

ATTACHMENTS

Senate have passed strong reauthorization bills in the past. The conference report before you today is a worthy synthesis of not only H.R. 8 and S. 1128, but also H.R. 3282 and other previous clean water reauthorization bills. It represents a truly workable compromise that will add needed reforms to our Nation's Clean Water Program.

Let me first congratulate the many people who made such valuable contributions throughout this lengthy and arduous process. I want to thank the gentleman from New Jersey, Mr. HOWARD, who serves so ably as the chairman of the Committee on Public Works and Transportation, for his leadership and good judgment on this bill. I also want to congratulate the chairman and ranking minority member of the Water Resources Subcommittee from New Jersey, Mr. ROE, and the gentleman from Minnesota, Mr. STANGELAND, for their tireless efforts, their spirit of cooperation and especially for their comprehensive understanding of the issues. And of course, I would be remiss if I did not thank the able leadership of the Environment and Public Works Committee in the other body for its guidance and cooperation.

By working together, we have forged a truly landmark piece of legislation that deserves the support of Congress and the administration. S. 1128 makes far-reaching changes to the Clean Water Act's Regulatory Program. It also makes some "fine-tuning" adjustments to reflect years of testimony from the administrative agencies, the regulated community, and citizens groups. Perhaps most importantly, the bill addresses essential funding needs of State and local governments, but does so in a fiscally responsible manner. In short, Mr. Speaker, S. 1128 greatly increases the protection of the environment and public health, while balancing the need to recognize other important goals.

Last Congress' Clean Water Reauthorization Bill, H.R. 3282, and this year's bill, H.R. 8, passed overwhelmingly. S. 1128, as amended in conference, incorporates much of H.R. 8 and H.R. 3282. I believe the resulting compromise is the strongest, most workable clean water legislation yet. The conference report's authorization levels are significantly lower than those provided for in previous House bills. Despite these reductions, S. 1128 will not result in any significant cutbacks for communities. The conference report will continue funding of Clean Water Act programs which are not less than the current funding.

S. 1128 will also establish new initiatives in a number of areas to assist the Nation in achieving the act's goals of reducing or eliminating the discharge of pollutants into our Nation's rivers, lakes and streams. Specifically, the bill establishes a new, expanded program for control of nonpoint source pollution and a new grant program to assist

States in setting up revolving funds to finance future capital improvements by municipalities. This latter initiative will provide a more flexible system of funding and will ultimately replace the Construction Grant Program. State revolving funds will be available for use by localities to help pay for improvements needed to achieve water quality objectives without the myriad of Federal procedures and requirements applicable under the Construction Grant Program.

Mr. Speaker, allow me to highlight some of the regulatory amendments and construction grant amendments of the bill.

REGULATORY AMENDMENTS

One of S. 1128's most valuable contributions is its new and comprehensive nonpoint source pollution control program. The Clean Water Act, as written in 1972 and amended in 1977 and 1981, focused on point source discharges of pollution. Over the years, however, new information has indicated that nonpoint sources contribute up to 50 percent of the water pollution in some States. Thus, the conferees establish a new national policy to develop and implement programs for controlling nonpoint sources or pollution. New section 319 of the Clean Water Act will provide for State assessment reports, management programs, optional interstate management conferences, and needed Federal funding. With this new emphasis on nonpoint sources of pollution, we should be able to wage a more comprehensive and complete assault on water pollution throughout the Nation.

A related issue involves stormwater discharge permits. The conference report retains important provisions of the House bill on agricultural discharges and expands upon municipal stormwater provisions addressed inadequately by the House- and Senate-passed bills. The conferees retained section 37 of the House bill, specifically excluding agricultural stormwater discharges from the definition of point source. In addition, the conferees have extensively revised the stormwater permit provisions for municipalities, recognizing the disastrous consequences that could result if provisions in the House- and Senate-passed bills remained unchanged. The new language will properly reduce the universe of permits required for stormwater from millions to thousands without reducing the protection of the environment. We have established a mechanism that will require permits only where necessary—rather than in every instance. Without these changes, local, State, and Federal officials would be inundated with an enormous permitting workload even though most of the discharges would not have significant environmental impacts.

In the same section of the bill, the conferees have addressed the permitting requirements for industrial stormwater runoff. It is important, however,

to clarify that a discharge is "associated with industrial activity" if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharge which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

The conference report also contains an important provision clarifying the regulatory treatment of stormwater runoff from oil, gas and mining operations. Section 402 of the Clean Water Act is amended to prohibit the administrator from requiring permits for stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities except when the runoff is contaminated by contact with the overburden, raw material, or various waste products. With this limitation on the permitting requirements for such stormwater runoff, important oil, gas and mining operations will be able to continue without unnecessary paperwork restrictions, while protection of the environment remains at a premium.

S. 1128 also addresses criminal, civil and administrative penalties for violations under the act. EPA may pursue a violation of the specified statutory provisions by assessing a class I penalty, assessing a class II penalty, or filing an action in court and requesting that the court assess a penalty under section 309(d). In class I actions, EPA may assess a penalty of no more than \$10,000 per violation, up to a maximum penalty of \$25,000. An informal hearing must be provided upon request of the discharger. In class II actions, EPA may assess a penalty of no more than \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. The discharger has the right to a formal, Administrative Procedure Act hearing.

Under these penalty provision, multiple violations which stem from a single cause should be considered as one "violation" for penalty assessment purposes.

The conference report includes important provisions on clean lakes, research and management of pollution in the Great Lakes, and estuary management conferences. In amending the act's section 314 clean lakes authority, S. 1128 provides for increased environmental protection with the addition of a new demonstration program. I am particularly pleased to see that, through ARLAN STANGELAND's able leadership, Sauk Lake in Minnesota is included as one of the projects in this important \$40 million demonstration program. The bill also authorizes EPA to conduct demonstration projects related to restoring the biological integrity of acidified lakes and watersheds through liming. In addition, S. 1128 establishes a Great Lakes program office in EPA and a Great Lakes research

office in NOAA to develop and implement environmental programs with special emphasis on the control of toxic pollutants. The bill also authorizes EPA to convene estuary management conferences to solve water pollution problems in estuaries throughout the country.

S. 1128 makes numerous changes to improve dramatically the removal and control of toxic pollutants. Toxics present one of the greatest dangers to this Nation's health and welfare. The conference report addresses this increasing concern in numerous areas. For example, EPA is directed to identify toxic pollutants which may be present in sewage sludge and to promulgate regulations and impose conditions in section 402 permits to protect public health and the environment. S. 1128 also contains important provisions relating to water pollution control levels to be achieved after the rulemaking authority pursuant to section 501(A) of the act. States must submit to EPA lists of navigable waters for which applicable water quality standards are not expected to be achieved after implementation of the best available technology and after pretreatment requirements and approaching statutory deadlines required to restrict itself in the regulation process to a representative sampling of plants. It is entirely possible that the resulting regulations will provide additional control strategies to reduce the discharge of toxic pollutants. In addition, EPA must develop methods for establishing and measuring water quality criteria for toxic pollutants.

The conference report allows case-by-case modifications of BAT limits for pre-existing discharge from coal-remining areas. This is consistent with the concern of the administration and the needs of the coal mining industries. In addition, the amendment ensures careful analysis of environmental consequences by requiring an applicant to demonstrate that the coal remaining operation would result in the potential for improved water quality. The conference specifically agreed to retain the phrase "potential for" so that applicants would not face the unreasonable burden of showing actual improvement in every instance.

Another important regulatory issue involves EPA's variance for fundamen-tally different factors (PDF's). Under current law, a discharger can apply for PDF variance, the conference is re-quiring to limit severely its usefulness or applicability. Thus, the conference have agreed to many of the provisions in the House bill rather than those in the Senate bill. Under new section 301(n), EPA may issue fundamen-tally different factors (PDF) variances from national effluent limitations guide-lines or categorical pretreatment standards. The PDF application must be based on information which the applicant submitted, or did not have a reasonable opportunity to submit, during the relevant rulemaking. An applicant could satisfy the "did not have a reasonable opportunity" test in the following situations:

While it limits the availability of the PDF modification in some instances, the conference report also recognizes the tremendous importance of the mechanism and provides further direction to EPA.

First, the discharger knew of the variance process to the Clean Water Act's Regulatory Program. For years, Federal courts have articulated many reasons for retaining PDF variances. By establishing variance from nationally applicable effluent limitations guidelines and standards, the PDF modification provides necessary flexibility to nationwide standards and rulemaking, but could not submit certain data showing fundamental differences because those data could not be generated until the final rules were issued and tests could be run to assess the expected performance of the facility in complying with the final numerical limits.

Third, The discharger did not know of the rulemaking, due to lack of actual or constructive notice.

I do have some concerns about other regulatory provisions in title I. In certain respects, S. 1128 fails to impose realistic deadlines and requirements or to provide the necessary amount of discretion and flexibility to EPA. As legislators, we must always strive to write laws that are workable and achievable. I am afraid that we have not done this consistently throughout S. 1128.

The sheer number of point sources potentially subject to regulation and the rapidly changing technology and the approach to restrict itself in the regulation process to a representative sampling of plants. It is entirely possible that the resulting regulations will provide additional control strategies to reduce the discharge of toxic pollutants. In addition, EPA must develop methods for establishing and measuring water quality criteria for toxic pollutants.

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should expect to revisit the whole issue again soon.

The conferees agreed on a new compliance date for achievement of effluent limitations guidelines: As expeditiously as practicable, but no later than 3 years after promulgation of the guidelines, but in no event later than March 31, 1989. During the discussion of this issue in the conference, it was noted that this deadline could pose a significant problem for some plants in the organic chemicals, plastics and synthetic fibers [OCPSF] industry. Our hearings clearly demonstrate that at least 3 years from promulgation is needed for most plants to comply. The guidelines for the OCPSF industry are currently required, by court order to be issued by December 1986. If the guidelines are issued in December, OCPSF plants would have only 2 years and 3 months to obtain permits and design, construct, install, and operate the equipment necessary to meet the applicable limitations. It therefore appears that some OCPSF plants may fail to comply with their guidelines by the time required, not through any fault of their own, but simply because their guidelines were not issued early enough. Congress and EPA are both aware of their problem. Delay in promulgation of guidelines may make it impossible for some plants and industries to comply with the March 31, 1989, deadline. We agreed to address this problem in the conference report.

EPA told us that if presented with a compliance problem due to delay in guidelines promulgation, they would issue an administrative order to establish a reasonable compliance date for the discharger beyond March 31, 1989. The order would not assess a penalty for the discharger's failure to meet the statutory compliance date. EPA stated that it currently issues such orders to dischargers who are unable, because of delays in guidelines promulgation or permit issuance, to meet the July 1, 1984 deadline in existing law. EPA's statement that it would continue to issue these orders was the major reason for our not seeking to reopen and extend the March 31, 1989, outside compliance date. Issuance of such orders by EPA provides a useful method for remedying inequities suffered by specific plants as a result of the delay in guidelines promulgation. When a plant is issued this type of order, the plant should not thereafter be subject to suit—by EPA, a State, or a citizen—on the basis of its failure to adhere to the statutory compliance date. It is our intent that noncompliance which is not the fault of the plant should not be penalized in any way, whether administratively, legally, or in the eyes of the public.

On another issue, the antibacksliding provision included in the conference report, while designed to ensure that reasonable further progress is made in meeting the goals of the act, is not designed to prohibit industrial

growth, nor to penalize those who have production-based permits.

Technology-based limits are often based on the level of production at a facility—pounds per ton. Permittees will continue to be able to increase their production or add to or change their manufacturing processes. They would, of course, still be required to maintain the effluent limitation guidelines—pounds per ton—issued by EPA for the appropriate industrial categories or subcategories as well as meet all applicable water quality standards.

CONSTRUCTION GRANT AMENDMENTS

The funding levels in S. 1128 are both environmentally responsive and fiscally responsible. There is no unwarranted drain on the Federal Treasury in this bill. The level of \$18 billion over 9 years for the current Sewer Grant Program and the new State revolving loan fund represents a reasonable compromise and a worthy investment. The wastewater treatment needs of this Nation are steadily increasing. The creative financing in S. 1128 will address these needs, but at the same time initiate the final phase of the transition to state and local self-sufficiency as soon as reasonably possible. Mr. Speaker, this bill signals a movement from the current level of Federal financial involvement to a program focused on increased State and local self-sufficiency; it does not, however, abandon the crucial Federal-State-local partnership that has developed over the years.

One of S. 1128's most innovative proposals is its Revolving Fund Program through which a State will be able to provide financing assistance to its local subdivisions and, upon repayment, be able to use that money again to construct needed pollution control facilities. These funds can be used for loans, guarantees, interest subsidies, and other nongrant purposes. Under this new authority, many more communities will receive funding for construction of needed wastewater treatment facilities. Countless communities have waited in vain for Federal funding, because they were too low on State priority lists. This new Revolving Fund Program will help those communities meet their requirements under the act.

The conference report also authorizes critically needed projects for improving publicly owned treatment facilities throughout the Nation. For example, the Administrator is directed to grant \$250,000 from funds allotted under the act to Taylor Mill, KY for the repair and reconstruction of its publicly owned treatment works. This is an extremely important project, so I am particularly delighted to see it receive proper attention from Congress. S. 1128 similarly provides necessary funding for water quality improvement projects at other municipalities. In addition, the conference report increases the mandatory set-aside for rural States by establishing a floor of 4 percent—with a ceiling of 7½ percent.

With all of these provisions, the entire Nation will stand to benefit.

Mr. Speaker, S. 1128 provides vital funding to States and municipalities and makes farsighted changes to the Clean Water Act's regulatory program. It coordinates governmental and private actions in pursuit of one common goal: Making our waters fishable and swimmable. The conference report addresses the needs of municipalities and State governments, but at the same time recognizes the importance of increasing non-Federal self-sufficiency and decreasing Federal expenditures. In spite of today's budgetary constraints, S. 1128 represents a worthy investment in our Nation's water quality. This bill embodies an approach to environmental protection which is both sensible and environmentally sensitive. S. 1128 is one of the most important environmental laws of the 99th Congress and perhaps of this decade. I urge my colleagues and the administration to support it fully.

Finally, Mr. Speaker, I would be remiss if I did not take this opportunity to thank all of the staff who worked so tirelessly over the years toward passage of clean water legislation. In particular, I would like to thank—and congratulate—John Doyle, Gabe Rozsa, Ben Grumbles, Kathy Guilfooy, Errol Tyler, Ken Kopocis, Randy Deltz, and Charlotte Miles of the Water Resources Subcommittee and Dave Mendelsohn and Bob Bergman of legislative counsel. I would also like to thank the Senate staff, including Bob Hurley, Phil Cummings, Jeff Peterson, Jimmy Powell, Ron Outen, and Steve Shimberg. All of these people worked practically nonstop for months, dedicating countless nights and weekends to make this moment happen. Some individuals endured this lengthy process for over 4 years. Because of their efforts, we have a bill that everyone can be proud of.

Mr. ROE. Mr. Speaker, I yield 3 minutes to the distinguished gentleman from West Virginia [Mr. RAHALL].

(Mr. RAHALL asked and was given permission to revise and extend his remarks.)

Mr. RAHALL. Mr. Speaker, I join in the overwhelming support for this bill, the Clean Water Act, and urge my colleagues to accept this conference report. I begin by joining in the commendation for the distinguished chairman of the full committee, my committee chairman, the gentleman from New Jersey [Mr. HOWARD], the ranking minority member, the gentleman from Kentucky [Mr. SNYDER], my subcommittee chairman, whose tenacity has made it possible for this legislation to come to the floor today, and the gentleman from New Jersey [Mr. ROE], and to the ranking minority member of the subcommittee, the gentleman from Minnesota [Mr. STANGELAND], I commend for his diligent efforts on this legislation.

water quality in a vast number of these abandoned sites.

It wasn't too long ago we were reading press accounts about filthy, toxic conditions prevalent in many of our major rivers and lakes. Think back for a moment when the Hudson, Monongahela, and Ohio Rivers were void of native wildlife. Lake Erie was considered practically dead. And then look at them today. All are enjoying a renaissance; fish are returning in larger numbers; certain species are beginning to reestablish spawning grounds in areas once considered chemical cesspools; and many related forms of native wildlife are beginning to flourish again.

We were able to achieve these gains through aggressive Federal funding for constructing wastewater treatment plants, and through the aggressive regulation of toxic discharges. The bill before us today seeks to improve upon these achievements by imposing more stringent standards on the amounts and types of pollutants discharged into our waters.

At the same time, this legislation recognizes the budgetary realities now facing the Federal Government. It does not attempt to increase funding for the Wastewater Treatment Construction Grants Program; rather, it phases out the grant program and instead establishes a modest revolving loan fund to be administered by the States.

Some administration officials have already gone on record in sharp disagreement with this legislation, arguing that the construction grants funding is too high. In the bill, we've authorized \$18 billion through 1990. I'd like to remind Members that a needs-assessment survey undertaken in 1984 by the EPA estimated a total investment of \$101.7 billion was required of Federal, State and local governments, and private investment, through the year 2000 to meet current and projected demands. In light of this assessment, I don't believe you can characterize S. 1128 as a "budget-buster."

You must pay a price to clean up discharges, and I believe the bill before us meets this test responsibly.

Mr. Speaker, this bill tightens a number of regulatory guidelines; it authorizes a Federal grant program to clean up lakes; it establishes a storm-water discharge program designed to address a major source of pollution; and it stiffens fines and penalties for polluters.

