



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2015-0828; FRL9994-23-OW]

### Final Modification to National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities

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

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

**SUMMARY:** All ten of the Environmental Protection Agency (EPA) Regions today are issuing a final modification to the 2017 National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges from construction activities, also referred to as the “2017 Construction General Permit (CGP)” or “2017 CGP,” which became effective on February 16, 2017. The modified permit, hereinafter known as the “modified 2017 CGP” or “final modified permit,” replaces several conditions in the original 2017 CGP and relevant fact sheet sections. The scope of the modification is limited to only these conditions; all other conditions remain the same. The permit term also remains the same, meaning the modified 2017 CGP will still expire on February 16, 2022. This **Federal Register** notice describes the final permit modification and changes that were made from the proposed modified permit to the final modified permit based on public comments. The modified 2017 CGP and accompanying fact sheet can be found in the Docket (EPA-HQ-OW-2015-0828) as well as on the EPA’s

construction stormwater website at <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>.

**DATES:** The modified 2017 CGP will become effective on June 27, 2019. In accordance with 40 CFR part 23, specifically 23.2, this modified permit shall be considered issued for the purpose of judicial review on May 28, 2019. Under section 509(b) of the Clean Water Act, judicial review of this modified general permit can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the modified permit is considered issued. Under section 509(b)(2) of the Clean Water Act, this modified permit may not be challenged later in civil or criminal proceedings to enforce this permit. In addition, this modified permit may not be challenged in any other agency proceedings. Deadlines for submittal of Notices of Intent are provided in Part 1.4.3 of the permit. The permit also provides additional dates for compliance with the terms of the permit.

**FOR FURTHER INFORMATION CONTACT:** For further information on the permit, contact the appropriate EPA Regional office listed in Section I.F of this notice, or Emily Halter, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202-564-3324 or email: [halter.emily@epa.gov](mailto:halter.emily@epa.gov).

**SUPPLEMENTARY INFORMATION:** This section is organized as follows:

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**I. General Information**

A. *Does this Action Apply to Me?*

*1. Entities Covered by this Permit*

The scope of EPA’s action to modify the 2017 CGP did not include the types of entities eligible to be covered under the original 2017 CGP. The CGP continues to be available to cover the following entities, as categorized in the North American Industry Classification System (NAICS):

**Table 1—Entities Covered by this Permit**

Category	Examples of Affected Entities	North American Industry Classification System (NAICS) Code
<b>Industry</b>	Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities:	

	Construction of Buildings	236
	Heavy and Civil Engineering Construction	237

The EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding the types of activities of which the Agency is now aware that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your site could be affected by this action, you should carefully examine the definition of “construction activity” and “small construction activity” in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding FOR FURTHER INFORMATION CONTACT section.

## *2. Coverage Area of the Permit*

The scope of EPA’s action to modify the 2017 CGP did not include the coverage area of the permit under the original 2017 CGP. Coverage remains available to operators of eligible projects for stormwater discharges from construction activities located in those areas where the EPA is the NPDES permitting authority. A list of eligible areas can be found in Appendix B of the modified 2017 CGP and includes the states of New Hampshire, Massachusetts, New Mexico, and Idaho, as well as most Indian country lands, and areas in selected states operated by a federal operator. Permit coverage is also available to operators in Puerto Rico, the District of Columbia, and the Pacific Island territories, among others.

## *B. How Can I Get Copies of these Documents and Other Related Information?*

1. *Docket.* The EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OW-2015-0828. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/ DC) WJC West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy at the EPA Docket Center Public Reading Room, open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Water Docket is (202) 566–2426.

2. *Electronic Access.* You may access this Federal Register notice electronically through the United States government on-line source for Federal regulations at <https://www.regulations.gov>.

Electronic versions of this final modified permit and accompanying fact sheet are available on the EPA's NPDES web site at <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>.

An electronic version of the public docket is available through the EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <https://www.regulations.gov> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about the EPA's public docket, visit the Agency's Docket Center homepage at <https://www.epa.gov/dockets>. Although not all docket materials may

be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified in Section I.B.1.

*C. Who are the EPA Regional Contacts for the Final Modified Permit?*

For EPA Region 1, contact Suzanne Warner at tel.: (617) 918-1383 or e-mail at *warner.suzanne@epa.gov*.

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

For EPA Region 3, contact Carissa Moncavage at tel.: (215) 814-5798 or e-mail at *moncavage.carissa@epa.gov*

For EPA Region 4, contact Michael Mitchell at tel.: (404) 562-9303 or e-mail at *mitchell.michael@epa.gov*.

For EPA Region 5, contact Brian Bell at tel.: (312) 886-0981 or e-mail at *bell.brianc@epa.gov*.

For EPA Region 6, contact Suzanna Perea at tel.: (214) 665-7217 or e-mail at: *perea.suzanna@epa.gov*.

For EPA Region 7, contact Mark Matthews at tel.: (913) 551-7635 or e-mail at: *matthews.mark@epa.gov*.

