

Building, Room B-102, at 1301 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**

Additional information concerning the final permit, the permit's Notice of Intent (NOI), or the permit's Notice of Termination (NOT) is available on EPA's Web site at <http://www.epa.gov/npdes/stormwater/cgp.cfm> or from Thelma Murphy, Office of Ecosystem Protection, Environmental Protection Agency, 1 Congress Street, Suite 1100, Boston, MA 02114-2023; telephone: 617-918-1615; e-mail: [murphy.thelma@epa.gov](mailto:murphy.thelma@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

On July 1, 2003 (68 FR 39087), EPA published final NPDES construction general permits for large construction activity in Regions 1, 2, 3, 6, 7, 8, 9 and 10. Also on July 1, 2003 (68 FR 39087), EPA published final NPDES construction general permits for small construction activity in Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10. At the time of publication, the State Coastal Zone Management Act certification for Massachusetts had not been received, therefore the neither the small or large construction activity general permits were issued in Massachusetts. EPA Region 1 received certification from the Office of Coastal Zone Management. The Office concurred with EPA's certification that the permit as proposed is consistent with the Coastal Zone Management enforceable program policies.

Today's action reissues EPA's NPDES General Permit for Storm Water Discharges from Construction Activities for the Commonwealth of Massachusetts and Indian country in Massachusetts. The permit's terms and conditions are those set forth in the Construction General Permit reissued on July 1, 2003 (68 FR 39087) and available at <http://www.epa.gov/npdes/stormwater/cgp>. The state specific requirements for the Commonwealth of Massachusetts, except Indian country, under section 401 of the Clean Water Act are found in part 9.A.1 of the construction general permit. The Office of Coastal Zone Management did not add any additional requirements to the permit.

Additional information regarding the statutory and regulatory history of the final permit and storm water program; significant changes to the permit; and a summary of the terms and conditions of the permit are found in the July 1, 2003 **Federal Register** and are not being repeated here.

**II. Executive Order 12866**

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has exempted review of NPDES general permits under the terms of Executive Order 12866.

**III. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rule-making requirements under the Administrative Procedures 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.

Issuance of an NPDES general permit is not subject to rulemaking requirements, under APA section 553 or any other law, and is thus not subject to the RFA requirements. The APA defines two broad, mutually exclusive categories of agency action—"rules" and "orders." Its definition of "rule" encompasses "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency \* \* \*" APA section 551(4). Its definition of "order" is residual: "a final disposition \* \* \* of an agency in a matter other than rule making but including licensing." APA section 551(6) (emphasis added). The APA defines "license" to "include \* \* \* an agency permit \* \* \*" APA section 551(8). The APA thus categorizes a

permit as an order, which by the APA's definition is not a rule. Section 553 of the APA establishes "rule making" requirements. The APA defines "rule making" as "the agency process for formulating, amending, or repealing a rule." APA section 551(5). By its terms, then, section 553 applies only to "rules" and not also to "orders," which include permits.

**IV. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their "regulatory actions" on State, local, and tribal governments and the private sector. UMRA uses the term "regulatory actions" to refer to regulations. (See, e.g., UMRA section 201, "Each agency shall \* \* \* assess the effects of Federal regulatory actions \* \* \* (other than to the extent that such regulations incorporate requirements specifically set forth in law)" (emphasis added)). UMRA section 102 defines "regulation" by reference to 2 U.S.C. 658 which in turn defines "regulation" and "rule" by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines "rule" as "any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of [the Administrative Procedure Act (APA)], or any other law. \* \* \*" As discussed in the RFA section of this notice, NPDES general permits are not "rules" under the APA and thus not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the CWA. While EPA publishes a notice to solicit public comment on draft general permits, it does so pursuant to the CWA section 402(a) requirement to provide "an opportunity for a hearing." Thus, NPDES general permits are not "rules" for RFA or UMRA purposes.

**V. Paperwork Reduction Act**

EPA has reviewed the requirements imposed on regulated facilities resulting from the final construction general permit under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* The information collection requirements of the construction general permit for large construction activities have already been approved by the Office of Management and Budget (OMB) (OMB Control No. 2040-0188) in previous submissions made for the NPDES permit program under the provisions of the Clean Water Act. Information collection requirements of the construction general