



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2012-0195; FRL-9722-5]

RIN: 2040-AF42

Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Rulemaking

SUMMARY: The EPA is proposing revisions to its Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a National Pollutant Discharge Elimination System (NPDES) permit is not required for these stormwater discharges.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: You may submit comments, identified by docket number EPA-HQ-OW-2012-0195, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW, Washington DC 20460, Attention Docket ID No. EPA-HQ-OW-2012-0195.

- Hand Delivery / Courier: EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC, 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OW-2012-0195. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an “anonymous access” system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index.

Although listed in the index, some information may not be publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Water Docket, EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The 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.

FOR FURTHER INFORMATION CONTACT: For further information on this notice, you may contact Jeremy Bauer, EPA Headquarters, Office of Water, Office of Wastewater Management via email at bauer.jeremy@epa.gov or telephone at 202-564-2775.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Applicability

This notice does not impose requirements on any entity. The action proposed is intended to clarify the status of stormwater discharges from logging roads. Those with an interest in such discharges may be interested in this proposed action. If you have questions regarding the applicability of this notice, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Copies of this Document and other Information

This document is available for download at <http://www.epa.gov/npdes/stormwater/forestroads> or under docket EPA-HQ-OW-2012-0195.

II. Background

A. Purpose

The EPA is issuing this notice to address the stormwater discharges identified under *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (*NEDC*).

This notice proposes adding language to existing stormwater regulations to clarify that, for the purposes of assessing whether stormwater discharges are “associated with industrial activity,” the only facilities under SIC code 2411 that are “industrial” are: rock crushing, gravel washing, log sorting, and log storage. The effect of this would be to clarify, contrary to the Ninth Circuit’s decision in *NEDC*, that discharges of stormwater from silviculture facilities other than the four specifically named silviculture facilities identified above do not require an NPDES permit.¹

B. Statutory Authority and Regulatory History

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. 33 U.S.C. § 1251(a). To that end, the Act provides that the discharge of any pollutant by any person shall be unlawful, except in compliance with other provisions of the statute. Generally, the Act provides for a permit program for the addition to waters of the United States of a pollutant from a point source, defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C.

¹ This rulemaking responds to the uncertainty created by the Ninth Circuit’s holding in *NEDC* that certain channeled discharges of stormwater from logging roads constitute point source discharges, bringing them within the Section 402 NPDES permitting framework. This proposed rule, by clarifying what constitutes a discharge “associated with industrial activity,” makes clear that such discharges do not require NPDES permits even if they are point source discharges. Nothing in this proposed rule should be construed as conceding that discharges of stormwater from logging roads constitute point source discharges, a question on which the Supreme Court has granted review for the October 2012 term.

1362(14). In 1987 Congress amended the Clean Water Act with the addition of section 402(p), which required NPDES permits for certain categories of stormwater point source discharges and allowed EPA discretion to determine how pollution from other stormwater discharges would be addressed.

For the initial phase, section 402(p)(1) created a temporary moratorium on NPDES permits for stormwater discharges from point sources except for those listed in section 402(p)(2), which includes discharges for which a permit had already been issued; discharges from large municipal separate storm sewer systems; and “industrial discharges.” Congress did not define industrial discharges, allowing the EPA to define the term. For subsequent phases, section 402(p)(5) directs the EPA to conduct studies, in consultation with the states, for “identifying those stormwater discharges or classes of stormwater discharges for which permits are not required”; “determining to the maximum extent practicable, the nature and extent of pollutants in such discharges”; and “establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.” Section 402(p)(6) directs the Agency to issue regulations, in consultation with state and local officials, based on such studies. The section allows the EPA flexibility in issuing regulations to address designated stormwater discharges where appropriate and does not require the use of NPDES permits or any specific regulatory approach. Specifically, the section states that the regulations “shall establish priorities, establish requirements for state stormwater management programs, and establish expeditious deadlines” and may include “performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.” 33 U.S.C. § 1342(p)(6). This flexibility is unique to stormwater discharges and is different than the treatment of stormwater discharges listed in section

402(p)(2)(B) of the Act, which requires a permit for a stormwater discharge “associated with industrial activity.”

Prior to the 1987 Amendments, there were numerous questions regarding the appropriate means of regulating stormwater discharges within the NPDES program due to the water quality impacts of stormwater, the variable nature of stormwater, the large number of stormwater discharges, and the limited resources of permitting agencies. The EPA undertook numerous regulatory actions, which resulted in extensive litigation, in an attempt to address these unique discharges.