For EPA Region 8, contact Amy Clark at tel.: (303) 312-7014 or e-mail at: *clark.amy@epa.gov*.

For EPA Region 9, contact Eugene Bromley at tel.: (415) 972-3510 or e-mail at *bromley.eugene@epa.gov*.

For EPA Region 10, contact Margaret McCauley at tel.: (206) 553–1772 or e-mail at *mccauley.margaret@epa.gov*.

## **II. Background on the Permit and Final Modification**

Section 402(p) of the Clean Water Act (CWA) directs the EPA to regulate certain stormwater discharges under the NPDES program, including discharges from regulated construction sites. The EPA’s NPDES regulations further specify that permits are required for stormwater discharges from construction activities that disturb at least one acre, including smaller sites that are part of a larger common plan of development or sale that will ultimately disturb at least one acre. See 40 CFR 122.26(a)(1)(ii), (a)(9)(i)(B), (b)(14)(x), and (b)(15)(i). Under the statutory and regulatory authority cited above, the EPA issued the original 2017 CGP on January 19, 2017 (82 FR 6534) and the permit became effective on February 16, 2017.

In accordance with 40 CFR 23.2, the original 2017 CGP was considered issued for the purposes of judicial review on January 25, 2017. Within the 120-day period of judicial review under section 509(b) of the CWA, both the National Association of Home Builders (NAHB) and the Chesapeake Bay Foundation (CBF) filed petitions for review of the original 2017 CGP in the United States Court of Appeals in the D.C. Circuit.

After receiving the petitions for review, the EPA engaged in multiple discussions with both NAHB and CBF in which the parties discussed their concerns and provided new information to the Agency on how certain permit requirements might be misinterpreted by construction site operators permitted under the original 2017 CGP. Under 40 CFR 122.62(a)(2), the EPA may modify a permit if the Agency is presented with new information during the permit term that was not available at the time of issuance and would have justified the application of

different permit conditions at the time of issuance. Based on the information the petitioners provided to the EPA following the issuance of the original 2017 CGP, the Agency proposed a permit modification for a 45-day public comment period beginning on December 12, 2018 and ending on January 28, 2019. The purpose of the proposed modification was to clarify the Agency's intent of certain permit requirements.

In the proposed permit modification, the EPA proposed to remove examples of operators in the definition of operator; align three permit requirements that implement the Effluent Limitations Guidelines (ELGs) and New Source Performance Standards (NSPS) for Construction and Development (40 CFR part 450) (referred to collectively as "the C&D rule") more closely with the ELG text; and clarify the roles and responsibilities of individual operators on construction sites with multiple operators. The proposed changes were intended to simplify the permit language and accompanying fact sheet explanation without changing the underlying requirements, applicability, implementation, or enforceability of the original permit's requirements. Only those requirements that the EPA proposed to modify were reopened in the proposed modified permit for public comment (40 CFR 122.62).

The final modified 2017 CGP is substantially similar to the proposed modified permit. The final modified 2017 CGP replaces several existing conditions in the original 2017 CGP and relevant fact sheet sections, but retains all other terms and conditions of the original permit unchanged. For instance, the modified 2017 CGP does not affect the eligible coverage area, the number or type of entities eligible to be covered by the permit, nor the five-year permit term of the original 2017 CGP, meaning the modified 2017 CGP will still expire on February 16, 2022. The final modification is summarized in more detail below.

### III. Summary of the Final Modification

During the public comment period for the proposed permit modification, the EPA received a total of 14 comment letters. Three industry groups, one environmental group, three states, and seven anonymous commenters submitted comments to the Agency. The majority of comments were generally supportive of the proposed modification, with some commenters suggesting further changes to the wording or phrasing of some elements of the proposed modification. The EPA considered all comments before finalizing the permit modification. The EPA's response to comments is available in the Docket (EPA-HQ-OW-2015-0828). The modified 2017 CGP contains the following finalized changes from the original 2017 CGP:

1. *Removed examples in the definition of "operator"*—The EPA removed two parenthetical examples that appeared in Part 1.1.1 of the original 2017 CGP showing examples of the type of entity that would be considered an "operator" and therefore would be eligible for coverage under the permit. The EPA has determined after further consideration that providing these examples may cause unintended confusion since there may be instances where a party technically fits the description used in the example yet would not qualify as an operator as intended by the permit. Therefore, rather than suggesting who might be considered an operator "in most cases," the EPA removed the examples from both Part 1.1.1(a) and (b) so that entities determining if they should seek permit coverage under the modified 2017 CGP can focus solely on the substantive definition of operator. See Part 1.1.1 of the final modified permit.

2. *Aligned language of three requirements with the C&D rule*—The EPA adjusted the wording of two erosion and sediment control requirements and one pollution prevention requirement in the permit to clarify their intent and to align their text with the C&D ELG at 40 CFR part 450. See Part 2.2.6 on minimizing dust; Part 2.2.11 on minimizing channel and

streambank erosion and scour in the immediate vicinity of discharge points; and Part 2.3.3(a) on storage, handling, and disposal of building products, materials, and wastes.