We need this legislation. It is necessary as well as responsible and I urge all Members to support it.

Mr. ROE. Mr. Speaker, I yield 4 minutes to the distinguished gentleman from Georgia [Mr. ROWLAND].

(Mr. ROWLAND of Georgia asked and was given permission to revise and extend his remarks.)

Mr. ROWLAND of Georgia. Mr. Speaker, I rise in strong support of the conference agreement on clean water and also to pay tribute to the leader-

ship of the gentleman from New Jersey [Mr. ROE], chairman of the Water Resources Subcommittee.

I have served on the Subcommittee on Water Resources since joining the Congress in 1983 and witnessed the delicate balance the chairman has struck with its members over the years. I was keenly aware of his leadership ability, and especially the gentleman is truly to be commended for his fight to retain much of the House language during negotiations, particularly the House allocation formula for distribution of construction grants funds.

I also want to commend the chairman of the full committee, the gentleman from New Jersey [Mr. ROE], and the ranking minority member of the full committee, the gentleman from Kentucky [Mr. SNYDER], and especially the ranking minority member of the subcommittee, the gentleman from Minnesota [Mr. STANGELAND], for the hard work that they did, and also to commend the staff on both sides.

The conference agreement, which includes a provision exempting certain storm water runoff from the NPDES permitting process takes a giant step toward reducing the immense regulatory burden being proposed by the EPA. As a result, the cost to local governments for complying with the act will be restrained. Under current law, municipalities would be required to obtain permits for each of the millions of storm water discharge points across the country at a cost which would be almost impossible to meet per permit application. It does not take a whiz at math to realize that our cities and towns were facing massive capital outlays; the cost could have easily exceeded \$8.5 billion in expenditures for compliance with the proposed EPA regulations from storm water discharge.

Other storm water discharges are exempted from permits unless they fall into one of five categories. One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include those from parking lots and administrative areas and employee buildings.

At the same time, the agreement will strengthen the act through tighter controls and enforcement mechanisms, thus insuring that all of our national waters will ultimately be free of pollution and remain that way for future generations.

Mr. Speaker, I hope our colleagues will support the conference agreement which is a well-thought-out and hard-fought agreement that does justice to the environment and reaffirm the Congress' ability to accomplish the objectives for which it exists; to serve those who have the confidence to trust us with their welfare.

Mr. Speaker, I want to engage the chairman of the subcommittee, the gentleman from New Jersey [Mr. ROE] in a short colloquy at this point concerning the provisions for a study in the storm water runoff section.

May I ask the chairman, as I understand it, this study would only require the EPA to carry it out in areas that are not permitted. I would like for it to be understood that this will not preclude the EPA and the States and it does not preclude them in the law from carrying out the studies in other areas if they so desire.

Mr. Speaker, I yield to the gentleman from New Jersey.

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Mr. ROE. As the gentleman knows from his extraordinary work on this legislation, which I applaud and appreciate, the intent of the conferees and the intent of the committee is that they would have wider latitude to do their studying, as the gentleman has suggested.

Mr. ROWLAND of Georgia. I certainly appreciate that, and again I appreciate the hard work that the gentleman has done on this legislation.

Mr. STANGELAND. Mr. Speaker, I yield 4 minutes to the gentleman from California [Mr. PACKARD].

(Mr. PACKARD asked and was given permission to revise and extend his remarks.)

Mr. PACKARD. Mr. Speaker, I rise in support of S. 1128, the Clean Water Reauthorization Act. I would like to commend the gentleman from New Jersey [Mr. ROE], and the gentleman from Minnesota [Mr. STANGELAND], the ranking minority member, as well as the gentleman from New Jersey [Mr. HOWARD], and the gentleman from Kentucky [Mr. SNYDER] for their leadership on this legislation. They and the committee staff have worked long and hard to bring this legislation to a successful conclusion. All should be commended for their diligence and perseverance.

This bill is of great importance to the citizens of San Diego County, CA. In particular, it addresses a longstanding problem involving Tijuana sewage. For some time, the city and county of San Diego have been plagued with raw sewage emanating from Tijuana, Mexico. This bill authorizes defensive treatment works to address this problem.

In addition, this legislation authorizes additional treatment works to take care of this problem if they are needed, particularly if the Mexican's construct their stage II Alamar Plant. If the stage II Alamar Plant is built by the Mexican's, this bill provides authority to build additional treatment works on the United States side of the border. A number of alternatives have been suggested such as an inland plant land outfall or a deep ocean outfall. One or both if these alternatives may be constructed if the Administrator

date of enactment would ordinarily be subject to enforcement actions only if permit applications for such discharges are not filed within 3 years after enactment of the amendments.

The bill also contains an important provision clarifying the regulatory treatment of stormwater runoff from oil, gas, and mining operations. Section 402 of the Clean Water Act is amended to prohibit the Administrator from requiring permits for stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities except when the runoff is contaminated by contact with the overburden, raw material, or various waste products. With this limitation on the permitting requirements for such stormwater runoff, important oil, gas, and mining operations will be able to continue without unnecessary paperwork restrictions, while protection of the environment remains at a premium.

The bill includes important provisions on clean lakes, research and management of pollution in the Great Lakes, and estuary management conferences. In amending the act's section 314 clean lakes authority, H.R. 1 provides for increased environmental protection with the addition of a new demonstration program. I am particularly pleased to see that Beaver Lake in Arkansas is included as one of the projects in this important \$40 million demonstration program. The bill also authorizes EPA to conduct demonstration projects related to restoring the biological integrity of acidified lakes and watersheds through liming. In addition, H.R. 1 establishes a Great Lakes Program Office in EPA and a Great Lakes Research Office in NOAA to develop and implement environmental programs with special emphasis on the control of toxic pollutants. The bill also authorizes EPA to convene estuary management conferences to solve water pollution problems in estuaries throughout the country.

H.R. 1 makes numerous changes to improve dramatically the removal and control of toxic pollutants. Toxics present one of the greatest dangers to this Nation's health and welfare. The conference report addresses this increasing concern in numerous areas. For example, EPA is directed to identify toxic pollutants which may be present in sewage sludge and to promulgate regulations and impose conditions in section 402 permits to protect public health and the environment. H.R. 1 also contains important provisions relating to water pollution control levels to be achieved after the act's technology-based BPT/BCT/BAT standards have been met. States must submit to EPA lists of navigable waters for which applicable water quality standards are not expected to be achieved after implementation of the best available technology and after pretreatment requirements and new source performance standards are

met. States must also propose individual control strategies to reduce the discharge of toxic pollutants. In addition, EPA must develop methods for establishing and measuring water quality criteria for toxic pollutants.

The bill allows case-by-case modifications of BAT limits for preexisting discharges from coal remining areas. This is consistent with the concern of the administration and the needs of the coal mining industries. In addition, the amendment ensures careful analysis of environmental concerns by requiring an applicant to demonstrate that the coal remining operation would result in the potential for improved water quality. The conferees specifically agreed to retain the phrase "potential for" so that applicants would not face the unreasonable burden of showing actual improvement in every instance.

Another important regulatory issue involves EPA's variance for fundamentally different factors [FDF's]. Under current law, a discharger can apply for and receive modifications from otherwise applicable effluent guidelines upon demonstrating that his plant is fundamentally different from the plants which EPA based its effluent guidelines. The Supreme Court recently ratified the FDF variance process in *Chemical Manufacturers Assoc. v. National Resources Defense Council, Inc.*, — U.S.—; 105 Sup. Ct. 1102; (1985). Today, Congress gives its full support for this administratively created FDF mechanism and provides further direction to EPA.

While it limits the availability of the FDF modification in some instances, the bill also recognizes the tremendous importance of the variance process to the Clean Water Act's regulatory program. For years, Federal courts have articulated many reasons for retaining FDF variances. By establishing variances from nationally applicable effluent limitations guidelines and standards, the FDF modification provides necessary flexibility to nationwide standards and allows necessary challenges to regulations in a nonrulemaking forum. Courts around the country have upheld nationally applicable effluent limits specifically because of EPA's FDF variance, which provided a needed "safety valve." See for example *American Frozen Food Institute v. Train* 539 F. 2d 107 (D.C. Cir., 1976) and *Natural Resources Defense Council, Inc. v. EPA*, 537 F. 2d 642 (2d Cir., 1976).

In *NRDC versus EPA*, the court held that the establishment of an FDF variance was a valid exercise of EPA's rulemaking authority pursuant to section 501(A) of the act. The court stated that, in the context of the Clean Water Act, the variance was particularly appropriate:

The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required the EPA to restrict itself in the regulation promulgation process to a representative

sampling of plants. It is entirely possible that the resulting regulations will prove ill-suited to some of the unsampled individual plants to which they will be applied in the permit process. Unless the variance clause is established, there is no guarantee that such a defect could be effectively remedied if it occurred. Review of the regulations pursuant to section 509 of the act is not an acceptable substitute. Since the act authorizes informal rulemaking, review of the regulations will tend to be narrowly confined. The petitioner's recommendation that the rulemaking procedure be reopened at the permit-granting stage is unnecessarily cumbersome.— 537 F. 2d at 647.

Finally, the court warned that "Not all of the thousands of plants in operation could be expected to fit into prefabricated molds or templates. By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of continuing the broader regulations in light of the specific type of plant applying for the permit. Without variance flexibility, the program might well founder on the rocks of illegality." 537 F. 2d at 647.

Recognizing the importance of an FDF variance, the conferees last year refused to limit severely its usefulness or applicability. Thus, the conferees agreed to many of the provisions in the House bill rather than those in the Senate bill. Under new section 301(n), EPA may issue fundamentally different factors [FDF] variances from national effluent limitations guidelines or categorical pretreatment standards. The FDF application must be based on information which the applicant submitted, or did not have a reasonable opportunity to submit, during the relevant rulemaking. An applicant would satisfy the "did not have a reasonable opportunity to submit" test in the following situations:

First, the discharger knew of the rulemaking, but had no reason to know until the final rule was issued that certain data would be relevant to the specific nature of the final rules—that is, the subcategorization as well as the exact numerical limits—as they apply to his facility;

Second, the discharger knew of the rulemaking, but could not submit certain data showing fundamental differences because those data could not be generated until the final rules were issued and tests could be run to assess the expected performance of the facility in complying with the final numerical limits; and

Third, the discharger did not know of the rulemaking, due to lack of actual or constructive notice.

I am pleased that the conferees deleted provisions in each bill related to savings clauses and other statutes. As a result, the Water Quality Act of 1987 does not in any way affect the well-established rulings of Milwaukee, I, II, and III involving the Clean Water Act. Taken together, these decisions hold that, in interstate water pollution disputes, a downstream plaintiff State

may not apply Federal common law nor the State common or statutory law of the downstream State against an upstream State with EPA-approved water pollution control requirements. In *Illwaukee II*, the Supreme Court held that the "all encompassing program of water pollution regulation" under the Clean Water Act pre-empted the Federal common law of nuisance. As stated by the court:

Congress has not left the formation of appropriate Federal standards to the courts through application of often vague and indeterminate nuisance concepts and maximums of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.—*City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

Today, Congress leaves this comprehensive regulatory mechanism intact and does not in any way imply that Federal common law remedies are available to supplant or supplement remedies already available under the Clean Water Act. Interstate water pollution should be—and will remain—the subject of uniform Federal law and not the conflicting laws of various States.

I am particularly pleased the conference deleted section 118—interstate dispute resolution—and section 119—preservation of other rights—of the bill. I note that some of the deadlines imposed in the bill have already been missed. We must avoid imposing unrealistic requirements that result in court—rather than expert agencies—running the Clean Water Act Program. I hope, Mr. Speaker, this new bill will not establish an unhealthy spiral of missed deadlines, lawsuits, congressional distrust, more deadlines, more missed deadlines, then Congress should expect to revisit the whole issue again soon.

The conference agreed on a new compliance date for achievement of effluent limitations guidelines: As expeditious as practicable, but no later than 3 years after promulgation of the guidelines, but in no event later than March 31, 1989. During the discussion of this issue in the conference, it was noted that this deadline could pose a significant problem for some plants in certain parts of the industry. The organic chemicals, plastics and synthetic fibers (OCPSP) industry. Our hearings clearly demonstrated that at least 3 years from promulgation is needed for most plants to comply. The guidelines for the OCPSP industry were required, by court order, to be issued by December 1986, a date that has passed without the guidelines having been issued. Even if the guidelines had been issued in December, COPSF plants would have had only 2 years and 3 months to obtain permits and design, construct, install and operate the equipment necessary to meet the needs of this Nation are steadily increasing. The creative financing in the previous Congress extended compliance deadlines for priority, conventional, and nonconventional pollutants to "as expeditiously as practicable"

My greatest concern is over the bill's report, my fears remain unabated. I do have some concerns about other and consistent regulatory scheme. I am afraid that we did not do this consistently throughout the conference report. Because the bill before us today is the same in all substantive respects with last years conference report, my fears remain unabated.

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but not more than 3 years after the promulgation of effluent guidelines, with an outside date of July 1, 1988. The conference report adopted the Senate provisions, but modified the outside compliance date to March 31, 1989.

This is not a satisfactory—or sensible—resolution. Subsequent information and comments from EPA indicate that the deadline is unrealistic. It does not allow enough time to achieve compliance. Industrial direct discharges find themselves in an uncompromising situation, since EPA has not yet promulgated final effluent guidelines for various pollutants. Industrial facilities still waiting for guidance from EPA will have very little time to install necessary water treatment facilities. By retaining the March 31, 1989, deadline, I am afraid we are legislating fiction and defying common sense.

I am concerned that the bill's legally enforceable requirements, coupled with the act's citizen suit provisions may ultimately harm the program. The cumulative load of deadlines throughout the bill may set up EPA, municipalities and industries for failure which will, in turn, breed endless litigation and disrespect for the law. As an example of the unreasonable of some of the deadlines in the bill, I note that some of the deadlines imposed in the bill have already been missed. We must avoid imposing unrealistic requirements that result in court—rather than expert agencies—running the Clean Water Act Program. I hope, Mr. Speaker, this new bill will not establish an unhealthy spiral of missed deadlines, lawsuits, congressional distrust, more deadlines, more missed deadlines, then Congress should expect to revisit the whole issue again soon.

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simply because their guidelines were not issued early enough. Congress and EPA are both aware of their problem. Delay in promulgation of guidelines may make it impossible for some plants and industries to comply with the March 31, 1989 deadline. We agreed to address this problem in the conference report.

EPA told us that if presented with a compliance problem due to delay in issue an administrative order to establish a reasonable compliance date for the discharger beyond March 31, 1989. The order would not assess a penalty for the discharger's failure to meet the statutory compliance date. EPA stated that it currently issues such orders to dischargers who are unable, because of delays in guidelines promulgation or permit issuance, to meet the July 1, 1984, deadline in existing law. EPA's statement that it would continue to issue these orders was the major reason for our March 31, 1989, outside compliance date. Issuance of such orders by EPA provides a useful method for remedying inequities suffered by specific plants as a result of the delay in guidelines promulgation. When a plant is issued this type of order, the plant should not thereafter be subject to suit—by EPA, a State, or a citizen—on the basis of its failure to adhere to the statutory compliance date. It is our intent that noncompliance which is not the fault of the plant should not be penalized in any way, whether administratively, legally, or in the eyes of the public.

On another issue, the anti-backsliding provision included in the bill, while designed to ensure that reasonable further progress is made in meeting the goals of the act, is not designed to prohibit industrial growth, nor to penalize those who have production-based permits.

Technology-based limits are often based on the level of production at a facility—pounds per ton. Permits will continue to be able to increase their production or add to or change their manufacturing processes. They would, of course, still be required to maintain the effluent limitation guidelines—pounds per ton—issued by EPA for the appropriate industrial categories or subcategories as well as meet all applicable water quality standards. The funding levels in H.R. 1 are both environmentally responsible and fiscally responsible. There is no unwarranted drain on the Federal Treasury in this bill. The level of \$18 billion over 9 years for the current sewer grant program and the new State revolving loan fund represents a reasonable compromise and a worthy investment. The wastewater treatment needs of this Nation are steadily increasing. The creative financing in H.R. 1 will address these needs, but at the same time initiate the final phase of self-sufficiency as soon as reasonably

possible. Mr. Speaker, this bill signals a movement from the current level of Federal financial involvement to a program focused on increased State and local self-sufficiency; it does not, however, abandon the crucial Federal-State-local partnership that has developed over the years.

One of the bill's most innovative proposals is its revolving fund program through which a State will be able to provide financing assistance to its political subdivisions and, upon repayment, be able to use that money again to construct needed pollution control facilities. These funds can be used for loans, guarantees, interest subsidies, and other nongrant purposes. Under this new authority, many more communities will receive funding for construction of needed wastewater treatment facilities. Countless communities have waited in vain for Federal funding, because they were too low on State priority lists. This new revolving fund program will help those communities meet their requirements under the act.

The bill will also remove current obstacles to the use of funding provided by Farmers Home Administration for Clean Water Act construction grant projects. Many rural communities would not be able to finance the substantial cost of meeting the act's requirements without use of FmHA funds.

