

ENVIRONMENTAL PROTECTION AGENCY

[FRL-[8-039]

NOTICE OF AVAILABILITY OF FINAL NPDES GENERAL PERMITS MAG07000 AND NHG07000 FOR DISCHARGES FROM DEWATERING ACTIVITIES IN THE COMMONWEALTH OF MASSACHUSETTS (INCLUDING BOTH COMMONWEALTH AND INDIAN COUNTRY LANDS) AND THE STATE OF NEW HAMPSHIRE: THE DEWATERING GENERAL PERMIT (DGP)

AGENCY: ENVIRONMENTAL PROTECTION AGENCY (EPA)

ACTION: NOTICE OF AVAILABILITY OF FINAL NPDES GENERAL PERMITS MAG07000 AND NHG07000

**SUMMARY:** The Director of the Office of Ecosystem Protection, EPA-New England, is providing a notice of availability of the final National Pollutant Discharge Elimination System (NPDES) general permits for dewatering activity discharges to certain waters of the Commonwealth of Massachusetts (including both Commonwealth and Indian country lands) and the State of New Hampshire. These General Permits replace the Construction Dewatering General Permits, which expired on September 23, 2007. The notice of availability of the draft NPDES general permits for dewatering activity discharges was published in the Federal Register on July 21, 2008 and the public notice period ran from July 22, 2008 to August 21, 2008. In addition to comments on the draft general permits, EPA also requested comments on the cost associated with a limit for total residual chlorine (TRC) for discharges containing potable water. No comments were received during the public notice period regarding either the draft permits or the cost associated with a TRC limit for discharges containing potable water.

The final General Permits establish Notice of Intent (NOI) requirements, effluent limitations, standards, prohibitions, and management practices for facilities with construction dewatering of groundwater intrusion and/or storm water accumulation from

sites less than one acre and short-term and long-term dewatering of foundation sumps.

Based on inter-governmental agency review, the following changes have been made from the draft permit:

- Appendix III was updated to include the most recent information regarding federally-listed threatened and endangered species and the process by which permittees determine if the Endangered Species Act criteria are met.
- Coverage for and references to discharges originating from flushing of potable water lines and pump testing of water wells were removed from the General Permit. Facilities with these types of discharges retain the ability to apply for coverage under an individual permit.

Owners and/or operators of facilities with dewatering discharges, including those currently authorized to discharge under the expired General Permits, will be required to submit an NOI to be covered by the General Permit to both EPA-New England and the appropriate state agency. After EPA and the State have reviewed the NOI, the facility will receive a written notification from EPA of permit coverage and authorization to discharge under the General Permit. The eligibility requirements for coverage under the general permits are discussed in detail under Part 3 of the permit. The reader is strongly urged to go to that section to determine eligibility. An individual permit may be necessary if the discharger cannot meet the terms and conditions or eligibility requirements in the permit.

**DATES:** The general permits shall be effective on the date of signature and will expire at midnight, five (5) years from the last day of the month preceding the effective date.

**ADDRESSES:** The required notification information to obtain permit coverage is provided

in the general permits. This information shall be submitted to both EPA and the appropriate state. Notification information may be sent via USPS or email to EPA at EPA-Region 1, Office of Ecosystem Protection, CIP, 1 Congress Street, Suite 1100, Boston, Massachusetts 02114-2023 or email address

GeneralPermit.Dewatering@epa.gov. Notification information shall be submitted to the appropriate State agency at the addresses listed in Appendix V of the General Permits.

**FURTHER INFORMATION CONTACT:** Additional information concerning the final General Permits may be obtained between the hours of 9 a.m. and 5 p.m. Monday through Friday, excluding holidays, from Sara Green at [Green.Sara@EPA.GOV](mailto:Green.Sara@EPA.GOV) or (617) 918-1574. The general permits may be viewed over the Internet at the EPA web site <http://www.epa.gov/region1/npdes/dewatering.html>. To obtain a paper copy of the general permits, please contact Ms. Green using the contact information provided above.

A reasonable fee may be charged for copying requests.

**SUPPLEMENTARY INFORMATION:**

**Regulatory Flexibility Analysis**

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.

The legal question of whether a general permit (as opposed to an individual permit) qualifies as a “rule” or as an “adjudication” under the Administrative Procedure

Act (APA) has been the subject of periodic litigation. In a recent case, the court held that the Clean Water Act (CWA) Section 404 Nationwide general permit before the court did qualify as a “rule” and therefore that the issuance of the general permit needed to comply with the applicable legal requirements for the issuance of a “rule.” *National Ass’n of Home Builders v. US Army Corps of Engineers*, 417 F.3d 1272, 1284-85 (DC Cir.2005) (Army Corps general permits under Section 404 of the Clean Water Act are rules under the APA and the Regulatory Flexibility Act; “Each NWP [nationwide permit] easily fits within the APA’s definition of a ‘rule.’ . . . As such, each NWP constitutes a rule . . .”).