3. *Clarified individual operator responsibility in multiple operator arrangements—*

The EPA clarified an individual operator's legal responsibility for permit compliance in situations where there are multiple operators who divide permit responsibilities among themselves. In particular, the EPA removed references to "joint and several liability" from the original permit since they may have provided, in the Agency's view, an inaccurate explanation of what the permit compliance duties are for multiple operators who share implementation responsibilities under the permit.

In addition, the EPA clarified that, where multiple operators divide permit responsibilities among themselves, each operator remains responsible for compliance with the permit, but that they do not have to duplicate those permit-related functions if one of the other operators is appropriately implementing the relevant requirement in full compliance with the permit. The EPA received some public comments indicating that the italicized part of the following sentence proposed in the permit footnote 52 and in the fact sheet may be construed in ways that the EPA did not intend: "Regardless of whether there is a group SWPPP or multiple individual SWPPPs, each operator is responsible for compliance with the permit's terms and conditions, *notwithstanding how the SWPPP(s) may divide each operator's responsibilities.*" Given that this phrase is not imperative to the objective of the sentence, which describes that all operators have an individual responsibility to comply with the permit, the EPA agreed to remove it in the final modified permit. Additionally, the EPA added the "Operator A/B" example that was proposed in the fact sheet, which explains how operators do not have to duplicate divided responsibilities, to the permit footnote 52 to reinforce the Agency's position. The example reads, "In other words, if

Operator A relies on Operator B to satisfy its permit obligations, Operator A does not have to duplicate those permit-related functions if Operator B is implementing them for both operators to be in compliance with the permit. However, Operator A remains responsible for permit compliance if Operator B fails to implement any measures necessary for Operator A to comply with the permit.” See Part 1.1.1, footnote 1; Part 7.1, footnote 52; and Appendix A definition for “shared control”; and the accompanying fact sheet explanation for these Parts.

#### **IV. Analysis of Economic Impacts**

Due to the narrow scope of this permit modification and the focus on clarifying the intent of certain requirements rather than changing the underlying requirement itself, the EPA does not expect any change in economic impact from this permit modification. It is therefore unnecessary for the EPA to revise the economic analysis that was prepared for the original 2017 CGP. A copy of the EPA’s economic analysis, titled “Cost Impact Analysis for the 2017 Construction General Permit (CGP),” is available in the docket for this permit modification.

#### **V. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review**

The Office of Management and Budget (OMB) determined that this action is not significant under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

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

Executive Order (EO) 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 by identifying and addressing, as appropriate, 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.

Consistent with the EPA's previous determination for the original 2017 CGP, this final modification to the 2017 CGP will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because the requirements in the modified permit apply equally to all construction projects that disturb one or more acres in areas where the Agency is the permitting authority, and the erosion and sediment control provisions increase the level of environmental protection for all affected populations.

## **VII. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

This action does not have tribal implications as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes. Thus, Executive Order 13175 does not apply to this action.

In compliance with Executive Order 13175, the EPA consulted with tribal officials during the development of the original 2017 CGP to gain an understanding of and, where necessary, address any areas of the original draft permit that may affect tribal interest. In the course of this consultation, the EPA conducted several outreach activities with tribal officials which are detailed in the **Federal Register** notice for the final 2017 CGP (82 FR 6534). During the finalization of the original 2017 CGP, the EPA also completed the CWA Section 401

certification procedures with all applicable tribes where the permit applies (see Appendix B of the modified 2017 CGP).

As part of the proposal for this modification, the EPA reviewed the tribal conditions that were incorporated into the original 2017 CGP under Section 401 certifications to identify any requirements that the proposed action might affect. See Part 9 of the original 2017 CGP. Only two tribal conditions referenced a permit requirement that was the subject of the proposed modification, Part 2.2.11 (Minimize erosion of stormwater conveyance channels and their embankments ...). The EPA also completed the CWA Section 401 certification procedures with all applicable tribes where the permit applies for the final permit modification. Due to the narrow scope of the permit modification and the focus on clarifying the intent of certain requirements rather than changing the underlying requirement itself, the EPA determined that the final action will not change the interpretation or implementation of the tribal conditions referencing Part 2.2.11, and therefore any tribal impacts from this modification will be limited.

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

**Dated:** May 14, 2019.

**Deborah A. Szaro,**  
*Acting Regional Administrator, EPA Region 1.*

Dated: May 14, 2019.

Jeff Gratz,  
Deputy Director, Water Division, EPA Region 2.

Dated: May 14, 2019.

Jose C. Font,  
Acting Director, Caribbean Environmental Protection Division, EPA Region 2.

Dated: May 14, 2019.

Catharine McManus,  
Deputy Director, Water Division, EPA Region 3.

Dated: May 14, 2019.

Jeanne M. Gettle,  
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Dated: May 14, 2019.

Joan M. Tanaka,  
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Charles W. Maguire,  
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Jeffery Robichaud,  
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Daniel D. Opalski,  
Director, Water Division, EPA Region 10.

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