Are Classified as Associated With Industrial Activity

AGENCY: Environmental Protection Agency (EPA).

ACTION: Amendment to the notice of draft NPDES general permit reissuance for storm water discharges from construction activities that are classified as associated with industrial activity.

SUMMARY: Today's notice is an amendment to the notice of draft NPDES general permit reissuance for storm water discharges from construction activities that are classified as associated with industrial activity, which was published on April 16, 1997 (62 FR 18605). The draft general permit reissuance is being amended to include Indian country lands in Part I.A. of the permit, to expand the eligibility in Part I.B., to change the requirements of the contents of the Notice of Intent in accordance with the national NOI (this will precipitate a change in Appendix C), to revise the renewal requirements in Part VII.B, to correct a typographical error in the fact sheet, to update the Region 4 mailing address and to extend the comment permit for the draft general permit reissuance.

DATES: Comments relative to the draft permit, or this amendment, are not required; however, if you wish to submit comments, the comments must be received by August 26, 1997.

ADDRESSES: Persons wishing to comment upon or object to any aspects of this permit reissuance, or this amendment, or wishing to request a public hearing, are invited to submit the same in writing within sixty (60) days of this notice to the Office of Environmental Assessment, United States Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303-3104, Attention: Ms. Lena Scott.

FOR FURTHER INFORMATION CONTACT: Mr. Floyd Wellborn, telephone number (404) 562-9296, or Mr. Michael Mitchell, telephone number (404) 562-9303, or at the following address: United States Environmental Protection Agency, Region 4, Water Management Division, Surface Water Permits Section, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-3104.

SUPPLEMENTARY INFORMATION:

Procedures for Reaching a Final Permit Decision

Pursuant to 40 CFR 124.13, any person who believes any condition of the permit is inappropriate must raise all reasonably ascertainable issues and submit all reasonably available arguments in full, supporting their position, by the close of the comment period. All comments on the proposed NPDES general permit received within the 60-day period will be considered in the formulation of final determinations regarding the permit reissuance.

After consideration of all written comments and the requirements and policies in the Act and appropriate regulations, the EPA Regional administrator will make determinations regarding the general permit reissuance. If the determinations are substantially unchanged from those announced by this notice, the Administrator will so notify all persons submitting written comments. If the determinations are substantially changed, the Administrator will issue a public notice indicating the revised determinations.

A formal hearing is available to challenge any NPDES permit issued according to the regulations at 40 CFR 124.15 except for a general permit as cited by 40 CFR 124.71. Persons affected by a general permit may not challenge the conditions of a general permit as a right in further Agency proceedings. They may instead either challenge the general permit in court, or apply for an individual permit as specified at 40 CFR 122.21 as authorized at 40 CFR 122.28, and then request a formal hearing on the issuance or denial of an individual permit.

Administrative Record

The proposed NPDES general permit, fact sheet and other relevant documents are on file and may be inspected any time between 9 a.m. and 4 p.m., Monday through Friday at the address shown below. Copies of the draft NPDES general permit, fact sheet or other relevant documents may be obtained by writing the United States Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-3104, Attention: Ms. Lena Scott.

Revised Draft NPDES Permits for Storm Water Discharges From Construction Activities That are Classified as Associated With Industrial Activity

Part I. Coverage Under This Permit

A. Permit Area

The permit, except the parts listed below, covers all areas administered by Region 4:

- All Indian Country Lands within the State of Alabama, except Part IV and Part V.D.2.a.(1), NPDES Permit No. ALR10 *##I
- State of Florida, excluding Indian lands, NPDES Permit No. FLR10 *##I
- All Indian Country Lands within the State of Florida, except Part IV and Part V.D.2.a.(1), NPDES Permit No. FLR10 *##I
- All Indian Country Lands within the State of Mississippi, except Part IV and Part V.D.2.a.(1), NPDES Permit No. MSR10 *##I
- All Indian Country Lands within the State of North Carolina, except Part IV and Part V.D.2.a.(1), NPDES Permit No. NCR10 *##I
- All Indian Country Lands within the State of South Carolina, except Part IV and Part V.D.2.a.(1), NPDES Permit No. SCR10 *##I

B. Eligibility

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1. This permit may authorize all discharges identified in the pollution prevention plan of storm water associated with industrial activity from construction sites, (those sites or common plans of development or sale, including unpaved roads, that will result in the disturbance of five or more acres total land area or less than five acres if the Director designates the site),¹ (henceforth referred to as storm water discharges from construction activities) occurring after the effective date of this permit (including discharges occurring after the effective date of this permit where the construction activity was initiated before the effective date of this permit), except for discharges identified under paragraph I.B.3.