Another important issue which the bill addresses is the problem of insuring that our ground water resources are adequately protected. Communities around the country face problems caused by pollution of the Nation's aquifers. Accordingly, the bill before us today calls upon EPA to undertake a study of the measures needed to adequately protect water resources at seven specified aquifers, including the Sparta aquifer in Arkansas. Because of the growing threat to ground water posed by point sources and nonpoint sources, it is appropriate that we dedicate our efforts to examining how we can best protect this important supply of water for millions of Americans.

Another provision of this bill with which I am particularly pleased is an increase in the rural set-aside program. Under the current law a Governor may set aside 4 percent of the State's construction grant funds to address water pollution problems in rural areas. This is an important provision which insures that our rural communities are not forgotten under the Clean Water Program. The conference report expands the rural set-aside program by requiring that at least 4 percent and not more than 7½ percent of a State's allotment shall be made available for rural problems.

Mr. Speaker, H.R. 1 provides vital funding to States and municipalities and makes farsighted changes to the Clean Water Act's regulatory program. It coordinates governmental and private actions in pursuit of one common goal: making our waters fishable and

swimmable. The bill addresses the needs of municipalities and State governments, but at the same time recognizes the importance of increasing non-Federal self-sufficiency and decreasing Federal expenditures. In spite of today's budgetary constraints, H.R. 1 represents a worthy investment in our Nation's water quality. It is one of the most important environmental laws of the 100th Congress and perhaps of this decade. I urge my colleagues to support it fully. Furthermore, I urge the President to reconsider his objections to the bill and allow for it to become law.

Let me take a moment to congratulate the many Members who made such valuable contributions throughout this lengthy and arduous process. I want to thank the gentleman from New Jersey [Mr. HOWARD], who serves so ably as the chairman of the Committee on Public Works and Transportation, for his leadership and good judgment on this bill. I also want to congratulate the chairman last year and the ranking minority member of the Water Resources Subcommittee, the gentleman from New Jersey [Mr. ROE] and the gentleman from Minnesota [Mr. STANGELAND] for their tireless efforts, their spirit of cooperation, and especially for their comprehensive understanding of the issues. I especially want to thank the former ranking Republican member on the House Public Works Committee, the gentleman from Kentucky, Mr. Snyder, who so ably helped to mold this bill. And of course, I would be remiss if I did not thank the able leadership of the Environment and Public Works Committee in the other body for its guidance and cooperation.

Finally, Mr. Speaker, I would be remiss if I did not take this opportunity to thank all of the staff who worked so tirelessly over the years toward passage of clean water legislation. In particular, I would like to thank—and to congratulate—Gabe Rozsa, Ben Grumbles, Kathy Guilfooy, Errol Tyler, Ken Kopocis, Randy Deitz, and Charlotte Miles of the Water Resources Subcommittee. I would like to give a special note of appreciation to John Doyle. John served the members of the committee and, indeed, all of the Members of the House over the past 8 years as minority counsel to the Water Resources Subcommittee. He recently left the committee staff to assume new responsibilities as the principal Deputy Assistant Secretary of the Army for Civil Works. During the past few years he helped craft this bill in many ways and my colleagues and I are deeply indebted to him for all his help. I would also like to thank the Senate staff, including Bob Hurley, Phil Cummings, Jeff Peterson, Jimmy Powell, Ron Outen, and Steve Shimberg. All of these people worked practically non-stop for months, dedicating countless nights and weekends to make this moment happen. Some individuals en-

dured this lengthy process for over 4 years. Because of their efforts, we have a bill that everyone can be proud of.

□ 1330

Mr. FIELDS. Mr. Speaker, will the gentleman yield?

Mr. HAMMERSCHMIDT. I yield to the gentleman from Texas.

(Mr. FIELDS asked and was given permission to revise and extend his remarks.)

Mr. FIELDS. Mr. Speaker, as a cosponsor of H.R. 1, I rise to express my strong and enthusiastic support for the passage of this critically important legislation.

This bill, which is the product of several years of hard work, is virtually identical to a proposal which unanimously passed both bodies of Congress last year.

The fundamental purpose of this legislation is to reauthorize the landmark and historic Federal Water Pollution Control Act.

This law, better known as the Clean Water Act, is one of our most important and prominent environmental statutes. Since its enactment in 1972, impressive strides have been made in cleaning up thousands of lakes, rivers, and streams throughout this Nation.

Mr. Speaker, today we have an opportunity to renew our commitment to the national goal of making all of our waters fishable and swimmable for the benefit of every American.

While there are a number of key provisions contained within this legislation, including an extension of the Federal Wastewater Treatment Program, I will confine my remarks to the specific portion of this bill dealing with the Federal Clean Lakes Program.

Incorporated within section 315 is important language to improve water quality in Lake Houston, which is located in my congressional district.

Mr. Speaker, Lake Houston is a 12,000-acre manmade lake located within Harris County, TX. Owned by the city of Houston, it was created to provide residents with an alternative source of drinking water to replace the area's rapidly depleting ground water supply.

Based on current needs and projections, it is expected that the Lake will continue to provide drinking water to some 40 percent of the city's population.

As the Members of Congress who proudly represents the Lake Houston area, I have long recognized the importance of this vital watershed in providing both safe drinking water and recreational opportunities for thousands of my constituents.

For these reasons, I have viewed with alarm the periodic increases of fecal coliform bacteria in the lake. In fact, at one point the Houston Water Department found that 12 out of its 14 sampling locations around the lake ex-

To implement these Great Lakes provisions, the bill contains an authorization of \$11 million per year for fiscal years 1987 through 1991 to be divided as follows: \$4.4 million for demonstration cleanups of toxic-contaminated sediments; \$3.3 million for a National Oceanic and Atmospheric Administration Research Program; and, \$770,000 for nutrient-monitoring. These amounts are in addition to existing appropriations for the Great Lakes National Program Office and are not meant to displace current resources.

The bill establishes a national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner. The bill provides \$400 million over 4 years to States or combinations of adjacent States to implement nonpoint source management programs. Since as much as 50 percent of the pollution in our waters, is estimated, to be caused by nonpoint sources it is imperative that this pollution be addressed promptly.

Our efforts toward clean water are further strengthened by the strong antibacksliding section in the bill. That section prohibits, except in certain narrow circumstances, the ability of a permitted discharger to increase the amount of pollutants discharged, when permits are renewed or modified. This will aid in the effort to obtain continually cleaner water in our Nation.

The legislation provides for increases in civil and criminal penalties for violations of the act. It also provides for the addition of new authority for EPA to impose administrative penalties to add to EPA's enforcement capabilities under the act. Hopefully the increases in penalty amounts and the addition of administrative penalties will reduce violations of the act and discourage those parties who would choose to violate the act with little fear of punishment.

There are numerous other provisions in the bill which continue our efforts to cleanup and maintain our Nation's waters. The passage of the bill will once again send a strong message to the administration on the urgency of addressing the nation's need for responsible and effective measures, to achieve and preserve the quality of our waters. I urge my colleagues to give unanimous support to the legislation, as this House did only a few weeks ago.

Mr. HAMMERSCHMIDT. Mr. Speaker, I yield one minute to the gentleman from Minnesota [Mr. STANGELAND], the ranking member of the Water Resources Subcommittee, and hard working member of our committee.

(Mr. STANGELAND asked and was given permission to revise and extend his remarks.)

Mr. STANGELAND. Mr. Speaker, I rise to address provisions in H.R. 1, the Water Quality Act of 1987. This

legislation is the result of conference discussions in the 99th Congress spanning over 6 months and work, by House and Senate committees spanning over 4 years. Weeks of hearings, thousands of pages of testimony, and countless hours of analysis, discussion and debate led to development of this vitally important environmental legislation.

H.R. 1 should look strikingly familiar to each of us. This legislation—like its counterpart S. 1—is virtually identical to the conference report on S. 1128, which passed the House and Senate unanimously—by combined votes of 504 to 0—less than 3 months ago but was pocket vetoed by the President on November 6. As a matter of fact, H.R. 1 is the same as S. 1128 except for a few purely technical changes, such as replacing 1986 with 1987 in the act's name to reflect the new year.

I should also point out that despite its immediate consideration in the 100th Congress, H.R. 1 has a complete legislative history in the form of documents from the 99th Congress. To determine congressional intent in H.R. 1, one should first consult the conference report on S. 1128 and then, if necessary, committee reports and floor statements for the 99th Congress' House- and Senate-passed bills (H.R. 8 and S. 1128). These documents, particularly S. 1128's conference report, provide a detailed legislative history for H.R. 1 even though the new legislation introduced just 2 days ago has no committee report, conference report, or statement of managers from the 100th Congress.

From the outset, let me thank and congratulate all the key players in the 99th Congress responsible for his legislation. In particular, I would like to commend the chairman of our Public Works Committee, Mr. HOWARD, the full committee's ranking Republican member, Mr. SNYDER, and the subcommittee chairman who presided over the conference, Mr. ROE. Chairman ROE worked tirelessly for the past two Congresses holding hearings, researching the issues, and perfecting the bill's language. He devoted entire weekends and worked constantly around the clock to bring this legislation to us today. I also want to congratulate last year's Senate conferees, particularly Senators CHAFEE, STAFFORD, BENTSEN, MITCHELL, and MOYNIHAN. They deserve our thanks, not only for their hard work and dedication, but also their patience and willingness to find balanced and acceptable solutions to the myriad of water quality problems facing this Nation. Special thanks are also due to Members of the 100th Congress—particularly the new ranking minority member of the House Public Works Committee, JOHN PAUL HAMMERSCHMIDT, and the new chairman of the Water Resources Subcommittee, HENRY NOWAK, for their contributions and bipartisan cooperation.

Mr. Speaker, months ago very few in this Chamber, or in Washington for that matter, would have predicted the House and Senate could reach agreement in the Clean Water Act Conference. The issues were seen as being too complex and time consuming. Most people felt the clean water bill would simply be lost in the rush to adjourn. Yet, the conferees were able to achieve compromise in the form of a carefully crafted, well reasoned bill that earned the unanimous support of Congress. Our success was due not only to the dedication of all involved in last year's conference, but, more importantly, to the commitment of Congress and the American people to the goals of the Clean Water Act.

H.R. 1, which is virtually identical to the conference report on S. 1128, represents a balance of House and Senate interests and, quite honestly, is a better product than either of its two predecessor bills, H.R. 8 in the House and S. 1128 in the Senate. The resulting legislation ensures full protection of the environment in a way that adequately protects those who bear the cost of the required protective measures.

Under the conference substitute embodied in H.R. 1, the Construction Grant Program continues at the current annual authorization level of \$2.4 billion through fiscal year 1988. Thereafter, the program authorization level is reduced to \$1.2 billion per year until the program is eliminated, beginning in fiscal year 1991. This adopts the funding level in the Senate bill and represents a responsible approach to a total phase-out of the construction grant program.

Mr. Speaker, we cannot just walk away from communities that have not received grant funding because, quite frankly, they have polluted less. If we did nothing more than discontinue the construction grants program sometime in the future, this improper result would occur. The conferees' solution to this problem was to provide the same type of transitional financing mechanism contained in both House and Senate bills. That mechanism, now commonly referred to as State revolving fund capitalization grants, originated in the 98th Congress in the House-passed version of this legislation. After a year-long study by EPA, the Agency endorsed the idea, and in the 99th Congress our counterparts in the Senate included authorization for State revolving fund grants in their bill, improving on some of the original House concepts. H.R. 1's provisions are the end product of this evolutionary process, and the new State revolving fund authorities we bring to you today will possibly put the States in a position a few years hence to adequately fill the financial assistance void that would otherwise be created by phasing out the construction grants program.

To assist in the phase-out of the Construction Grant Program, we are

calling for funding for a new revolving loan program. Revolving loan funds have been tried in a number of States, including my State of Minnesota, and found to be an extremely effective way to spend scarce resources in a way that broadens our ability to achieve the act's purposes. Under this program, the Federal Government will help provide seed money to establish State revolving funds which local communities will use to help finance needed wastewater treatment facilities. Federal money made available for these funds would be subject to certain restrictions on their use as are provided through the Construction Grant Program. As these monies are repaid into the fund, the restriction on how the funds can be used would be eliminated, thereby allowing the States greater flexibility and freedom in financing municipal wastewater treatment programs.

Mr. Speaker, the allotment formula was another central issue in the conference. The House bill continued the existing formula for distributing the grant funds to individual States. The Senate bill, however, contained a new formula that was totally unacceptable to the House and that would have had States represented by a majority of the members of the House receiving reduced shares of Construction Grant Program appropriations. My State of Minnesota stood to lose 15 percent of its annual allotment in the first 2 years and 20 percent in the last 2 years of the program under the Senate formula.

I was extremely pleased the conference agreed to adopt an allotment formula substantially different from that in the Senate bill, under which funding for the overwhelming majority of States stays at or near the level of funding under current law. Where there are charges up or down, they are generally slight. For example, my State of Minnesota will get a slightly lower allotment than under current law, but by only \$350,000—a change of less than 1 percent of the State's annual allotment of almost \$45 million. This is a major victory not only for my home State, which would have lost \$9 million per year under the Senate formula, assuming an appropriation of \$2.4 billion, but also for the House's position on this issue.

I am also pleased H.R. 1 retains section 202(e) of last year's conference report on S. 1128. This provision recognizes the importance of the activated biotreater feature of the treatment works project for Little Falls, MN. The subsection provides that the city's activated biotreater component is deemed to be an innovative water process and technique and is eligible for increased grants, which the act makes available for innovative technology projects.

Mr. Speaker, H.R. 1 also calls for a major new program to address the serious problems posed by nonpoint source pollution. This initiative recognizes the growing problem of nonpoint source pollution, which contributes as much as one-half of all pollution affecting our waters. Under the program, States must establish nonpoint source programs which identify watersheds and develop management plans to deal with such pollution. Under these management plans, the States would develop best management practices (BMPs) which are intended to be the primary water quality improvement and water quality standards established under section 303 of the act would be used to determine where nonpoint source management programs are necessary and assess the overall effectiveness of the program, including BMPs, in achieving the goals of the act. Where water quality standards are not achieved, the BMPs may need to be reviewed and updated in the State Water Quality Management Program.

The bill authorizes a total of \$400 million to assist States in setting up their nonpoint programs. In addition, 1 percent of a State's allotment under the Construction Grant Program or \$100,000, whichever is more, would be set aside to be used for nonpoint source pollution management. Furthermore, States with greater needs in the area of controlling this kind of pollution could use up to 20 percent of the State's construction grant funds for nonpoint source problems. This increased flexibility will allow States to better target Federal funding to where it will do the most good.

Mr. Speaker, H.R. 1 provides for a strengthened and improved Clean Lakes Program under section 314 at an annual funding level of \$30 million. In addition, \$15 million is authorized for cleanup of acidified lakes and a \$40 million special demonstration program is established for cleanup of seven specified lakes. I am particularly pleased the conferees were able to agree with me about the pressing need for this new lake cleanup program. I am also gratified that Sauk Lake at Sauk Centre, MN, is one of the lakes named in the bill. Funding under this demonstration program will allow EPA to implement measures to restore this important water body to its once pristine condition.

Mr. Speaker, another significant issue addressed in H.R. 1 relates to exemptions contained in the House and Senate bills for stormwater discharges. Under current judicial and administrative interpretations of the law, businesses and municipalities that channel and discharge ordinary stormwater into a navigable water must obtain NPDES permits.

The House and Senate created differing exemptions from this requirement to allow EPA and the States to focus their attention on the most serious problems. The conference substituted a new approach, which I believe will be a balanced and targeted approach to dealing with municipal stormwater discharge problems, while at the same time establishing new mechanisms for addressing less serious stormwater discharge pollution situations after the highest priority environmental problems are solved. The provision is meant to provide relief where it is appropriate, to cities without serious stormwater pollution problems, while providing EPA and the States with the time they need to properly address this major national water quality need.

H.R. 1 does not provide a specific permit exemption for stormwater discharge associated with industrial activity, although it does provide a new timetable for regulating such discharges. A discharge is "associated with industrial activity" if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

Mr. Speaker, H.R. 1 also contains a number of other significant improvements to the Clean Water Act. We have included dynamic initiatives for addressing toxic hot spot problems and the increasing problem of ground water contamination. Another provision expands the existing exemption for return flows from irrigated agriculture to include agricultural stormwater discharges.

One of H.R. 1's most significant provisions combines concepts in both the House and Senate bills passed in the 98th Congress limiting the authority of the Administrator to issue "fundamentally different factor" modifications. The conferees agreed to place certain limitations on EPA's authority in an effort to encourage dissemination of information when EPA is in the process of establishing applicable effluent guidelines regulations. The conferees also devised the restrictions contained in the conference report on this issue in order to expedite decisions that are filed. We took these actions in an effort to narrow the RFD application process to RFD applications that are filed. We took these actions in an effort to narrow the RFD application process to RFD applications that are filed. We took these actions in an effort to narrow the RFD application process to RFD applications that are filed.



NPDES Storm Water Program

Question And Answer Document Volume 2

STORM WATER QUESTIONS AND ANSWERS PART II

I. General Applicability

1. **What kinds of storm water discharges are required to obtain a NPDES permit under Phase I of the storm water program?**

A. The National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations, promulgated by the U.S. Environmental Protection Agency (EPA), require that the following storm water discharges apply for a NPDES permit: (1) A discharge associated with industrial activity; (2) A discharge from a large or medium municipal separate storm sewer system; or (3) A discharge which EPA or the State determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. The permit application deadlines are specified in EPA's regulations.