As EPA stated in 1998, “the Agency recognizes that the question of the applicability of the APA, and thus the RFA, to the issuance of a general permit is a difficult one, given the fact that a large number of dischargers may choose to use the general permit.” 63 FR 36489, 36497 (July 6, 1998). At that time, EPA “reviewed its previous NPDES general permitting actions and related statements in the Federal Register or elsewhere,” and stated that “[t]his review suggests that the Agency has generally treated NPDES general permits effectively as rules, though at times it has given contrary indications as to whether these actions are rules or permits.” *Id.* at 36496. Based on EPA’s further legal analysis of the issue, the Agency “concluded, as set forth in the proposal, that NPDES general permits are permits [i.e., adjudications] under the APA and thus not subject to APA rulemaking requirements or the RFA.” *Id.* Accordingly, the Agency stated that “the APA’s rulemaking requirements are inapplicable to issuance of such permits,” and thus “NPDES permitting is not subject to the requirement to publish a general notice of proposed rulemaking under the APA or any other law . . . [and] it is not subject to the RFA.” *Id.* at 36497.

However, the Agency went on to explain that, even though EPA had concluded that it was not legally required to do so, the Agency would voluntarily perform the RFA's small-entity impact analysis. *Id.* EPA explained the strong public interest in the Agency following the RFA's requirements on a voluntary basis: "[The notice and comment] process also provides an opportunity for EPA to consider the potential impact of general permit terms on small entities and how to craft the permit to avoid any undue burden on small entities." *Id.* Accordingly, with respect to the NPDES permit that EPA was addressing in that Federal Register notice, EPA stated that "the Agency has considered and addressed the potential impact of the general permit on small entities in a manner that would meet the requirements of the RFA if it applied." *Id.*

Subsequent to EPA's conclusion in 1998 that general permits are adjudications, rather than rules, as noted above, the DC Circuit recently held that Nationwide general permits under section 404 are "rules" rather than "adjudications." Thus, this legal question remains "a difficult one" (*supra*). However, EPA continues to believe that there is a strong public policy interest in EPA applying the RFA's framework and requirements to the Agency's evaluation and consideration of the nature and extent of any economic impacts that a CWA general permit could have on small entities (e.g., small businesses). In this regard, EPA believes that the Agency's evaluation of the potential economic impact that a general permit would have on small entities, consistent with the RFA framework discussed below, is relevant to, and an essential component of, the Agency's assessment of whether a CWA general permit would place requirements on dischargers that are appropriate and reasonable. Furthermore, EPA believes that the RFA's framework and requirements provide the Agency with the best approach for the Agency's

evaluation of the economic impact of general permits on small entities. While using the RFA framework to inform its assessment of whether permit requirements are appropriate and reasonable, EPA will also continue to ensure that all permits satisfy the requirements of the Clean Water Act. Accordingly, EPA has committed to operating in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency has committed that it will apply the RFA in its issuance of general permits as if those permits do qualify as "rules" that are subject to the RFA).

EPA anticipates that for most general permits the Agency will be able to conclude that there is not a significant economic impact on a substantial number of small entities. In such cases, the requirements of the RFA framework are fulfilled by including a statement to this effect in the permit fact sheet, along with a statement providing the factual basis for the conclusion. A quantitative analysis of impacts would only be required for permits that may affect a substantial number of small entities, consistent with EPA guidance regarding RFA certification<sup>1</sup>.

Consistent with the above discussion, EPA has concluded that the issuance of the 2008 DGP would not affect a substantial number of small entities. An estimated 36 construction projects per year were authorized under the 2002 General Permits, a substantial number of which were not operated by small entities. The 2008 DGP includes expanded coverage for additional types of discharges; however, these discharges are

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<sup>1</sup> EPA's current guidance, entitled Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement and Fairness Act, was issued in November 2006 and is available on EPA's website: <http://www.epa.gov/sbrefa/documents/rfafinalguidance06.pdf>. After considering the Guidance and the purpose of CWA general permits, EPA concludes that general permits affecting less than 100 small entities do not have a significant economic impact on a substantial number of small entities.

temporary in nature. At any one time, fewer than 100 small entities are expected to be discharging and incurring costs. In addition, requirements in the 2008 DGP remain substantially similar to those in the 2002 General Permit, except for the addition of total residual chlorine (TRC) limits for discharges from municipal sources. Therefore, EPA has concluded that the issuance of the 2008 DGP is unlikely to have an adverse economic impact on small entities.

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Date

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Robert W. Varney, Regional Administrator