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3.e. Storm water discharges from construction sites if the discharges may adversely affect a listed or proposed to be listed endangered or threatened species or its critical habitat;

(1) A discharge of storm water associated with construction activity

¹ On June 4, 1992, the United States Court of Appeals for the Ninth Circuit remanded the exemption for construction sites of less than five acres to the EPA for further rulemaking. (Nos. 90-70671 and 91-70200). Section 402(p)(2)(E) of the Clean Water Act shall be used as a basis for any designations.

may be covered under this permit only if the applicant certifies that they meet at least one of the following criteria. Failure to continue to meet one of these criteria during the term of the permit will result in the storm water discharges associated with construction ineligible for coverage under this permit.

(a) The storm water discharge(s), and the construction and implementation of Best Management Practices (BMPs) to control storm water runoff, are not likely to adversely affect species identified in Addendum A of this permit or critical habitat for a listed species; or

(b) The applicant's activity has received previous authorization under Section 7 or section 10 of the Endangered Species Act and that authorization addressed storm water discharges and/or BMPs to control storm water runoff (e.g., developer included impact of entire project in consultation over a wetlands dredge and fill permit under Section 7 of the Endangered Species Act); or

(c) The applicant's activity was considered as part of a larger, more comprehensive assessment of impacts on endangered species under section 7 or section 10 of the Endangered Species Act that which accounts for storm water discharges and BMPs to control storm water runoff (e.g., where an area-wide habitat conservation plan and Section 10 permit is issued which addresses impacts from construction activities including those from storm water, or a National Environmental Policy Act (NEPA) review is conducted which incorporates ESA section 7 procedures); or

(d) Consultation under section 7 of the Endangered Species Act is conducted for the applicant's activity which results in either a no jeopardy opinion or a written concurrence on a finding of no likelihood of adverse effects; or

(e) The applicant's activity was considered as part of a larger, more comprehensive site-specific assessment of impacts on endangered species by the owner or other operator of the site and that permittee certified eligibility under item (a), (b), (c), or (d) above (e.g. owner was able to certify no adverse impacts for the project as a whole under item (a), so the contractor can then certify under item (e)). Utility companies applying for permit coverage for the entire permit area of coverage as defined under Part I.A. may certify under item (e) since authorization to discharge is contingent on a principal operator of a construction project having been granted coverage under this, or an alternative NPDES permit for the areas of the site where

utilities installation activities will occur.

(2) All applicants must follow the procedures provided at Addendum A of this permit when applying for permit coverage.

(3) The applicant must comply with any terms and conditions imposed under the eligibility requirements of paragraphs (1) (a), (b), (c), (d), or (e) above to ensure that storm water discharges or BMPs to control storm water runoff are protective of listed endangered and threatened species and/or critical habitat. Such terms and conditions must be incorporated in the applicant's storm water pollution prevention plan.

(4) For the purposes of conducting consultation to meet the eligibility requirements of paragraph (1)(d) above, applicants are designated as non-Federal representatives. See 50 CFR 402.08. However, applicants who choose to conduct consultation as a non-Federal representative must notify EPA and the appropriate Service office in writing of that decision.

(5) This permit does not authorize any "taking" (as defined under Section 9 of the Endangered Species Act) of endangered or threatened species unless such takes are authorized under sections 7 or 10 of the Endangered Species Act.

(6) This permit does not authorize any storm water discharges nor require any BMPs to control storm water runoff that are likely to jeopardize the continued existence of any species that are listed as endangered or threatened under the Endangered Species Act or result in the adverse modification or destruction of habitat that is designated as critical under the Endangered Species Act.