2. **What is a "storm water discharge associated with industrial activity?"**

A. The term "storm water discharge associated with industrial activity" means a storm water discharge from one of the eleven categories of industrial activity defined at 40 Code of Federal Regulations (CFR) 122.26(b)(14)(i) through (xi). Six of these categories are identified by Standard Industrial Classification (SIC) code and the other five categories provide narrative descriptions of the industrial activity. The complete definition is included in Section XIII of this document.

If any activity at a facility is covered by one of the five categories which provide narrative descriptions, storm water discharges from that area are subject to storm water permit application requirements. If the primary SIC code of the facility is identified in one of the remaining six categories, the facility is subject to the storm water permit application requirements. Note that only those facilities/activities described above having point source discharges of storm water to waters of the United States or through a municipal separate storm sewer system or other conveyance are required to submit a storm water permit application. The definition of "point source" is provided at 40 CFR 122.2. The definition is included in Section XIII of this document.

3. **What are SIC codes and how can a facility find out its proper SIC code?**

A. SIC codes are four-digit industry codes that were originally created by the Office of Management and Budget (OMB) for statistical purposes. Other

22. If construction of cells at a landfill disturbs greater than five acres of land, is coverage under EPA's construction general permits required?

A. No. EPA considers construction of new cells to be routine landfill operations that are covered by the landfill's industrial storm water general permit. However, the storm water pollution prevention plan for the landfill must incorporate best management practices (BMPs) that address sediment and erosion control. Where a new landfill is being constructed and five or more acres of land is being disturbed, such activity would need to be covered under EPA's construction general permit until the time that initial construction is completed and industrial waste is received. Please note that NPDES authorized States may address this situation differently.

Category (viii): Transportation facilities

23. If all vehicle maintenance and equipment cleaning operations occur indoors at a transportation facility, as defined at 40 CFR 122.26(b)(14)(viii), is a permit application required for discharges from the roofs of these buildings?

A. Yes. Storm water discharges from all areas that are "associated with industrial activity," described at 40 CFR 122.26(b)(14), are subject to the storm water permit application requirements. This would include discharges from roofs of buildings that are within areas associated with industrial activity. In addition, storage areas of materials used in vehicle maintenance or equipment cleaning operations and holding yards or parking lots used to store vehicles awaiting maintenance are also considered areas associated with industrial activity.

24. For a facility classified as SIC code 5171 (bulk petroleum storage), is the transfer of petroleum product from the storage tanks to the distribution truck considered "fueling", and therefore an industrial activity as defined by the regulations?

A. No. The transfer of petroleum product from the storage tanks to the tanker truck is not considered fueling and would not require a storm water permit. However, fueling of the tanker truck itself at the 5171 facility is considered to be part of routine vehicle maintenance, and storm water discharges from these areas must be covered under a storm water permit application.

Friday
November 16, 1990

REGISTRATION

PERMITS

Part II

**Environmental
Protection Agency**

**40 CFR Parts 122, 123, and 124
National Pollutant Discharge Elimination
System Permit Application Regulations
for Storm Water Discharges; Final Rule**



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One commenter took issue with the decision to include drainage ponds, refuse sites, sites for residual treatment, storage, or disposal, as areas associated with industrial activity, because it was the commenter's view that such areas are unconnected with industrial activity. EPA disagrees with this comment. If refuse and other sites are used in conjunction with manufacturing or the by-products of manufacturing they are clearly associated with industrial activity. As noted above, Congress intended to include discharges directly related to manufacturing and processing at industrial plants. EPA is convinced that wastes, refuse, and residuals are the direct result or consequence of manufacturing and processing and, when located or stored at the plant that produces them, are directly related to manufacturing and processing at that plant. Storm water drainage from such areas, especially those areas exposed to the elements (e.g. rainfall) has a high potential for containing pollutants from materials that were used in the manufacturing process at that facility.

One commenter supported the inclusion of these areas since many toxins degrade very slowly and the mere passage of time will not eliminate their effects. EPA agrees and finalizes this part of the definition as proposed. One commenter requested clarification of the term "residual" as used in this context. Residual can generally be defined to include material that is remaining subsequent to completion of an industrial process. One commenter noted that the current owner of a facility may not know what areas or sites at a facility were used in this manner in the past. EPA has clarified the definition of discharge associated with industrial activity to include areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. The Agency believes that the current owner will be in a position to establish these facts.

One commenter suggested including material shipping and receiving areas, waste storage and processing areas, manufacturing buildings, storage areas for raw materials, supplies, intermediates, and finished products, and material handling facilities as additional areas "associated with industrial activity." EPA agrees that this would add clarification to the definition, and has incorporated these areas into the definition at § 122.26(b)(14).

One commenter stated that the language "point source located at an industrial plant" would include outfalls located at the facility that are not owned

or operated by the facility, but which are municipal storm sewers on easements granted to a municipality for the conveyance of storm water. EPA agrees that if the industry does not operate the point source then that facility is not required to obtain a permit for that discharge. A point source is a conveyance that discharges pollutants into the waters of the United States. If a facility does not operate that point source, then it would be the responsibility of the municipality to cover it under a permit issued to them. However, if contaminated storm water associated with industrial activity were introduced into that conveyance by that facility, the facility would be subject to permit application requirements as is all industrial storm water discharged through municipal sewers.

EPA disagrees with several comments that road drainage or railroad drainage within a facility should not be covered by the definition. Access roads and rail lines (even those not used for loading and unloading) are areas that are likely to accumulate extraneous material from raw materials, intermediate products and finished products that are used or transported within, or to and from, the facility. These areas will also be repositories for pollutants such as oil and grease from machinery or vehicles using these areas. As such they are related to the industrial activity at facilities. However, the language describing these areas of industrial activity has been clarified to include those access roads and rail lines that are "used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility." For the same reasons haul roads (roads dedicated to transportation of industrial products at facilities) and similar extensions are required to be addressed in permit applications. Two industries stated that haul roads and similar extensions should be covered by permits by rule. EPA is not considering the use of a permit by rule mechanism under this regulation, however this issue will be addressed in the section 402(p)(5) reports to Congress and in general permits to be proposed and promulgated in the near future. EPA would note however that facilities with similar operations and storm water concerns that desire to limit administrative burdens associated with permit applications and obtaining permits may want to avail themselves of the group application and/or general permits.

In response to comments, EPA would also like to clarify that it intends the language "immediate access roads"

(including haul roads) to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. EPA does not expect facilities to submit permit applications for discharges from public access roads, such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility. Also, some access roads are used to transport bulk samples of raw materials or products (such as prospecting samples from potential mines) in small-scale prior to industrial production. EPA does not intend to require permit applications for access roads to operations which are not yet industrial activities.

EPA does agree with comments made by several industries that undeveloped areas, or areas that do not encompass those described above, should generally not be addressed in the permit application, or a storm water permit, as long as the storm water discharge from these areas is segregated from the storm water discharge associated with the industrial activity at the facility.

Numerous commenters stated that maintenance facilities, if covered, should not be included in the definition. EPA disagrees with this comment. Maintenance facilities will invariably have points of access and egress, and frequently will have outside areas where parts are stored or disposed of. Such areas are locations where oil, grease, solvents and other materials associated with maintenance activities will accumulate. In response to one commenter, such areas are only regulated in the context of those facilities enumerated in the definition at § 122.26(b)(14), and not similar areas of retail or commercial facilities.

Another commenter requested that "storage areas" be more clearly defined. EPA disagrees that this term needs further clarification in the context of this section of the rule. However, in response to one comment, tank farms at industrial facilities are included. Tank farms are in existence to store products and materials created or used by the facility. Accordingly they are directly related to manufacturing processes.

Regarding storage areas, one commenter stated that the regulations should emphasize that only facilities that are not totally enclosed are required to submit permit applications. EPA does not agree with this interpretation since use of the generic term storage area indicates no exceptions for certain physical characteristics. Thus discharges from enclosed storage areas are also covered by today's rule (except as discussed above). EPA also disagrees with one

will not dictate what type of waste is exposed to the elements.

One commenter requested that the definition of industrial wastes be clarified. For the purpose of this rule, industrial waste consists of materials delivered to the landfill for disposal and whose origin is any of the facilities described under § 122.26(b)(14) of this regulation.

(vi) *Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093.* One commenter suggested that the recycling of materials such as paper, glass, plastics, etc., should not be classified as an industrial activity. EPA disagrees that such facilities should be excluded on that basis. These facilities may be considered industrial, as are facilities that manufacture such products absent recycling.

Other facilities exhibit traits that indicate industrial activity. In junkyards, the condition of materials and junked vehicles and the activities occurring on the yard frequently result in significant losses of fluids, which are sources of toxic metals, oil and grease and polychlorinated aromatic hydrocarbons. Weathering of plated and non-plated metal surfaces may result in contributions of toxic metals to storm water. Clearly such facilities cannot be classified as commercial or retail.

One municipality felt that "significant recycling" should be defined or clarified. EPA agrees that the proposed language is ambiguous. It has been clarified to require permit applications from facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093. These SIC codes describe facilities engaged in dismantling, breaking up, sorting, and wholesale distribution of motor vehicles and parts and a variety of other materials. The Agency believes these SIC codes clarify the term significant recycling.

One municipality stated that regulation of these facilities under NPDES would be duplicative if they are publicly owned facilities. One State expressed the view that automobile junkyards, salvage yards could not legitimately be considered industrial activity. As noted above, EPA disagrees with those comments. Facilities that are actively engaged in the storage and recycling of products including metals, oil, rubber, and synthetics are in the

business of storing and recycling materials associated with or once used in industrial activity. These activities are not commercial or retail because they are engaged in the dismantling of motors for distribution in wholesale or retail, and the assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials, which EPA views as industrial activity. Further, being a publicly owned facility does not confer non-industrial status.

(vii) *Steam electric power generating facilities, including coal handling sites, and onsite and offsite ancillary transformer storage areas.* Most of the comments were against requiring permit applications for onsite and offsite ancillary transformer facilities. One commenter stated that these transformers did not leak in storage and if there were leakage problems in handling transformers, such leaks were subject to Federal and State spill clean-up procedures. The same commenter suggested that if EPA required applications from such facilities that it exclude those that have regular inspections, management practices in place, or those that store 50 transformers at any one time.

EPA agrees that such facilities should not be covered by today's rule. As one commenter noted, the Toxic Substances Control Act (TSCA) addresses pollutants associated with transformers that may enter receiving water through storm water discharges. EPA has examined regulations under TSCA and agrees that regulation of storm water discharges from these facilities should be the subject of the studies being performed under section 402(p)(5), rather than regulations established by today's rule. Under TSCA, transformers are required to be stored in a manner that prevents rain water from reaching the stored PCBs or PCB items. 40 CFR 761.65(b)(1)(i). EPA considers transformer storage to be more akin to retail or other light commercial activities, where items are inventoried in buildings for prolonged periods for use or sale at some point in the future, and where there is no ongoing manufacturing or other industrial activity within the structure.

One commenter stated that this category of industries should be loosened so that all steam electric facilities are addressed—oil fired and nuclear. EPA believes that the language as proposed broadly defines the type of industrial activity addressed without specifying each mode of steam electric production. One commenter noted that the EPA has no authority under the CWA (*Train v. C.P.I.R., Inc.*, 426 U.S. 1 (1976)) to regulate the discharge of

source, special nuclear and by-product materials which are regulated under the Atomic Energy Act. EPA agrees permit applications may not address those aspects of such facilities, however the facility in its entirety may not necessarily be exempt. A permit application will be appropriate for discharges from non-exempt categories.

(viii) *Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, material handling facilities, equipment cleaning operations or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, or which are identified in another subcategory of facilities under EPA's definition of storm water discharges associated with industrial activity.* One commenter requested clarification of the terms "vehicle maintenance." Vehicle maintenance refers to the rehabilitation, mechanical repairing, painting, fueling, and lubricating of instrumentalities of transportation located at the described facilities. EPA is declining to write this definition into the regulation however since "vehicle maintenance" should not cause confusion as a descriptive term. One commenter wanted railroad tracks where rail cars are set aside for minor repairs excluded from regulation. In response, if the activity involves any of the above activities then a permit application is required. Train yards where repairs are undertaken are associated with industrial activity. Train yards generally have trains which, in and of themselves, can be classified as heavy industrial equipment. Trains, concentrated in train yards, are diesel fueled, lubricated, and repaired in volumes that connote industrial activity, rather than retail or commercial activity.

One commenter argued that if gasoline stations are not considered for permitting, then all transportation facilities should be exempt. EPA disagrees with the thrust of this comment. Transportation facilities such as bus depots, train yards, taxi stations, and airports are generally larger than individual repair shops, and generally engage in heavier more expansive forms of industrial activity. In keeping with Congressional intent to cover all industrial facilities, permit applications from such facilities are appropriate. In contrast, EPA views gas stations as retail commercial facilities not covered

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, and 124

[FRL—6470—8]

RIN 2040-AC82

National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's regulations (Phase II) expand the existing National Pollutant Discharge Elimination System (NPDES) storm water program (Phase I) to address storm water discharges from small municipal separate storm sewer systems (MS4s) (those serving less than 100,000 persons) and construction sites that disturb one to five acres. Although these sources are automatically designated by today's rule, the rule allows for the exclusion of certain sources from the national program based on a demonstration of the lack of impact on water quality, as well as the inclusion of others based on a higher likelihood of localized adverse impact on water quality. Today's regulations also exclude from the NPDES program storm water discharges from industrial facilities that have "no exposure" of industrial activities or materials to storm water. Finally, today's rule extends from August 7, 2001 until March 10, 2003 the deadline by which certain industrial facilities owned by small MS4s must obtain coverage under an NPDES permit. This rule establishes a cost-effective, flexible approach for reducing environmental harm by storm water discharges from many point sources of storm water that are currently unregulated.

EPA believes that the implementation of the six minimum measures identified for small MS4s should significantly reduce pollutants in urban storm water compared to existing levels in a cost-effective manner. Similarly, EPA believes that implementation of Best Management Practices (BMP) controls at small construction sites will also result in a significant reduction in pollutant discharges and an improvement in surface water quality. EPA believes this rule will result in monetized financial, recreational and health benefits, as well as benefits that EPA has been unable to monetize. Expected benefits include reduced scouring and erosion of streambeds, improved aesthetic quality

of waters, reduced eutrophication of aquatic systems, benefit to wildlife and endangered and threatened species, tourism benefits, biodiversity benefits and reduced costs for siting reservoirs. In addition, the costs of industrial storm water controls will decrease due to the exclusion of storm water discharges from facilities where there is "no exposure" of storm water to industrial activities and materials.

DATES: This regulation is effective on February 7, 2000. The incorporation by reference of the rainfall erosivity factor publication listed in the rule is approved by the Director of the Federal Register as of February 7, 2000. For judicial review purposes, this final rule is promulgated as of 1:00 p.m. Eastern Standard Time, on December 22, 1999 as provided in 40 CFR 23.2.

ADDRESSES: The complete administrative record for the final rule and the ICR have been established under docket numbers W-97-12 (rule) and W-97-15 (ICR), and includes supporting documentation as well as printed, paper versions of electronic comments. Copies of information in the record are available upon request. A reasonable fee may be charged for copying. The record is available for inspection and copying from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, EPA, East Tower Basement, 401 M Street, SW, Washington, DC. For access to docket materials, please call 202/260-3027 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: George Utting, Office of Wastewater Management, Environmental Protection Agency, Mail Code 4203, 401 M Street, SW, Washington, DC 20460; (202) 260-5816; sw2@epa.gov.

SUPPLEMENTARY INFORMATION: Entities potentially regulated by this action include:

Category	Examples of regulated entities
Federal, State, Tribal, and Local Governments.	Operators of small separate storm sewer systems, industrial facilities that discharge storm water associated with industrial activity or construction activity disturbing 1 to 5 acres.
Industry	Operators of industrial facilities that discharge storm water associated with industrial activity.
Construction Activity.	Operators of construction activity disturbing 1 to 5 acres.

This table is not intended to be exhaustive, but rather provides a guide

for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility or company is regulated by this action, you should carefully examine the applicability criteria in §§ 122.26(b), 122.31, 122.32, and 123.35 of the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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I. Background and Pre-Proposal Outreach

On January 9, 1998 (63 FR 1536), EPA proposed to expand the National Pollutant Discharge Elimination System (NPDES) storm water program to include storm water discharges from municipal separate storm sewer systems (MS4s) and construction sites that were smaller than those previously included in the program. The proposal also addressed industrial sources that have "no exposure" of industrial activities and materials to storm water. Today, EPA is promulgating a final rule to implement most of the proposed revisions with minor changes based on public comments received on the proposal. Today's final rule also extends the deadline by which certain industrial facilities operated by municipalities or less than 100,000 population must be covered by a NPDES permit; the deadline is changed from August 7, 2001 until March 10, 2003.

In 1972, Congress amended the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (CWA)) to prohibit the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. The NPDES program is a program designed to track point sources and require the implementation of the controls necessary to minimize the discharge of pollutants. Initial efforts to improve water quality under the NPDES program primarily focused on reducing pollutants in industrial process wastewater and municipal sewage. These discharge sources were often drastically degraded, water quality conditions.

As pollution control measures for industrial process wastewater and municipal sewage were implemented and refined, it became increasingly evident that more diffuse sources of water pollution were also significant causes of water quality impairment. Specifically, storm water runoff draining large surface areas, such as agricultural and urban land, was found to be a major cause of water quality impairment, including the nonattainment of designated beneficial uses.