EPA’s Silvicultural Rule (40 CFR 122.27) predates the 1987 amendments to the Clean Water Act that created section 402(p) for stormwater controls. The Agency defined silvicultural point source as part of the Silvicultural Rule to specify which silvicultural discharges were to be included in the NPDES program. The rule defines silvicultural point source to mean any “discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States” and further explains that “the term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.”

In 1990, following the 1987 amendments that directed the Agency to develop regulations requiring permits for large municipal separate storm sewer systems and stormwater “discharges associated with industrial activity,” the EPA promulgated the Phase I stormwater regulations. (55 FR 47990, November 16, 1990). The EPA defined in the Phase I regulations “storm water

discharge associated with industrial activity” which is not defined by the Act. In describing the scope of the term “associated with industrial activity,” several members of Congress explained in the legislative history that the term applied if a discharge was “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” (Vol. 132 Cong. Rec. H10932, H10936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)).

The Phase I rule clarified the regulatory definition of “associated with industrial activity” by adopting the language used in the legislative history and supplementing it with a description of various types of areas (e.g., material handling sites, sites used for the storage and maintenance of material handling equipment, etc.) that are directly related to an industrial process and to industrial facilities identified by the EPA. The supplemental language in the Phase I rule also includes the term “immediate access road.” The EPA considers “immediate access roads” to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. *See* 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990). These “immediate access roads” do not include public access roads that are state, county, or federal roads such as highways or Bureau of Land Management roads which happen to be used by the facility. *See id.* The Phase I regulation defines the term “storm water discharge associated with industrial activity” to include stormwater discharges from facilities identified in the rule by standard industrial classification or “SIC” code at 40 CFR 122.26(b)(14). The Agency specified in the Phase I rule that the term does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA’s regulations, including the Silvicultural Rule. As discussed above, the EPA had previously specified under the Silvicultural Rule which silvicultural discharges were to be included in the NPDES program (40 CFR 122.27). The EPA intended to regulate those same “silvicultural point source[s]” under the Phase I rule (i.e., rock crushing, gravel washing, log

sorting, and log storage facilities) and to exclude from the Phase I regulation stormwater runoff from other silvicultural activities. For the “silvicultural point source[s]” (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) regulated under the Phase I rule, the term “storm water discharge associated with industrial activity” includes “immediate access roads” (40 CFR 122.26(b)(14)(ii)). Unlike “immediate access roads” associated with industrial facilities, many logging roads have multiple uses, including recreation and general transportation, and commonly extend over long distances (i.e.; may not provide “immediate access” to an industrial site). The intent of the EPA in this notice of proposed rulemaking is that the NPDES program requirements be implemented with regard to “immediate access roads” in the same way they were implemented prior to the decision by the Ninth Circuit.

In developing the second phase of stormwater regulations, the EPA submitted to Congress in March 1995 a report that presented the nature of stormwater discharges from municipal and industrial facilities that were not already regulated under the Phase I regulations (U.S. Environmental Protection Agency, Office of Water. 1995. Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress. Washington, D.C. EPA 833-K-94-002). On December 8, 1999, the EPA promulgated the Phase II stormwater regulations to address stormwater discharges from small municipal separate storm sewer systems and construction sites that disturb one to five acres. (64 FR 68722, December 8, 1999). The EPA retains the authority to designate additional stormwater discharges for regulation at a later date under either CWA section 402(p)(2)(E) or 402(p)(6).

The Phase II regulations for stormwater controls were challenged in *Environmental Defense Center v. US EPA*, 344 F.3d 832 (9th Cir. 2003) (*EDC v. EPA*). In that case, petitioners

contended that the EPA arbitrarily failed to regulate discharges from forest roads under the Phase II rule. The court held that the EPA failed to consider the petitioners' comments and remanded the issue to the EPA "so that it may consider in an appropriate proceeding Petitioner's contention that § 402(p)(6) requires the EPA to regulate forest roads. The EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review." *Id.* at 863.

More recently, in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (*NEDC*), a citizen suit was filed alleging violations of the Clean Water Act for discharging stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by and then discharged from a system of ditches, culverts and channels, there was a point source discharge of industrial stormwater for which an NPDES permit is required. As discussed above, the Agency specified in the Phase I rule that the term "storm water discharge associated with industrial activity" does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA's regulations, including the aforementioned Silvicultural Rule. The EPA intends through this regulation to more clearly limit Phase I applicability to only those silvicultural facilities that are "rock crushing, gravel washing, log sorting, and log storage facilities."