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g. Storm water discharges that would affect a property that is listed or is eligible for listing in the National Historic Register maintained by the Secretary of Interior may be in violation of the National Historic Preservation Act. A discharge of storm water associated with construction activity may be covered under this permit only if the applicant certifies that either:

(1) The storm water discharge(s), and the construction and implementation of BMPs to control storm water runoff, do not affect a property that is listed or is eligible for listing in the National Historic Register maintained by the Secretary of Interior; or,

(2) The applicant consults with the State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer (THPO) on the potential for adverse effects which results in a no effect finding; or

(3) The applicant has obtained and is in compliance with a written agreement between the applicant and the SHPO or THPO that outlines all measures to be undertaken by the applicant to mitigate or prevent adverse effects to the historic property; or

(4) The applicant agrees to implement and comply with the terms of a written agreement between another owner/operator (e.g., subdivision developer, property owner, etc.) and the SHPO or THPO that outlines all measures to be undertaken by operators on the site to mitigate or prevent adverse effects to the historic property; or

(5) The applicant's activity was considered as part of a larger, more comprehensive site-specific assessment of effects on historic properties by the owner or other operator of the site and that permittee certified eligibility under item (1), (2), (3), or (4) above. Utility companies applying for permit coverage for the entire construction site may certify under item (4) since authorization to discharge is contingent on a principal operator of a construction project having been granted coverage under this, or an alternative NPDES permit for the areas of the site where utilities installation activities will occur.

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Part II.B. Contents of Notice of Intent

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The contents of the notice of intent are published in the June 2, 1997

Federal Register (62 FR 29785).

8. A certification that a storm water pollution prevention plan, including both construction and post-construction controls, has been prepared for the site in accordance with Part IV of this permit, and such plan provides compliance with approved State/Tribal and/or local sediment and erosion plans or permits and/or storm water management plans or permits in accordance with Part IV.D.2.d of this permit. (A copy of the plans or permits should not be included with the NOI submission). The applicant shall also submit a copy of the cover page of the State permit issued by FDEP or a FWMD to the facility for the storm water associated with construction activity.

9. Whether, based on the instruction in Addendum A, any species identified in Addendum A are in proximity to the storm water discharges covered by this permit or the BMPs to be used to comply with permit conditions.

10. Under which section(s) of Part I.B.3.e.(1)(Endangered Species) and Part I.B.3.f. (Historical Preservation) the applicant is certifying eligibility.

11. The following certifications shall be signed in accordance with Part VI.G.

"I certify under penalty of law that I have read and understand the Part I.B. eligibility requirements for coverage under the general permit for storm water discharges from construction activities, including those requirements relating to the protection of endangered species identified in Appendix C."

"To the best of my knowledge the discharges covered under this permit, and the construction and operation of BMPs to control storm water runoff, are not likely to adversely affect any species identified in Addendum A of this permit, or are otherwise eligible for coverage under this permit, in accordance with Part I.B.3.e of the permit, due to previous authorization under the Endangered Species Act, or agreement to implement protective measures required by the Director as a condition of eligibility."

"I further certify, to the best of my knowledge, that such discharges, and construction of BMPs to control storm water runoff, do not have an effect on properties listed or eligible for listing on the National Register of Historic Places under the National Historic Preservation Act, or are otherwise eligible for coverage, in accordance with Part I.B.3.f. of the permit, due to a previous agreement under the National Historic Preservation Act."

"I understand that continued coverage under this storm water general permit is contingent upon maintaining eligibility as provided for in Part I.B."

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Part VII. Standard Permit Conditions

B. Continuation of the Expired General Permit

This permit expires at midnight 5 years from the effective date of the permit. However, an expired general permit continues in force and effect until a new general permit is issued. Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit. Upon reissuance of a new general permit, the permittee is required to notify the permit issuing authority of the intent to be covered by the new general permit by use of the NOI requirements of the reissued permit, unless otherwise noted in the reissued permit. These requirements are discussed in Part II of this general permit.

Facilities that have not obtained coverage under this permit by the expiration date of this permit cannot become authorized to discharge under the continued permit. The authorization to discharge under the continued permit expires 90 days from the effective date of this permit.

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Part X. Definitions

Operator means any party associated with the construction project that meets either of the following 2 criteria: (1) The party has operational control over project specifications (including the ability to make modifications in specifications), or (2) the party has day-to-day operational control of those activities at a project site which are necessary to ensure compliance with the storm water pollution prevention plan or other permit conditions (e.g., they are authorized to direct workers at the site to carry out activities identified in the storm water pollution prevention plan or comply with other permit conditions).

Beverly H. Banister,

Acting Director, Water Management Division.