In 1987, Congress amended the CWA to require implementation, in two phases, of a comprehensive national program for addressing storm water discharges. The first phase of the program, commonly referred to as "Phase I," was promulgated on November 16, 1990 (55 FR 47990). Phase I requires NPDES permits for a large number of priority sources including storm water discharge from a large municipal separate storm sewer systems of 100,000 or more and several categories of industrial activity, including construction sites that disturb five or more acres of land.

Today's rule, which is the second phase of the storm water program, expands the existing program to include discharges of storm water from smaller municipalities in urbanized areas and from construction sites that disturb between one and five acres of land. Today's rule allows certain sources to be excluded from the national program based on a demonstrable lack of impact on water quality. The rule also allows other sources not automatically regulated on a national basis to be designated for inclusion based on increased likelihood for localized adverse impact on water quality.

EPA received several comments regarding the timing of when the "no exposure" certification should be submitted. The proposed rule said that the "no exposure" certification notice must be submitted "at the beginning of each permit term or prior to commencing discharges during a permit term." Some commenters interpreted this statement to mean that existing facilities can only submit the certification at the time a permit is being issued or renewed. EPA intended the phrase "at the beginning of each permit term" to mean "once every 5 years" and today's rule reflects this clarification. EPA envisions that the NPDES storm water program will be implemented primarily through general permits which are issued for a 5 year term. Likewise the "no exposure" certification term is 5 years. The NPDES permitting authority will maintain a simple registration list that should impose only a minor administrative burden on the permitting authority. The registration list will allow for tracking of industrial facilities claiming the exclusion. This change allows a facility to submit a "no exposure" certification at any time during the term of the permit, provided that a new certification is submitted every 5 years from the time it is first submitted (assuming that the facility maintains a "no exposure" status). Once a discharger has established that the facility meets the definition of "no exposure", and submits the necessary "no exposure" certification, the discharger must maintain their "no exposure" status. Failure to maintain "no exposure" at their facility could result in the unauthorized discharge of pollutants to waters of the United States and enforcement for violation of the CWA. Where a discharger believes that exposure could occur in the future due to some anticipated change at the facility, the discharger should submit an application and obtain coverage under an NPDES permit prior to such discharge to avoid penalties.

Where EPA is the permitting authority, dischargers may submit a "no exposure" certification at any time after the effective date of today's rule. Where EPA is not the permitting authority, dischargers may not be able to submit the certification until the non-federal permitting authority completes any necessary statutory or regulatory changes to adopt this "no exposure" provision. EPA recommends that the discharger contact the permitting authority for guidance on when the "no exposure" certification should be submitted.

EPA received comments on the proposed rule requirement that the

discharger "must comply immediately with all the requirements of the storm water program including applying for and obtaining coverage under an NPDES permit," if changes occur at the facility which cause exposure of industrial activities or materials to storm water. The comments expressed the difficulty of immediate compliance. EPA expects that most facility changes can be anticipated, therefore dischargers should apply for and obtain NPDES permit coverage in advance of changes that result in exposure to industrial activities or materials. Permitting authorities may grant additional time, on a case-by-case basis, for preparation and implementation of a storm water pollution prevention plan.

Finally, today's rule at § 122.26(g)(4) includes the information which must be included on the "no exposure" certification. Authorized States, Tribes or U.S. Territories may develop their own form which includes this required information, at a minimum. EPA adopted the requirements (with modification) from the draft "No Exposure Certification Form" published as an appendix to the proposed rule. Modifications were made to the draft form to address comments received and to streamline the required information. EPA included these certification requirements in today's rule in order to preserve its integrity. Dischargers in areas where EPA is the permitting authority should use the "No Exposure Certification" form included in Appendix 4.

3. Definition of "No Exposure"

For purposes of this section, "no exposure" means that all industrial materials or activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product. However, storm resistant shelter is not required for: (1) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak; (2) adequately maintained vehicles used in material handling; and (3) final products, other than products that would be mobilized in storm water discharge (e.g., rock salt). Each of these three exceptions to the no exposure

definition are discussed in more detail below.

EPA intends the term "storm resistant shelter" to include completely roofed and walled buildings or structures, as well as structures with only a top cover but no side coverings, provided material under the structure is not otherwise subject to any run-on and subsequent runoff of storm water. While the Agency intends that this provision promote permanent "no exposure", EPA understands that certain vehicles could pass between buildings and, during passage, be exposed to rain and snow. Adequately maintained vehicles such as trucks, automobiles, forklifts, or other such general purpose vehicles at the industrial site that are not industrial machinery, and that are not leaking contaminants or are not otherwise a source of industrial pollutants, could be exposed to precipitation or runoff. Such activities alone does not prevent a discharger from being able to certify no exposure under this provision. Similarly, trucks or other vehicles awaiting maintenance at vehicle maintenance facilities, as defined at § 122.26(b)(14)(viii), that are not leaking contaminants or are not otherwise a source of industrial pollutants, are not considered exposed.

In addition, EPA recognizes that there are circumstances where permanent "no exposure" of industrial activities or materials is not possible. Under such conditions, materials and activities may be sheltered with temporary covers, such as tarps, between periods of permanent enclosure. The final rule does not specify every such situation. EPA intends that permitting authorities will address this issue on a case-by-case basis. Permitting authorities can determine the circumstances under which temporary structures will or will not meet the requirements of this section. Until permitting authorities specifically determine otherwise, EPA recommends application of the "no exposure" exclusion for temporary sheltering of industrial materials or activities only during facility renovation or construction, provided that the temporary shelter achieves the intent of this section. Moreover, "exposure" that results from a leak in protective covering would only be considered "exposure" if not corrected prior to the next storm water discharge event. EPA received one comment requesting that this allowance for temporary shelter be limited to facility renovation or construction directly related to the industrial activity requiring temporary shelter, and be scheduled to minimize the use of temporary shelter. Another comment suggested placing time limits

Members of the FACA Committee urged that EPA not allow dischargers to certify "no exposure" to take actions to quality for this provision that result in a net environmental detriment. In developing a regulatory implementation mechanism, however, EPA found that the phrase "no net environmental detriment," was too imprecise to use within this context. Therefore, today's rule addresses this issue by requiring information that should help the permitting authority to determine whether actions taken to quality for the exclusion interfere with the attainment or maintenance of water quality standards, including designated uses. Permitting authorities will be able, where necessary, to make a determination by evaluating the activities that changed at the industrial site to achieve "no exposure", and assess whether these changes cause an adverse impact on, or have the reasonable potential to cause an instream excursion of, water quality standards, including designated uses. EPA anticipates that many efforts to achieve "no exposure" will employ simple good housekeeping and contaminant cleanup activities. Other efforts may involve moving materials and industrial activities indoors into existing buildings or structures.

In very limited cases, industrial operators may make major changes at a site to achieve "no exposure". These efforts may include constructing a new building or cover to eliminate exposure or constructing structures to prevent run-on and storm water contact with industrial materials or activities. Where major changes to achieve "no exposure" increase the impervious area of the site, the facility operator must provide this information on the "no exposure" certification form as discussed above. Using this and other available data and information, permitting authorities should be able to assess whether any major change has resulted in increased pollutant concentrations or loadings, toxicity of the storm water runoff, or a change in natural hydrological patterns that would interfere with the attainment and maintenance of water quality standards, including designated uses or appropriate narrative, chemical, biological, or habitat criteria where such State or Tribal water quality standards exist. In these instances, the facility operator and their NPDES permitting authority should take appropriate actions to ensure that attainment or maintenance of water quality standards can be achieved. The NPDES permitting authority should decide if the facility must obtain coverage under an

individual or general permit to ensure that appropriate actions are taken to address adverse water quality impacts. While the intent of today's "no exposure" provision is to reduce the regulatory burdens on industrial facilities and government agencies, the FACA Committee suggested that the NPDES permitting authority consider a compliance assessment program to ensure that facilities that have availed themselves of this "no exposure" option meet the applicable requirements. Inspections could be conducted at the discretion of the NPDES authority and be coordinated with other facility inspections. EPA expects, however, that the permitting authority will conduct inspections when it becomes aware of potential water quality impacts possibly caused by the facility's storm water discharges or when requested to do so by adversely affected members of the public. The intent of this provision is that the 5 year "no exposure" certification be fully available to, and enforceable by, appropriate federal and State authorities under the CWA. Private citizens can enforce against facilities for discharges of storm water that are inconsistent with a "no exposure" certification if storm water discharges from such facilities are not otherwise permitted and in compliance with applicable requirements.

EPA received comments from owners, operators and representatives of Phase I facilities classified as "light industry" as defined by the regulations at § 122.26(b)(14)(xi). The comments cannot rely on the "unverified judgment" of the facility. The comments opposing documentation did not address the "unverified judgment" concern.

Today's rule is a "conditional" exclusion from permitting which requires all categories, including the "light industrial" facilities that have no exposure of materials to storm water, to submit a certification to the permitting authority. Upon receipt of a complete certification, the permitting authority can review the information, or call, or inspect the facility if there are doubts about the facility's "no exposure" claim. Also, if the facility discharges into an MS4, the operator of the MS4 can

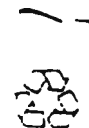
request a copy of the certification, and can inspect the facility. The public can request a copy of the certification and/or inspection reports. In adopting these conditional "no exposure" provisions, the Agency addressed the Ninth Circuit court's ruling regarding the dischargers' "unverified judgment."

EPA received one comment requesting clarification on whether the anti-backsliding provisions in the regulations at § 122.44(l) apply to industrial facilities that are currently covered under an NPDES storm water permit, and whether such facilities could qualify for the "no exposure" exclusion under today's rule. The anti-backsliding provisions will not prevent most industrial facilities that can certify "no exposure" under today's rule from permitting. The anti-backsliding provisions contain 5 exceptions that allow permits to be renewed, reissued or modified with less stringent conditions. One exception at § 122.44(l)(2)(A) allows less stringent conditions if "material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation." Section 122.44(l)(B)(1) also allows less stringent requirements if "information is available which was not available at the time of permit issuance and which would have justified the application of less stringent effluent limitations at the time of permit issuance." Facility operators who certify "no exposure" and submit the required information once every 5 years will have provided the permitting authority "information that was not available at the time of permit issuance." Also, some facilities may, in order to achieve "no exposure", make "material and substantial alterations or additions to the permitted facility." Therefore, most facilities covered under existing NPDES general permits for storm water (e.g., EPA's Multi-Sector General Permit) will be eligible for the conditional "no exposure" exclusion from permitting without concern about the anti-backsliding provisions. Such dischargers will have met one or both of the anti-backsliding exceptions detailed above. Facilities that are covered under individual permits containing numeric limitations for storm water should consult with their permitting authority to determine whether the anti-backsliding provisions will prevent them from qualifying for the exclusion from permitting (or that discharge point) based on a certification of "no exposure".



NPDES Storm Water Program

Question And Answer Document Volume 1



Category VIII - Transportation Facilities

21. **Are gas stations and automotive repair shops required to apply for an NPDES storm water discharge permit?**

No. These facilities are classified in SIC codes 5541 (gasoline filling stations) and 7538 (automotive repair shops). The storm water rule generally does not address facilities with SIC classifications pertaining to wholesale, retail, service or commercial activities. Additional regulations addressing these sources may be developed under Section 403(p)(6) of the CWA if studies required under Section 402(p)(5) indicate the need for regulation.

22. **Does a vehicle maintenance shop or an equipment cleaning facility need to apply for a permit?**

Yes, if the shop is categorized by the SIC codes listed in the transportation category of facilities engaged in industrial activity [i.e., SIC codes 40, 41, 42 (except 4221-25) 43, 44, 45 and 5171]. Only the vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) and equipment cleaning areas (such as truck washing areas) must be addressed in the application.

As explained above, gas stations are classified in SIC code 5541 and automotive repair services are classified as SIC code 75, which are not included in the regulatory definition of industrial activity, and therefore are not required to submit NPDES storm water discharge permit applications.

23. **Are municipally owned and/or operated school bus maintenance facilities required to apply for an NPDES permit?**

No. The SIC Manual states that "school bus establishments operated by educational institutions should be treated as auxiliaries" to the educational institution. Since the SIC code assigned to educational institutions is 82, the municipally operated (i.e., by a school board, district, or other municipal entry) school bus establishments would not be required to apply for an NPDES permit for their storm water discharges. Private contract school bus services are required to apply for an NPDES permit for their storm water discharges.

24. Is SIC code 4212 always assigned to facilities with dump trucks?

No. The maintenance facility must be primarily engaged in maintaining the dump truck to be characterized as SIC code 4212. Dump trucks used for road maintenance and construction and facilities that maintain these trucks are classified under SIC code 16 (heavy construction other than building construction) and therefore would not be characterized as engaging in industrial activity.

25. How does a municipality determine what type of vehicle a particular maintenance facility is primarily engaged in servicing?

The SIC Manual recommends using a value of receipts or revenues approach to determine what is the primary activity of a facility. For example, if a maintenance facility services both school buses and intercity buses, the facility would total receipts for each type of vehicle and whichever generated the most revenue, would be the vehicle type that the facility is primarily engaged in servicing. If data on revenues and receipts are not available, the number of vehicles and frequency of service may be compared. If a facility services more than two types of vehicles, whichever type generates the most (not necessarily greater than half of the total) revenue, or is most frequently serviced, is the vehicle type the facility is primarily engaged in servicing.

26. Is a municipal maintenance facility that is primarily engaged in servicing garbage trucks required to apply for a permit?

The answer depends on the SIC code assigned to the establishment. If the municipality also owns the disposal facility (e.g., landfill, incinerator) that receives refuse transported by the trucks, then the maintenance facility would be classified as SIC code 4953 and thus would not be required to apply for a permit unless the maintenance facility was located at a facility covered under one of the other categories of industrial activity (e.g., a landfill that receives industrial waste). If, however, the municipality does not own the disposal facility, the truck maintenance facility would be classified as SIC code 4212 and thus would be required to apply for a permit. If other vehicles are serviced at the same maintenance facility, the facility may not be required to submit a permit application (see question #25 above).

31. Are railroad facilities included?

Railroad facilities, classified as SIC code 40, which have vehicle maintenance activities, equipment cleaning operations or are otherwise identified under 122.26(b)(14)(i)-(vii) or (x)-(xi) need to apply for a permit.

32. Are repairs along a railroad system considered to be vehicle maintenance and thus regulated?

No. Only nontransient vehicle maintenance shops are included in the transportation category.

33. Are tank farms at petroleum bulk storage stations covered by the rule?

No, unless the storm water discharge from the tank farm area commingles with storm water from any vehicle maintenance shops or equipment cleaning operations located onsite. However, tank farms located onsite with other industrial facilities, as defined in 122.26(b)(14), are included in the regulation.

34. Is a parking lot associated with a vehicle maintenance shop included in the regulation?

Yes. Under 122.26 (b)(14)(viii) vehicle maintenance and equipment cleaning operations are considered industrial activity. Parking lots used to store vehicles prior to maintenance are considered to be a component of the vehicle maintenance activity.

35. Is the fueling operation of a transportation facility (SIC codes 40 through 45) covered if there are no other vehicle maintenance activities taking place at the facility?

Yes. A nonretail fueling operation is considered vehicle maintenance [see 122.26(b)(14)(viii)] and requires an NPDES storm water discharge permit application.

36. Is a manufacturing facility's offsite vehicle maintenance facility required to apply for a permit under the transportation category?

No. An offsite vehicle maintenance facility supporting one company would not be required to apply for a permit if that company is not primarily engaged in providing transportation services and therefore would not be classified as SIC

code 42. The maintenance facility would be considered an auxiliary operation to the manufacturing facility. For a full discussion on auxiliary facilities see page 13 through 17 of the 1987 Standard Industrial Classification Manual. If the maintenance facility is located on the same site as the manufacturing operation, it would be included in the areas associated with industrial activity and must be addressed in an application.

37. **Is a marina required to apply for a storm water permit if it operates a retail fuelling operation, but other vehicle maintenance or equipment cleaning activities are not conducted onsite?**

Facilities that are "primarily engaged" in operating marinas are best classified as SIC 4493 - marinas. These facilities rent boat slips, store boats, and generally perform a range of other marine services including boat cleaning and incidental boat repair. They frequently sell food, fuel, fishing supplies, and may sell boats. For facilities classified as 4493 that are involved in vehicle (boat) maintenance activities (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or equipment cleaning operations, those portions of the facility that are involved in such vehicle maintenance activities are considered to be associated with industrial activity and are covered under the storm water regulations.

Facilities classified as 4493 that are not involved in equipment cleaning or vehicle maintenance activities (including vehicle rehabilitation, mechanical repairs, painting, and lubrication) are not intended to be covered under 40 CFR Section 122.26(b)(14)(viii) of the storm water permit application regulations. The retail sale of fuel alone at marinas, without any other vehicle maintenance or equipment cleaning operations, is not considered to be grounds for coverage under the storm water regulations.

Marine facilities that are "primarily engaged" in the retail sale of fuel and lubricating oils are best classified as SIC code 5541 - marine service stations - and are not covered under 40 CFR Section 122.26(b)(14)(viii) of the storm water permit application regulations. These facilities may also sell other merchandise or perform minor repair work.

Facilities "primarily engaged" in the operation of sports and recreation services such as boat rental, canoe rental, and party fishing, are best classified under SIC code 7999 - miscellaneous recreational facilities - and are not covered under 40 CFR Section 122.26(b)(14)(viii).