In response to the partial remand under *EDC v. EPA*, the Agency continues to review available information on the water-quality impacts of stormwater discharges from forest roads, which include logging roads as discussed above, as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the

Agency's section 402(p) rulemaking authority. The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use. EPA is currently evaluating comments on its *Notice of Intent to Revise Stormwater Regulations To Specify That an NPDES Permit is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges* (77 FR 30473, May 23, 2012), as it considers possible next steps.

In the interim, the EPA notes that Congress has directed that permits are not required for stormwater discharges for logging roads. Under the Consolidated Appropriations Act of 2012, until September 30, 2012, the Administrator may not require an NPDES permit or directly or indirectly require any state to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities.

III. Proposed Revisions and Rationale

A. Proposed Revisions

The EPA is proposing to revise 40 CFR 122.26(b)(14)(ii) to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under SIC code 2411 that are "industrial" are rock crushing, gravel washing, log sorting, and log storage. This revision does not remove any existing exemptions. Though the existing language in 40 CFR 122.26(b)(14)(ii) excepts SIC code 2434, wood kitchen cabinets, the wood kitchen cabinets category remains covered in a separate subsection. *See id.* at 122.26(b)(14)(xi) (listing "Facilities covered under Standard Industrial Classifications 20, 21, 22, 23, 2434 . . ." as engaging in industrial activity for purposes of the industrial stormwater regulations.)

B. Rationale

The EPA did not intend logging roads themselves to be regulated as industrial facilities. However, in light of *NEDC*, the EPA proposes the addition of language to 40 CFR 122.26(b)(14) to clarify the Agency's intent.

The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that may be better suited to address the complexity of forest road ownership, management, and use.

C. Request for Comment

The EPA requests comment on whether the proposed language sufficiently clarifies that discharges of stormwater from logging roads do not require an NPDES permit. The EPA does not think that changes to 40 CFR 122.27 are necessary to accomplish the goal of clarifying the scope of stormwater discharges associated with industrial activity, but welcomes comments on this point and reserves the option of making changes to that section as appropriate to clearly articulate the Agency's intent.

Although the EPA has conducted a preliminary review of the comments submitted in response to the "Notice of Intent to Revise Stormwater Regulations To Specify That an NPDES Permit is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges" (77 FR 30473, May 23, 2012), the Agency does not plan to respond to these comments when taking final action on the rule proposed in today's notice. If you submitted comments in response to the earlier Federal Register Notice that you believe to be relevant to the rule proposed today, please resubmit your comments in accordance with the process outlined above.

IV. Economic Impact

The proposed action clarifies existing regulations and has no economic, public health, or environmental impacts.

V. Statutory and Executive Order Review

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) requires the EPA to estimate the burden on regulated entities to comply with information collection requirements of the EPA’s regulations. This proposed action would clarify existing regulations and would have no impact on existing information collection requirements.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today’s rule on small entities, small entity is defined as: (1) a small business “as defined by the Small Business Administration’s (SBA) regulations at 13

CFR 121.201;” (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. This proposed rule will not impose any requirements on small entities. Rather, the proposed rule will clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that an NPDES permit is not required for these stormwater discharges. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This proposed action would not have Federalism implications. This proposed action would clarify existing regulations and would have no economic impact. Thus, it would 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.

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

This proposed action would not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this proposed action.

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

The proposed action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866. Moreover, this proposed action would clarify existing regulations and would have no economic, public health, or environmental impacts.

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

The proposed action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the proposed change does not involve the installation of treatment or other components that use a measurable amount of energy.

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, 12(d) (15 U.S.C. 272 note) directs the 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 standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

The proposed action would clarify existing regulations and would make no change to existing standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission. Agencies must do this by identifying and addressing as appropriate any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed action would clarify existing regulations and would have no economic, public health, or environmental impacts.

List of Subjects 40 CFR Part 122

Environmental protection, water pollution control

Dated: August 24, 2012

Lisa P. Jackson

Administrator

For the reasons set out in the preamble, 40 CFR part 122 is proposed to be 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: 33 U.S.C. 1251 et seq.

Subpart B--[Amended]

2. Section 122.26 is amended by revising paragraph (b)(14)(ii) to read as follows:

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

* * * * *

(b) * * *

(14) * * *

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)-(3) and Industry Groups 242 through 249;

26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

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