Draft NPDES Permits for Storm Water Discharges From Construction Activities That Are Classified as "Associated With Industrial Activity"; Fact Sheet

Today's notice is an amendment to the notice of draft NPDES general permit reissuance for storm water discharges from construction activities that are classified as associated with industrial activity (62 FR 18605). The draft general permit reissuance is being amended to include Indian country lands in Part I.A. of the permit. This includes the Catawba Indian Nation in South Carolina, Eastern Band of Cherokee Indians in North Carolina, the Miccosukee Tribe of Indians of Florida, the Mississippi Band of Choctaw Indians, the Poarch Band of Creek Indians in Alabama, and the Seminole Tribe of Florida. The amendment expands the eligibility in Part I.B. to include discharges of storm water from construction sites less than five acres in accordance with 40 CFR 122.26(a)(v). The determination of inclusion for construction sites less than five acres will be on a case by case basis. Part I.B.e. and the NOI contents requirements in Part II.B. are also being changed in accordance with the provisions of the National General Permit for the Discharge of Storm Water from Construction Activities published in the June 2, 1997 **Federal Register** (62 FR 29785). Part I.B.g. has been included in the permit to exclude facilities that would affect a property that is listed or is eligible for listing in the National Historic Register maintained by the Secretary of Interior may be in violation of the National Historic Preservation Act. This provision was inadvertently omitted from the original draft published in the April 16, 1997 **Federal Register** (62 FR 18605). Part VII.B. is

being amended to allow coverage under a continued permit for facilities that are covered under the permit upon its expiration without having to submit an NOI until the reissued general permit is finalized. This change is to reduce administrative burden on the permittees by not requiring an NOI to be submitted for continued coverage and then another NOI for coverage under the reissued permit.

The April 16, 1997 notice of the proposed general permit is being amended to extend the comment permit for the draft general permit reissuance. Persons wishing to comment upon or object to any aspects of this permit reissuance or wishing to request a public hearing, are invited to submit the same in writing within sixty (60) days of this notice to the Office of Environmental Assessment, United States Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-3104, Attention: Ms. Lena Scott. The fact sheet published in the April 16, 1997 **Federal Register** is being changed, as follows, to correct a typographical error regarding the effective date of the permit and the deadlines for submission of the NOI:

Dates: These general permits are proposed to become effective on the first day of the month following the publication of the final issued permit in the **Federal Register**. Deadlines for submittal of Notices of Intent to be authorized to discharge under these permits are as follows:

(1) On or before September 25, 1997, for storm water discharges associated with industrial activity from construction sites where disturbances associated with a construction project occur on or before September 25, 1997, and final stabilization is completed after September 25, 1997;

(2) For storm water discharges associated with industrial activity from construction sites where disturbances associated with a construction project do not occur until after September 25, 1997, at least 2 days prior to the commencement of construction; and

(3) For storm water discharges associated with industrial activity from construction sites where the original permittee at the site changes or an additional operator submits an NOI for coverage as a copermitee, a new NOI shall be submitted at least 2 days prior to when the new operator commences work at the site. The final general permits provide additional dates for compliance with the terms of the permit.

Appendix C—Endangered Species Guidance**I. Instructions**

A list of species that EPA has determined may be affected by the activities covered by the construction general permit will be included in the final issued permit. These species will be listed by county. In order to get construction general permit coverage, applicants must:

- Certify by signing the NOI whether any species listed in this Addendum are in proximity to the facility, and
- Certify pursuant to Section I.B.3.e. of the construction general permit that their storm water discharges, and BMPs constructed to control storm water runoff, are not likely, and will not be likely to adversely affect species identified in Addendum H of this permit.

To do this, please follow steps 1 through 4 below.

Step 1: Review the County Species List To Determine if any Species Are Located in the Discharging Facility County

If no species are listed in a facility's county or if a facility's county is not found on the list, an applicant is eligible for construction general permit coverage and may indicate by signing the NOI that no species are found in proximity which provides the necessary certification. If species are located in the county, follow step 2 below. Where a facility is located in more than one county, the lists for all counties should be reviewed.

Step 2: Determine if any Species May Be Found "In Proximity" To the Facility

A species is in proximity to a facility's storm water discharge when the species is:

- Located in the path or immediate area through which or over which contaminated point source storm water flows from industrial activities to the point of discharge into the receiving water.
- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.
- Located in the area of a site where storm water BMPs are planned or are to be constructed.