INDUSTRIAL STORMWATER FACT SHEET SERIES

Sector P: Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities



U.S. EPA Office of Water
EPA-833-F-06-031
December 2006

What is the NPDES stormwater permitting program for industrial activity?

Activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing or other operations that occur at industrial facilities are often exposed to stormwater. The runoff from these areas may discharge pollutants directly into nearby waterbodies or indirectly via storm sewer systems, thereby degrading water quality.

In 1990, the U.S. Environmental Protection Agency (EPA) developed permitting regulations under the National Pollutant Discharge Elimination System (NPDES) to control stormwater discharges associated with eleven categories of industrial activity. As a result, NPDES permitting authorities, which may be either EPA or a state environmental agency, issue stormwater permits to control runoff from these industrial facilities.

What types of industrial facilities are required to obtain permit coverage?

This fact sheet specifically discusses stormwater discharges from land transportation and warehousing activities as defined by Standard Industrial Classification (SIC) Major Groups 40, 41, 42, 43, and SIC 5171. Facilities and products in this group fall under the following categories, all of which require coverage under an industrial stormwater permit:

- ◆ Motor freight transportation facilities (SIC 4212-4231)
- ◆ Passenger transportation facilities (SIC 4111-4173)
- ◆ Petroleum bulk oil stations and terminals (SIC 5171)
- ◆ Rail transportation facilities (SIC 4011, 4013)
- ◆ United States Postal Service facilities (SIC 4311)

Vehicle and equipment maintenance is a broad term used to include the following activities:

- ◆ Vehicle and equipment fluid changes
- ◆ Mechanical repairs
- ◆ Parts cleaning
- ◆ Sanding
- ◆ Refinishing
- ◆ Painting and/or fueling
- ◆ Locomotive sanding (loading sand for traction)
- ◆ Storage of vehicles and equipment waiting for repair or maintenance
- ◆ Storage of the related materials and waste materials, such as oil, fuel, batteries, tires, or oil filters

Sector P: Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities

Equipment cleaning operations include areas where the following types of activities take place:

- ◆ Vehicle exterior wash down
- ◆ Interior trailer washouts
- ◆ Tank washouts
- ◆ Rinsing of transfer equipment

What does an industrial stormwater permit require?

Common requirements for coverage under an industrial stormwater permit include development of a written stormwater pollution prevention plan (SWPPP), implementation of control measures, and submittal of a request for permit coverage, usually referred to as the Notice of Intent or NOI. The SWPPP is a written assessment of potential sources of pollutants in stormwater runoff and control measures that will be implemented at your facility to minimize the discharge of these pollutants in runoff from the site. These control measures include site-specific best management practices (BMPs), maintenance plans, inspections, employee training, and reporting. The procedures detailed in the SWPPP must be implemented by the facility and updated as necessary, with a copy of the SWPPP kept on-site. The industrial stormwater permit also requires collection of visual, analytical, and/or compliance monitoring data to determine the effectiveness of implemented BMPs. For more information on EPA's industrial stormwater permit and links to State stormwater permits, go to www.epa.gov/npdes/stormwater and click on "Industrial Activity."

What pollutants are associated with activities at my facility?

Pollutants conveyed in stormwater discharges from land transportation and warehousing activities will vary. There are a number of factors that influence to what extent industrial activities and significant materials can affect water quality.

- ◆ Geographic location
- ◆ Topography
- ◆ Hydrogeology
- ◆ Extent of impervious surfaces (e.g., concrete or asphalt)
- ◆ Type of ground cover (e.g., vegetation, crushed stone, or dirt)
- ◆ Outdoor activities (e.g., material storage, loading/unloading, vehicle maintenance)
- ◆ Size of the operation
- ◆ Type, duration, and intensity of precipitation events

The activities, pollutant sources, and pollutants detailed in Table 1 are commonly found at facilities with vehicle and equipment maintenance and equipment cleaning operations and Table 1A details activities, pollutant sources, and pollutants commonly found at petroleum bulk oil stations and terminals.

Table 1. Common Activities, Pollutant Sources, and Associated Pollutants at Motor Freight Transportation Facilities, Passenger Transportation Facilities, Rail Transportation Facilities, and United States Postal Service Transportation Facilities

Activity	Pollutant Source
Fueling	Fuel, oil, heavy metals
	Spills and leaks during fuel delivery
	Spills caused by "topping off" fuel tanks
	Rainfall falling on the fuel area or stormwater running onto the fuel area
	Hosing or washing down fuel area
	Leaking storage tanks

INDUSTRIAL STORMWATER FACT SHEET SERIES

Sector P: Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities

Table 1. Common Activities, Pollutant Sources, and Associated Pollutants at Motor Freight Transportation Facilities, Passenger Transportation Facilities, Rail Transportation Facilities, and United States Postal Service Transportation Facilities (continued)

Activity	Pollutant Source	Pollutant
Vehicle washing and maintenance	Parts cleaning	Chlorinated solvents, oil, heavy metals, acid/alkaline wastes
	Waste disposal of greasy rags, oil filters, air filters, batteries, hydraulic fluids, transmission fluid, radiator fluids, degreasers	Oil, heavy metals, chlorinated solvents, acid/alkaline wastes, ethylene glycol
	Spills of oil, degreasers, hydraulic fluids, transmission fluid, radiator fluids	Oil, arsenic, heavy metals, organics, chlorinated solvents, ethylene glycol
	Fluids replacement, including oil, hydraulic fluids, transmission fluid, radiator fluids	Oil, arsenic, heavy metals, organics, chlorinated solvents, ethylene glycol
	Washing or steam cleaning	Oil, detergents, heavy metals, chlorinated solvents, phosphorus, salts, suspended solids
Outdoor vehicle and equipment storage and parking	Leaking vehicle fluids including hydraulic lines and radiators, leaking or improperly maintained locomotive on-board drip collection systems, brake dust	Oil, hydraulic fluids, arsenic, heavy metals, organics, fuel
Painting areas	Paint and paint thinner spills	Paint, spent chlorinated solvents, heavy metals
	Spray painting	Paint solids, heavy metals
	Sanding or paint stripping	Dust, paint solids, heavy metals
	Paint clean up	Paint, spent chlorinated solvents, heavy metals
Railroad locomotive sanding	Loading traction sand on locomotives	Sediment
Liquid storage in above ground storage	External corrosion and structural failure	Oil, grease, heavy metals, materials being stored
	Installation problems	
	Spills and overfills due to operator error	
	Failure of piping systems (pipes, pumps, flanges, couplings, hoses, and valves)	

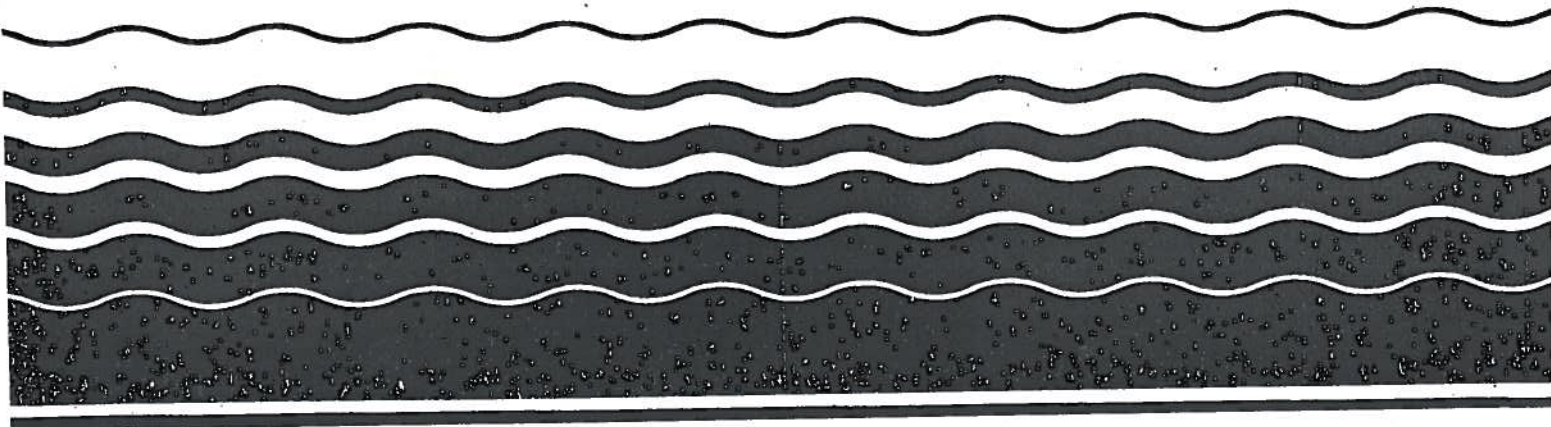
Table 1A. Common Activities, Pollutant Sources, and Pollutants at Petroleum Bulk Oil Stations and Terminals

Activity	Pollutant Source	Pollutant
Liquid storage in above ground storage	External corrosion and structural failure	Oil, grease, heavy metals, materials being stored
	Installation problems	
	Spills and overfills due to operator error	
	Failure of piping systems (pipes, pumps, flanges, couplings, hoses, and valves)	
Petroleum loading/unloading	Spills and overfills due to operator error	Oil, grease



Storm Water Management For Industrial Activities

Developing
Pollution Prevention Plans
And Best Management
Practices



CHAPTER 1 INTRODUCTION

Storm water runoff is part of a natural hydrologic process. However, human activities, particularly urbanization, can alter natural drainage patterns and add pollutants to the rainwater and snowmelt that runs off the earth's surface and enters our Nation's rivers, lakes, streams, and coastal waters. A number of recent studies by the U.S. Environmental Protection Agency (EPA), State water pollution control authorities, and various universities have shown that storm water runoff is a major source of water pollution, declines in fisheries, restrictions on swimming, and these conditions limit our ability to enjoy many of the other benefits that the Nation's waters provide.

In response to this problem, the States and many municipalities have been taking the initiative to manage storm water more effectively. In acknowledgement of the importance of the storm water problem, the Congress has directed EPA to undertake a wide range of activities, including providing technical and financial assistance to States and other jurisdictions to help them improve their storm water management programs. In addition, through recent amendments to the Clean Water Act, the Congress has instructed EPA to develop a regulatory program for certain high priority storm water sources.

In carrying out its responsibilities, EPA is committed to promoting the concept and the practice of preventing pollution at the source, before it can cause environmental problems costing the public and private sector in terms of lost resources and the funding it takes to remediate or correct environmental damage.

1.1 PURPOSE OF THIS GUIDANCE MANUAL

This manual provides general guidance on developing and implementing a Storm Water Pollution Prevention Plan for industrial facilities. Owners and operators of industrial facilities will find that putting together a Storm Water Pollution Prevention Plan is a straightforward process that can be accomplished by facility managers and employees.

EPA is publishing this manual for several reasons. The primary purpose of this manual is to provide guidance for industrial facilities that are subject to requirements under EPA's General Permits for storm water discharges associated with industrial activity. Facilities located in the 12 nondelegated States or 6 Territories are subject to these requirements (see Section 1.6 for a list of States and Territories subject to EPA General Permit requirements). EPA anticipates that most storm water discharge permits issued under the Storm Water Program will require a pollution prevention plan. Throughout this manual, specific EPA General Permit pollution prevention requirements are given in the shaded boxes as seen below. Although the requirements for a Storm Water Pollution Prevention Plan may vary from one permit to another, and from State to State, EPA expects that most of the general concepts described in this manual are common to all plan requirements. Please also note that, although this manual presents EPA General Permit requirements that apply to facilities located in nondelegated States and Territories, some of the nondelegated States required modifications or additions to the pollution prevention plan requirements to ensure that the permit complies with State laws and standards. Therefore, it is important that all facilities located in delegated States, as well as nondelegated States, read their permits to determine whether there are

any special conditions. This manual is not intended in any way to substitute for binding legal requirements pursuant to National Pollutant Discharge Elimination System (NPDES) permits.

EPA GENERAL PERMIT REQUIREMENTS
Storm Water Pollution Prevention Plans
Part IV
A Storm Water Pollution Prevention Plan shall be developed for each facility covered by this permit. Storm Water Pollution Prevention Plans shall be prepared in accordance with good engineering practices. The plan shall identify potential sources of pollution which may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the plan shall describe and ensure the implementation of practices which are to be used to reduce the pollutants in storm water discharges associated with industrial activity at the facility and to assure compliance with the terms and conditions of this permit. Facilities must implement the provisions of the Storm Water Pollution Prevention Plan required under this part as a condition of this permit.

In addition to providing guidance for facilities that are subject to storm water permit requirements, this manual contains information that is generally useful for controlling storm water pollution from almost any type of developed site. EPA hopes this manual is widely used in furthering the prevention of pollution at its sources and the adoption of management practices that help us protect the overall quality of the environment.

EPA is also issuing a guidance manual on Best Management Practices (BMPs) for construction activities. If you are subject to requirements under the general permit for storm water discharges associated with construction activities, that manual is designed to help you comply with those somewhat different requirements.

1.2 ORGANIZATION OF THIS GUIDANCE MANUAL

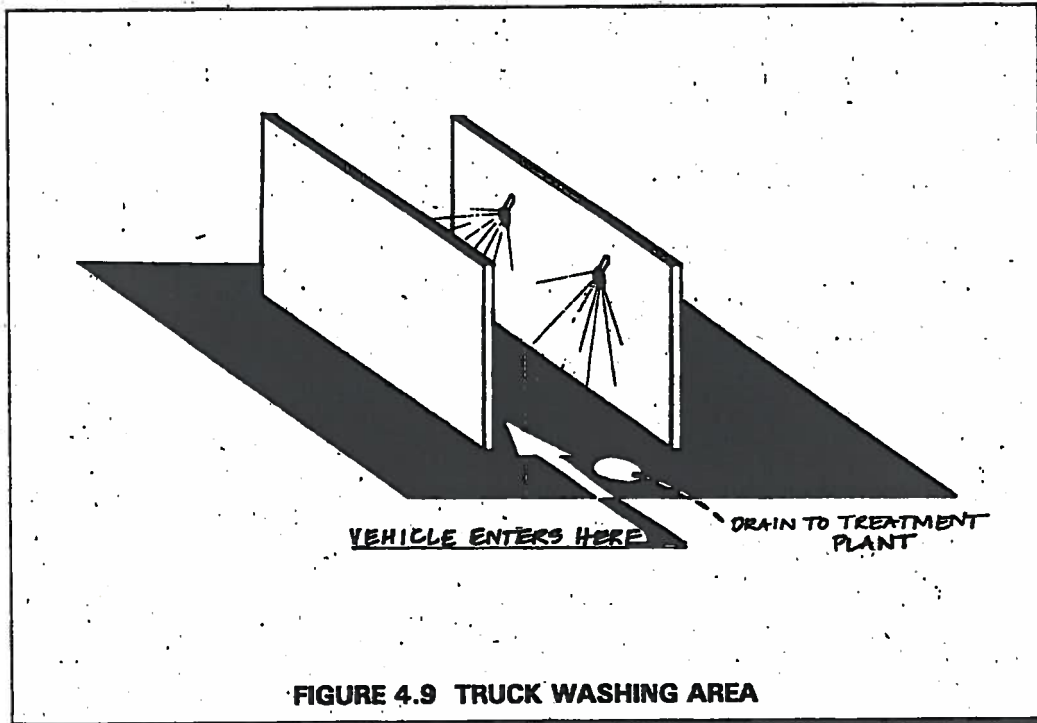
This manual is presented as a user's guide to Storm Water Pollution Prevention Plan requirements. Step-by-step guidelines and accompanying worksheets will walk you through the process of developing and implementing a Storm Water Pollution Prevention Plan. This approach allows you to complete this process in the simplest and most efficient way. The worksheets are designed to help you organize the required information. The remainder of this manual is divided into three sections: Chapter 2 provides information on how to develop a plan; Chapter 3 serves as a resource for selecting activity-specific Best Management Practices (BMPs); and Chapter 4 discusses site-specific BMPs. As you complete each section, you will move through each of the following steps and end up with a fully developed Storm Water Pollution Prevention Plan. Each step is important and should be completed before moving on to the next step. The five major phases involved in developing and implementing your plan are as follows:

Phase 1	Planning and Organization
Phase 2	Assessment
Phase 3	BMP Identification
Phase 4	Plan Implementation
Phase 5	Evaluation

Vehicle Washing

What Is It

Materials that accumulate on vehicles and then scatter across industrial sites represent an important source of storm water contamination. Vehicle washing removes materials such as site-specific dust and spilled materials that have accumulated on the vehicle. If not removed, residual material will be spread by gravity, wind, snow, or rainfall as the vehicles move across the facility site and off the site.



When and Where to Use It

This practice is appropriate for any facility where vehicles come into contact with raw materials on a site. If possible, the vehicle washing area should be built near the location where the most vehicle activity occurs. Wastewater from vehicle washing should be directed away from process materials to prevent contact. Those areas include material transfer areas, loading and unloading areas, or areas located just before the site exit.

What to Consider

When considering the method of vehicle washing, the facility should consider using a high-pressure water spray with no detergent additives. In general, water will adequately remove contaminants from the vehicle. If detergents are used, they may cause other environmental impacts. Phosphate- or organic-containing compounds should be avoided.

If this practice is considered, truck wash waters will result in a non-storm water discharge, thus requiring an application for an NPDES permit to cover the discharge.

Blowers or vacuums should be considered where the materials are dry and easily removed by air.

Advantages of Vehicle Washing
<ul style="list-style-type: none">• Prevents dispersion of materials across the facility site• Is necessary only where methods for transferring contained materials and minimizing exposure have not been successfully adopted and implemented
Disadvantages of Vehicle Washing
<ul style="list-style-type: none">• May be costly to construct a truck washing facility

Federal Register

**Friday
September 29, 1995**

Part XIV

**Environmental
Protection Agency**

**Final National Pollutant Discharge
Elimination System Storm Water Multi-
Sector General Permit for Industrial
Activities; Notice**

definition of "storm water discharge associated with industrial activity" which addresses point source discharges of storm water from eleven major categories of industrial activities. Industrial activities from all of these categories with the exception of construction activities participated in the group application process. The information contained in the group applications indicates that type and amount of pollutants discharged in storm water varies from industrial activity to industrial activity because of the variety of potential pollutant sources present in different industrial activities, as well as the variety of pollution prevention measures commonly practiced by each of the regulated industries. To facilitate the process of developing permit conditions for each of the 1200 group applications submitted, EPA classified groups into 29 industrial sectors where the nature of industrial activity, type of materials handled and material management practices employed were sufficiently similar for the purposes of developing permit conditions. Each of the industrial sectors were represented by one or more groups which participated in the group application process. Table 1 lists each of the industrial activities covered by today's permit, and the corresponding sections of today's fact sheet and permit which discuss the specific requirements for that industry. EPA has further

divided some of the 29 sectors into subsectors in order to establish more specific and appropriate permit conditions, including best management practices and monitoring requirements. Coverage under today's general permit is available to storm water discharges from industrial activities represented by the group application process. However, coverage under this permit is not restricted to participants in the group application process. To limit coverage under this general permit only to those who participated in the Group application process would not be appropriate for administrative, environmental, and national consistency reasons. The administrative burden for EPA to develop separate general permits for non-group members would be excessive, unnecessary, and wasteful of tax dollars. EPA would also need to use the same information in the development of such permits. The permits would be essentially the same. The time spent in this process would leave many facilities unregulated for some number of additional months. This would not address the environmental concerns of the Clean Water Act. Likewise, group members are not precluded from seeking coverage under other available storm water permits such as EPA's "baseline" general permits for Storm Water Discharges Associated with Industrial Activity, (57 FR 41175 and 57 FR 44412). Group members must consider,

however, that the deadlines for preparing and implementing the pollution prevention plan required under the baseline permit have already expired for existing facilities. Therefore, group members that seek coverage under the baseline general permit must have a pollution prevention plan developed and implemented prior to NOI submittal.

Unlike the baseline general permits, today's permit does not exclude all storm water discharges subject to effluent limitation guidelines. Four types of storm water discharges subject to effluent limitation guidelines may be covered under today's permit if they are not already subject to an existing or expired NPDES permit. These discharges include contaminated storm water runoff from phosphate fertilizer manufacturing facilities, runoff associated with asphalt paving or roofing emulsion production, runoff from material storage piles at cement manufacturing facilities and coal pile runoff at steam electric generating facilities. The permit does not, however, authorize all storm water discharges subject to effluent guidelines. Storm water discharges subject to effluent guidelines under 40 CFR part 436 or for mine drainage under 40 CFR part 440 are not covered under today's permit nor are discharges subject to effluent guidelines for acid or alkaline mine drainage under 40 CFR part 434.

TABLE 1.—INDUSTRIAL ACTIVITIES COVERED BY TODAY'S GENERAL PERMIT

Industrial activity	Fact sheet section describing discharges covered	Permit section describing discharges covered
Timber Products Facilities	VIII.A	XI.A.
Paper and Allied Products Manufacturing Facilities	VIII.B	XI.B.
Chemical and Allied Products Manufacturing Facilities	VIII.C	XI.C.
Asphalt Paving and Roofing Materials Manufacturers and Lubricant Manufacturers	VIII.D	XI.D.
Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities	VIII.E	XI.E.
Primary Metals Facilities	VIII.F	XI.F.
Metal Mining (Ore Mining and Dressing) Facilities	VIII.G	XI.G.
Coal Mines and Coal Mining-Related Facilities	VIII.H	XI.H.
Oil and Gas Extraction Facilities	VIII.I	XI.I.
Mineral Mining and Processing Facilities	VIII.J	XI.J.
Hazardous Waste Treatment, Storage, or Disposal Facilities	VIII.K	XI.K.
Landfills and Land Application Sites	VIII.L	XI.L.
Automobile Salvage Yards	VIII.M	XI.M.
Scrap and Waste Recycling Facilities	VIII.N	XI.N.
Steam Electric Power Generating Facilities, Including Coal Handling Areas	VIII.O	XI.O.
Vehicle Maintenance or Equipment Cleaning Areas at Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and the United States Postal Service.	VIII.P	XI.P.
Vehicle Maintenance Areas and/or Equipment Cleaning Operations at Water Transportation Facilities.	VIII.Q	XI.Q.
Ship and Boat Building or Repairing Yards	VIII.R	XI.R.
Vehicle Maintenance Areas, Equipment Cleaning Areas, or Delcing Area located at Air Transportation Facilities.	VIII.S	XI.S.
Treatment Works	VIII.T	XI.T.
Food and Kindred Products Facilities	VIII.U	XI.U.
Textile Mills, Apparel, and Other Fabric Product Manufacturing Facilities	VIII.V	XI.V.
Wood and Metal Furniture and Fixture Manufacturing Facilities	VIII.W	XI.W.

includes in the storm water pollution prevention plan a description of the location of the outfalls and explaining in detail why the outfalls are expected to discharge substantially identical effluent. In addition, for each outfall that the permittee believes is representative, an estimate of the size of the drainage area (in square feet) and an estimate of the runoff coefficient of the drainage area (e.g., low (under 40 percent), medium (40 to 65 percent) or high (above 65 percent)) shall be provided in the plan.

f. Compliance Monitoring Requirements. Today's permit requires permittees with coal pile runoff associated with steam electric power generation to monitor for the presence of total suspended solids and pH at least annually. These monitoring requirements are necessary to evaluate compliance with the numeric effluent limitation imposed on these discharges. Monitoring shall be performed upon a minimum of one grab sample. All samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches in magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. The grab sample shall be taken during the first 30 minutes of the discharge. If the collection of a grab sample during the first 30 minutes is impracticable, a grab sample can be taken during the first hour of the discharge, and the discharger shall submit with the monitoring report a description of why a grab sample during the first 30 minutes was impracticable. Monitoring results shall be submitted on Discharge Monitoring Report Form(s) postmarked no later than the last day of the month following collection of the sample. For each outfall, one Discharge Monitoring Report from must be submitted per storm event sampled. Facilities which discharge through a large or medium municipal separate storm sewer system (systems serving a population of 100,000 or more) must also submit signed copies of discharge monitoring reports to the operator of the municipal separate storm sewer system. Alternative Certification provisions described in Section XI.O.5 do not apply to facilities subject to compliance monitoring requirements in this section. Compliance monitoring is required at least annually for discharges subject to effluent limitations. Therefore, EPA cannot permit a facility to waive compliance monitoring.

g. Quarterly Visual Examination of Storm Water Quality. Quarterly visual examinations of storm water discharges from each outfall are required at steam

electric generating facilities. The examination must be of a grab sample collected from each storm water outfall. The examination of storm water grab samples shall include any observations of color, odor, clarity, floating solids, settled solids, suspended solids, foam, oil sheen, or other obvious indicators of storm water pollution. The examination must be conducted in a well lit area. No analytical tests are required to be performed on these samples.

The examination must be made at least once in each quarter of the permit during daylight unless there is insufficient rainfall or snow-melt to runoff. Where practicable, the same individual should carry out the collection and examination of discharges throughout the life of the permit to ensure the greatest degree of consistency possible. Grab samples shall be collected within the first 30 minutes (or as soon thereafter as practical, but not to exceed 60 minutes) of when the runoff begins discharging. Reports of the visual examination include: the examination date and time, examination personnel, visual quality of the storm water discharge, and probable sources of any observed storm water contamination. The visual examination reports must be maintained onsite with the pollution prevention plan.

EPA believes that this quick and simple assessment will allow the permittee to approximate the effectiveness of his/her plan on a regular basis at very little cost. Although the visual examination cannot assess the chemical properties of the storm water discharged from the site, the examination will provide meaningful results upon which the facility may act quickly. The frequency of this visual examination will also allow for timely adjustments to be made to the plan. If BMPs are performing ineffectively, corrective action must be implemented. A set of tracking or follow-up procedures must be used to ensure that appropriate actions are taken in response to the examinations. The visual examination is intended to be performed by members of the pollution prevention team. This hands on examination will enhance the staff's understanding of the storm water problems on that site and effects on the management practices that are included in the plan.

When a discharger is unable to collect samples over the course of the visual examination period as a result of adverse climatic conditions, the discharger must document the reason for not performing the visual examination and retain this documentation onsite with the records

of the visual examinations. Adverse weather conditions which may prohibit the collection of samples include weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.) or otherwise make the collection of a sample impracticable (drought, extended frozen conditions, etc.).

EPA realizes that if a facility is inactive and unstaffed it may be difficult to collect storm water discharge samples when a qualifying event occurs. Today's final permit has been revised so that inactive, unstaffed facilities can exercise a waiver of the requirement to conduct quarterly visual examination.

P. Storm Water Discharges Associated With Industrial Activity From Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities

1. Discharges Covered Under This Section

Special conditions have been developed for ground transportation facilities and rail transportation facilities that have vehicle and equipment maintenance shops (vehicle and equipment rehabilitation, mechanical repairs, painting, fueling and lubrication) and equipment cleaning operations. Vehicle and equipment maintenance is a broad term used to include the following activities: vehicle and equipment fluid changes, mechanical repairs, parts cleaning, sanding, refinishing, painting, fueling, locomotive sanding (loading sand for traction), storage of vehicles and equipment waiting for repair or maintenance, and storage of the related materials and waste materials, such as oil, fuel, batteries, tires, or oil filters. Equipment cleaning operations include areas where the following types of activities take place: vehicle exterior wash down, interior trailer washouts, tank washouts, and rinsing of transfer equipment. Any storm water discharges from facilities where such activities take place are subject to the special conditions described in Part XI.P. of today's permit.

The conditions in this section apply to storm water discharges from vehicle and equipment maintenance shops or cleaning operations located on any of the industrial facilities covered under the storm water application regulations (40 CFR 122.26) and applying for coverage under this permit.

FACT SHEET

FOR

STATE WATER RESOURCES CONTROL BOARD (STATE WATER BOARD)
WATER QUALITY ORDER NO. 97-03-DWQ
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)
GENERAL PERMIT NO. CAS000001 (GENERAL PERMIT)

WASTE DISCHARGE REQUIREMENTS (WDRS)
FOR
DISCHARGES OF STORM WATER ASSOCIATED WITH INDUSTRIAL ACTIVITIES
EXCLUDING CONSTRUCTION ACTIVITIES

BACKGROUND

In 1972, the Federal Water Pollution Control Act (also referred to as the Clean Water Act [CWA]) was amended to provide that the discharge of pollutants to waters of the United States from any point source is effectively prohibited unless the discharge is in compliance with an NPDES permit. The 1987 amendments to the CWA added Section 402(p) that establishes a framework for regulating municipal and industrial storm water discharges under the NPDES Program. On November 16, 1990, the U.S. Environmental Protection Agency (U.S. EPA) published final regulations that establish application requirements for storm water permits. The regulations require that storm water associated with industrial activity (storm water) that discharges either directly to surface waters or indirectly through municipal separate storm sewers must be regulated by an NPDES permit.

U.S. EPA developed a four-tier permit issuance strategy for storm water discharges associated with industrial activity as follows:

Tier I, Baseline Permitting--One or more general permits will be developed to initially cover the majority of storm water discharges associated with industrial activity.

Tier II, Watershed Permitting--Facilities within watersheds shown to be adversely impacted by storm water discharges associated with industrial activity will be targeted for individual or watershed-specific general permits.

Tier III, Industry-Specific Permitting--Specific industry categories will be targeted for individual or Industry-specific general permits.

Tier IV, Facility-Specific Permitting--A variety of factors will be used to target specific facilities for individual permits.

The regulations allow authorized states to issue general permits or individual permits to regulate storm water discharges.

Storm Water Pollution Prevention Plans (SWPPPs)

All facility operators must prepare, retain on site, and implement an SWPPP. The SWPPP has two major objectives: (1) to help identify the sources of pollution that affect the quality of industrial storm water discharges and authorized non-storm water discharges, and (2) to describe and ensure the implementation of BMPs to reduce or prevent pollutants in industrial storm water discharges and authorized non-storm water discharges.

This General Permit requires development and implementation of an SWPPP emphasizing BMPs. This approach provides the flexibility necessary to establish appropriate BMPs for different types of industrial activities and pollutant sources. As this General Permit covers vastly different types of facilities, the State Water Board recognizes that there is no single best way of developing or organizing an SWPPP. The SWPPP requirements contain the essential elements that all facility operators must consider and address in the SWPPP. This General Permit's SWPPP requirements are more detailed than the previous general permit's SWPPP requirements, and the suggested order of the SWPPP elements have been rearranged (1) to correspond more closely with other storm water permits in effect throughout the country, and (2) to generally follow a more logical path. Facility operators that have already developed and implemented SWPPPs under previous general permits are required to review the SWPPP's requirements contained in this General Permit and then review their existing SWPPP for adequacy. If the existing SWPPP adequately identifies and assesses all potential sources of pollutants and describes the appropriate BMPs necessary to reduce or prevent pollutants, the facility operator is not required to revise the existing SWPPP.

One of the major elements of the SWPPP is the elimination of unauthorized non-storm water discharges to the facility's storm drain system. Unauthorized non-storm water discharges can be generated from a wide variety of potential pollutant sources. They include waters from the rinsing or washing of vehicles, equipment, buildings, or pavement; materials that have been improperly disposed of or dumped, and spilled; or leaked materials. Unauthorized non-storm water discharges can contribute a significant pollutant load to receiving waters. Measures to control spills, leakage, and dumping can often be addressed through BMPs. Unauthorized non-storm water discharges may enter the storm drain system via conveyances such as floor drains. All conveyances should be evaluated to determine whether they convey unauthorized non-storm water discharges to the storm drain system. Unauthorized non-storm water discharges (even when commingled with storm water) shall be eliminated or covered by a separate NPDES Permit.

There are many non-storm water discharges that, under certain conditions, should not contain pollutants associated with

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(Cite as: 966 F.2d 1292)

▷

United States Court of Appeals,
Ninth Circuit.
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

v.
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondent,
Battery Council International, et al., Respon-
dents-Intervenors.

Nos. 90-70671, 91-70200.
Argued and Submitted Oct. 9, 1991.
Decided June 4, 1992.

Environmental group sought review of Environmental Protection Agency's (EPA's) Clean Water Act storm water discharge rule. The Court of Appeals, Ferguson, Senior Circuit Judge, held that: (1) the EPA's failure to include deadlines for permit approval or denial and compliance consistent with Clean Water Act was arbitrary and capricious, although injunctive relief was not warranted; (2) EPA's definition of municipal separate storm sewer serving a population was not arbitrary and capricious; and (3) EPA rule excluding various types of light industry and construction sites of less than five acres from application of rule was arbitrary and capricious.

Petition for review granted in part and denied in part.

O'Scannlain, Circuit Judge, filed an opinion concurring in part and dissenting in part.

West Headnotes

11 Declaratory Judgment 118A ↪203

118A Declaratory Judgment
118A11 Subjects of Declaratory Relief
118A11(K) Public Officers and Agencies
118Ak203 k. Federal Officers and Boards. Most Cited Cases

Question of whether Environmental Protection Agency (EPA) is bound by statutory scheme set by Con-

gress is legal one, and, thus, request for declaratory relief from EPA's failure to issue storm water permitting regulations by particular date was ripe for consideration by court. Federal Water Pollution Control Act Amendments of 1972, §§ 101-606, 101(a), 402(l, p), 502(14), as amended, 33 U.S.C.A. §§ 1251-1387, 1251(a), 1342(l, p), 1362(14).

21 Declaratory Judgment 118A ↪7

118A Declaratory Judgment
118A1 Nature and Grounds in General
118A1(A) In General
118Ak7 k. Necessity, Utility and Propriety. Most Cited Cases

Declaratory Judgment 118A ↪8

118A Declaratory Judgment
118A1 Nature and Grounds in General
118A1(A) In General
118Ak8 k. Termination or Settlement of Controversy. Most Cited Cases

For purposes of granting declaratory relief, court considers whether judgment will clarify and settle legal relations at issue and whether it will afford relief from uncertainty and controversy giving rise to proceedings.

31 Environmental Law 149E ↪16

149E Environmental Law
149E1 In General
149Ek14 Administrative Agencies and Proceedings in General
149Ek16 k. Regulations and Rulemaking in General. Most Cited Cases
(Formerly 199k25.5(1) Health and Environment)

Environmental Protection Agency (EPA) lacks authority to ignore unambiguous deadlines set by Congress for issuing regulations.

41 Injunction 212 ↪1

212 Injunction
2121 Nature and Grounds in General

2121(A) Nature and Form of Remedy
2121 k. Nature and Purpose in General. Most Cited Cases

Injunctive relief may be inappropriate if it requires constant supervision by the court.