The area in proximity to be searched/surveyed for listed species will vary with the size of the facility, the nature and quantity of the storm water discharges, and the type of receiving waters. Given the number of facilities potentially covered by the construction general permit, no specific method to determine whether species are in proximity is required for permit coverage under the construction general permit. Instead, applicants should use the method or methods which best allow them to determine to the best of their knowledge whether species are in proximity to their particular facility. These methods may include:

- *Conducting visual inspections:* This method may be particularly suitable for facilities that are smaller in size, facilities located in non-natural settings such as highly urbanized areas or industrial parks where

there is little or no nature habitat; and facilities that discharge directly into municipal storm water collection systems. For other facilities, a visual survey of the facility site and storm water drainage areas may be insufficient to determine whether species are likely to be located in proximity to the discharge.

- *Contacting the nearest State Wildlife Agency or U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) offices.* Many endangered and threatened species are found in well-defined areas or habitats. That information is frequently known to state or federal wildlife agencies. FWS has offices in every state. For Florida, the offices are located in Panama City, Jacksonville, and Vero Beach. NMFS has a regional offices in St. Petersburg, Florida.

- *Contacting local/regional conservation groups.* These groups inventory species and their locations and maintain lists of sightings and habitats.

- *Conducting a formal biological survey.* Larger facilities with extensive storm water discharges may choose to conduct biological surveys as the most effective way to assess whether species are located in proximity and whether there are likely adverse effects.

If no species are in proximity, an applicant is eligible for construction general permit coverage and may indicate that in the NOI and provide the necessary certification. If listed species are found in proximity to a facility, applicants must follow step 3 below.

Step 3: Determine if Species Could Be Adversely Affected by the Facility's Storm Water Discharges or by BMPs To Control Those Discharges

Scope of Adverse Effects

Potential adverse effects from storm water include:

- *Hydrological.* Storm water may cause siltation, sedimentation or induce other changes in the receiving waters such as temperature, salinity or pH. These effects will vary with the amount of storm water discharged and the volume and condition of the receiving water. Where a storm water discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- *Habitat.* Storm water may drain or inundate listed species habitat.
- *Toxicity.* In some cases, pollutants in storm water may have toxic effects on listed species.

The scope of effects to consider will vary with each site. Applicants must also consider the likelihood of adverse effects on species from any BMPs to control storm water. Most adverse impacts from BMPs are likely to occur from the construction activities.

Using earlier ESA authorizations for construction general permit eligibility. In some cases, a facility may be eligible for construction general permit coverage because actual or potential adverse affects were

addressed or discounted through an earlier ESA authorization. Examples of such authorization include:

- An earlier ESA Section 7 consultation for that facility.
- A Section 10(a) permit issued for the facility.
- An area-wide Habitat Conservation Plan applicable to that facility.
- A clearance letter from the Services (which discounts the possibility of an adverse impacts from the facility).

In order for applicants to use an earlier ESA authorization to meet eligibility requirements: (1) The authorization must adequately address impacts for storm water discharges and BMPs from the facility on endangered and threatened species, (2) it must be current because there have been no subsequent changes in facility operations or circumstances which might impact species in ways not considered in the earlier authorization, and (3) the applicant must comply with any requirements from those authorizations to avoid or mitigate adverse effects to species. Applicants who wish to pursue this approach should carefully review documentation for those authorizations ensure that the above conditions are met.

If adverse effects are not likely, an applicant is eligible for construction general permit coverage and may indicate in the NOI that species are found in proximity and provide the necessary certification. If adverse effects are likely, follow step 4 below.

Step 4: Determine if Measures Can Be Implemented To Avoid any Adverse Effects

If an applicant determines that adverse effects are likely, it can receive coverage if appropriate measures are undertaken to avoid or eliminate any actual or potential adverse affects prior to applying for permit coverage. These measures may involve relatively simple changes to facility operations such as re-routing a storm water discharge to bypass an area where species are located.

At this stage, applicants may wish to contact the FWS and/or NMFS to see what appropriate measures might be suitable to avoid or eliminate adverse impacts to species.

If applicants adopt these measures, they must continue to abide by them during the course of permit coverage.

If appropriate measures are not available, the applicant is not eligible at that time for coverage under the construction general permit. Applicants should contact the appropriate EPA regional office about either:

- Entering into Section 7 consultation in order to obtain construction general permit coverage, or
- Obtaining an individual NPDES storm water permit.

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