151 Environmental Law 149E ☞ 700

149E Environmental Law
149EXIII Judicial Review or Intervention
149EK699 Injunction
149EK700 k. In General. Most Cited Cases
(Formerly 199K25.15(2.1), 199K25.15(2) Health and Environment)

Court of Appeals would not enjoy Environmental Protection Agency (EPA) from further extensions of deadline for permit applications for municipal and industrial discharges as to do so would require extensive supervision of EPA by Court; Court would operate on assumption that EPA would follow dictates of Congress and Court.

161 Environmental Law 149E ☞ 196

149E Environmental Law
149EV Water Pollution
149EK194 Permits and Certifications
149EK196 k. Discharge of Pollutants. Most Cited Cases
(Formerly 199K25.7(14) Health and Environment)

Environmental Protection Agency's (EPA's) failure to include final approval and compliance deadlines for permit applications for storm water discharges associated with industrial activities in large municipalities was arbitrary and capricious exercise of its responsibility to issue regulations pursuant to Clean Water Act. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(4)(A, B), as amended, 33 U.S.C.A. § 1342(p)(4)(A, B).

171 Environmental Law 149E ☞ 196

149E Environmental Law
149EV Water Pollution
149EK194 Permits and Certifications
149EK196 k. Discharge of Pollutants. Most Cited Cases
(Formerly 199K25.7(14) Health and Environment)

Environmental Protection Agency's (EPA's) definition of phrase "municipal separate storm sewer system serving a population" in regulations for implementing the Clean Water Act storm water discharge rule, while complex and possibly convoluted, was not arbitrary and capricious; EPA defined phrase by considering factors such as its own workload, the incorporation status of municipalities, and

(Formerly 199K25.7(5) Health and Environment)

191 Environmental Law 149E ☞ 176
149E Environmental Law
149EV Water Pollution
149EK174 Substances, Sources, and Activities Regulated
149EK176 k. Sewage and Sewers. Most Cited Cases

Despite Environmental Protection Agency's (EPA's) unlawful delay in establishing comprehensive program for permit approval and compliance with Clean Water Act storm water discharge rule, EPA's schedule calling for immediate municipal system applications due six months after applications for large municipal systems was within statutory scheme in its relation to schedule for large systems and was not unreasonable. Federal Water Pollution Control Act Amendments of 1972, § 402(p), (p)(2)(C, D), (p)(4)(B), as amended, 33 U.S.C.A. § 1342(p), (p)(2)(C, D), (p)(4)(B).

(Formerly 199K25.7(14) Health and Environment)

149E Environmental Law
149EV Water Pollution
149EK194 Permits and Certifications
149EK196 k. Discharge of Pollutants. Most Cited Cases

181 Environmental Law 149E ☞ 196

Even if Environmental Protection Agency (EPA) was failing to proceed so that regulations for approval and compliance with permit applications for storm water discharges would be in place for small systems by deadline in Clean Water Act, small systems could not be put on same schedule as medium ones, as Clean Water Act did not require regulation of small systems prior to expiration of moratorium. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(1), (p)(4)(A, B), (p)(6), as amended, 33 U.S.C.A. § 1342(p)(1), (p)(4)(A, B), (p)(6).

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urban density. Federal Water Pollution Control Act Amendments of 1972, §§ 402(p)(2), 502, 502(4), as amended, 33 U.S.C.A. §§ 1342(p)(2), 1362, 1362(4).

[10] Environmental Law 149E ↪175

149E Environmental Law

149EV Water Pollution

149Ek174 Substances, Sources, and Activities

Regulated

149Ek175 k. In General. Most Cited Cases

(Formerly 199k25.7(5) Health and Environment)

Environmental Protection Agency's (EPA's) rules excluding various types of light industry and construction sites of less than five acres from application of Clean Water Act storm water discharge rule were arbitrary and capricious absent support in record for assumption that industrial activity or light industry would take place indoors and generate minimal amounts of particles and emissions. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(2)(B), as amended, 33 U.S.C.A. § 1342(p)(2)(B).

[11] Environmental Law 149E ↪175

149E Environmental Law

149EV Water Pollution

149Ek174 Substances, Sources, and Activities

Regulated

149Ek175 k. In General. Most Cited Cases

(Formerly 199k25.7(5) Health and Environment)

Environmental Protection Agency's (EPA's) exemption from Clean Water Act storm water discharge rule for construction sites of less than five acres, as increased from original proposal of exemption for sites of less than one acre, was arbitrary and capricious absent support in record for EPA's perception that construction activities on less than five acres were nonindustrial in nature. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(2)(B), as amended, 33 U.S.C.A. § 1342(p)(2)(B).

[12] Environmental Law 149E ↪175

149E Environmental Law

149EV Water Pollution

149Ek174 Substances, Sources, and Activities

Regulated

149Ek175 k. In General. Most Cited Cases

(Formerly 199k25.7(5) Health and Environment)

For purposes of setting rules for application of storm water discharge regulations in Clean Water Act, EPA lacked agency power to make categorical exemptions where result was de minimis. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(2)(B), as amended, 33 U.S.C.A. § 1342(p)(2)(B).

[13] Environmental Law 149E ↪176

149E Environmental Law

149EV Water Pollution

149Ek174 Substances, Sources, and Activities

Regulated

149Ek176 k. Sewage and Sewers. Most Cited

Cases

(Formerly 199k25.7(13.1), 199k25.7(13) Health and Environment)

Environmental Protection Agency's (EPA's) exemption from permit requirements under Clean Water Act storm water discharge rule for uncontaminated runoff from mining, oil, and gas facilities was not arbitrary and capricious; conference report gave administrator discretion to determine when contamination had occurred with respect to overburden, raw materials, waste products, and other items. Federal Water Pollution Control Act Amendments of 1972, § 402(l)(2), as amended, 33 U.S.C.A. § 1342(l)(2).

[14] Environmental Law 149E ↪175

149E Environmental Law

149EV Water Pollution

149Ek174 Substances, Sources, and Activities

Regulated

149Ek175 k. In General. Most Cited Cases

(Formerly 199k25.7(6.1), 199k25.7(6) Health and Environment)

Environmental Protection Agency (EPA) established substantive controls for municipal storm water discharges required by amendments to Clean Water Act as result of administrator's discretion to determine which controls were necessary. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(A, B), as amended, 33 U.S.C.A. § 1342(p)(3)(A, B).

[15] Administrative Law and Procedure 15A ↪394

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15AK392 Proceedings for Adoption
15AK394 k. Notice and Comment, Necessity.
Most Cited Cases

Environmental Law 149E  196

149E Environmental Law
149EV Water Pollution
149EK194 Permits and Certifications
149EK196 k. Discharge of Pollutants. Most Cited Cases
(Formerly 199K25.7(14) Health and Environment)

Environmental Protection Agency's (EPA's) group permit application process for industrial dischargers under Clean Water Act storm sewage discharge rules was not invalid despite its failure to provide for notice and comment, as approval of part 1 application was essentially factual determination. 5 U.S.C.A. §§ 551(4), 553.

*1294 Robert W. Adler, Natural Resources Defense Council, Washington, D.C., for petitioner.

Daniel S. Goodman, U.S. Dept. of Justice, Washington, D.C., for respondent.

*1295 Petition for Review of a Rule Promulgated by the Environmental Protection Agency.

Before PREGGERSON, FERGUSON, and OSCAN-MLAIN, Circuit Judges.

FERGUSON, Senior Circuit Judge:

The Natural Resources Defense Council ("NRDC") challenges aspects of the Environmental Protection Agency's ("EPA") recent Clean Water Act storm water discharge rule.^{FN1} NRDC argues that the deadlines contained in the rule and the scope of its coverage are unlawful under section 402(l), (p) of the Clean Water Act, 33 U.S.C. § 1342(l), (p). We grant partial relief.

FN1. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed.Reg. 47,990 (1990) (to be codified at 40 C.F.R. § 122.26); National

Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, 56 Fed.Reg. 12,098 (1991) (to be codified at 40 C.F.R. § 122.26(e)).

I. BACKGROUND

In 1972 Congress enacted significant amendments to the Clean Water Act ("CWA"),^{FN2} 33 U.S.C. §§ 1251-1387 (1988), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One major focus of the CWA is the control of "point source" pollution. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The CWA also established the National Pollutant Discharge Elimination System ("NPDES"), requiring permits for any discharge of pollutants from a point source pursuant to section 402 of the CWA, 33 U.S.C. § 1342. The CWA empowers EPA or an authorized state to conduct an NPDES permitting program. 33 U.S.C. § 1342(a)-(b). Under the program, as long as the permit issued contains conditions that implement the requirements of the CWA, the EPA may issue a permit for discharge of any pollutant. 33 U.S.C. § 1342(a)(1).

FN2. The Act is popularly known as the Clean Water Act or the Federal Water Pollution Control Act. 33 U.S.C. § 1251. For more background on the CWA, see *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 202-09, 96 S.Ct. 2072, 2073-26, 48 L.Ed.2d 578 (1976); *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1483 (9th Cir.1987), vacated on other grounds, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988); and *Natural Resources Defense Council v. Train*, 510 F.2d 692, 695-97 (D.C. Cir.1975).

This case involves runoff from diffuse sources that eventually passes through storm sewer systems and is thus subject to the NPDES permit program. See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed.Reg. 56,548 (1991). One recent study concluded that pollution from such sources, including runoff from urban areas, construction sites, and agricultural land, is now a leading cause of water quality impairment. 55 Fed.Reg. at 47,991.^{FN3}

FN3. The Nationwide Urban Runoff Program

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(NURP) conducted from 1978 through 1983 found that urban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants. 55 Fed.Reg. at 47,991. A significant number of samples tested exceeded water quality criteria for one or more pollutants. Id. at 47,992. Urban runoff is adversely affecting 39% to 59% of the harvest-limited shellfish beds in the waters off the East Coast, West Coast and in the Gulf of Mexico. 56 Fed.Reg. at 56,548.

A. Efforts to Regulate Storm Water Discharge.

Following the enactment of the CWA amendments in 1972, EPA promulgated NPDES permit regulations exempting a number of classes of point sources, including uncontaminated storm water discharge, on the basis of "administrative infeasibility," i.e., the extraordinary administrative burden imposed on EPA should it have to issue permits for possibly millions of point sources of runoff. Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1372 & n. 5, 1377 (D.C.Cir.1977). NRDC *1296 challenged the exemptions. Relying on the language of the statute, its legislative history and precedent, the D.C. Circuit held that the EPA Administrator did not have the authority to create categorical exemptions from regulation. Id. at 1379. However, the court acknowledged the agency's discretion to shape permits in ways "not inconsistent with the clear terms of the Act." Id. at 1382.

Following this litigation, EPA promulgated regulations covering storm water discharges in 1979, 1980 and 1984. 56 Fed.Reg. 56,548. NRDC challenged various aspects of these rules both at the administrative level as well as in the courts.

Recognizing both the environmental threat posed by storm water runoff ^{FN4} and EPA's problems in implementing regulations, ^{FN5} Congress passed the Water Quality Act of 1987 ^{FN6} containing amendments to the CWA ("the 1987 amendments"), portions of which set up a new scheme for regulation of storm water runoff. Section 402(p), as amended, established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits. See Appendix A. The Act also set up a moratorium on permitting requirements for most storm water discharges, which ends on October 1, 1992. There are five exceptions that are required to obtain permits before that date:

FN4. See 132 Cong. Rec. 32,381 (1986).

FN5. Senator Stafford, speaking in favor of the conference report for the Water Quality Act, noted that "EPA should have developed this program long ago. Unfortunately, it did not. The conference substitute provides a short grace period during which EPA and the States generally may not require permits for municipal separate storm sewers." 132 Cong. Rec. 32,381 (1986). Senator Chafee stated "[t]he Agency has been unable to move forward with a [storm water discharge control] program, because the current law did not give enough guidance to the Agency. This provision provides such guidance, and I expect EPA to move rapidly to implement this control program." 133 Cong. Rec. 1,264 (1987).

FN6. Pub.L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, ... determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

CWA § 402(p)(2); 33 U.S.C. § 1342(p)(2).

Section 402(p) also outlines an incremental or "phase-in" approach to issuance of storm water discharge permits. The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first. 133 Cong. Rec. 991 (1987). Section 402(p) requires EPA to promulgate rules regulating permit application procedures in a staggered fashion.

“set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Under this standard a court must find a “rational connection between the facts found and the choice made.” *Sierra Pacific Indus.*, 866 F.2d 1099, 1105 (9th Cir.1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). The court must decide whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

On questions of statutory construction, courts must carry out the unambiguously expressed intent of Congress. If a statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Congress may leave an explicit gap, thus delegating legislative authority to an agency subject to the arbitrary and capricious standard. *Id.* at 843-44, 104 S.Ct. at 2781-82. If legislative delegation is implicit, courts must defer to an agency’s statutory interpretation as long as it is reasonable. *Id.* at 844, 104 S.Ct. at 2782. This is because an agency has technical expertise as well as the authority to reconcile conflicting policies. See *id.* Nevertheless, questions of congressional intent that can be answered with “traditional tools of statutory construction” are still firmly within the province of the courts. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987).

B. EPA’s Extension of Statutory Deadlines.

1. Background.

NRDC challenges EPA’s extension of certain statutory deadlines in the November 1990 and March 1991 rules. The statutory scheme calls for EPA to consider permit applications from the most serious sources of pollutants first: industrial dischargers and large municipal separate storm sewer systems (“large systems”).^{FN7} The statute required EPA to establish regulations*1298 for permit application requirements for these two groups by February 4, 1989; to receive applications for permits one year later, February 4, 1990; and to approve or deny the permits by February 4, 1991. Permittees may be given up to three years to comply with their permits. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Medium sized municipal sep-

Responding to the 1987 amendments requiring the EPA to issue permit application requirements for storm water discharges associated with industrial activities and large municipalities, the EPA issued final rules on November 16, 1990, almost two years after its deadline (“the November 1990 rule”). 55 Fed.Reg. at 47,990. EPA issued amended rules on March 21, 1991 (“the March 1991 rule”). 56 Fed.Reg. at 12,098. It is to portions of these rules that NRDC objects.

B. Jurisdiction.

We have jurisdiction pursuant to CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). Section 509(b)(1) describes six types of actions by the EPA administrator that are subject to review in the court of appeals. Although the parties do not specify the section upon which they rely, § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) allows the court to review *1297 the issuance or denial of a permit under CWA § 402, 33 U.S.C. § 1342. The court also has the power to review rules that regulate the underlying permit procedures. *NRDC v. EPA*, 656 F.2d 768, 775 (D.C.Cir.1981); *cf. E.L. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 136, 97 S.Ct. 965, 979, 51 L.Ed.2d 204 (1977). NRDC filed timely petitions for review of the final rules at issue here pursuant to CWA § 509(b)(1), 33 U.S.C. 1369(b)(1).

C. Standing.

Any “interested person” may seek review of designated actions of the EPA Administrator. 33 U.S.C. § 1369(b)(1). This court has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 127, 133, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972) covers the “interested person” language. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir.1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 578 (D.C.Cir.1980)). A petitioner under *Sierra Club* must suffer adverse affects to her economic interests or “[a]esthetic and environmental well-being.” *Sierra Club*, 405 U.S. at 734, 92 S.Ct. at 1366. Intervenor are various industry and trade groups subject to regulation under the rules at issue. NRDC claims, inter alia, that EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC’s allegations and the potential economic impact of the rules on the intervenors satisfy the broad standing requirement applicable here.

II. DISCUSSION

A. Standard of Review.

5 U.S.C. § 706(2)(A) (1988) authorizes the court to

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arate storm sewer systems ("medium systems") (those serving a population of 100,000 or more but less than 250,000) are on a similar schedule, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(p)(4)(B). The temporary statutory exemption for all storm water sources expires on October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA states that discharges from municipal separate storm sewer systems serving a population of under 100,000 are to be regulated

after that date.

FN7. Large municipal systems are those serving a population of 250,000 or more. § 402(p)(2)(C).

The EPA rules at issue changed the statutory deadlines as follows:

Deadlines pursuant to CWA § 402(p) ⁸		EPA Deadlines ⁹	
Discharge type	Deadline to issue rules	Deadline for application and approval of permits	Application deadlines
Industrial	2/4/89	2/4/90-applications due 2/4/91-approval due	See below
Large municipal systems	2/4/89	2/4/90-applications due 2/4/91-approval	Part 1- 11/18/91 Part 2- 11/16/92
Medium municipal systems	2/4/91	2/4/92-applications due 2/4/93-approval due	Part 1- 5/18/92 Part 2- 5/17/93

EPA Application Deadlines for "Industrial Activity" Dischargers

Individual
 due 11/18/91

Group
 Part 1-9/30/91; Part 2-10/1/92

FN8. Since NRDC filed this action, Congress has passed certain legislation affecting some of the deadlines at issue. Congress ratified the date of September 30, 1991 for part 1 of group applications for industrial dischargers. See Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27, § 307, 105 Stat. 130, 152 (1991).

Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") clarifies the deadlines for storm water discharges associated with industrial activity from facilities owned or operated by a municipality. Pub.L. No. 102-240, § 1068, 105 Stat.1914, 2007 (1991). ISTEA deadlines are

being reviewed in a separate case. Nothing in this opinion should be viewed as requiring EPA to comply with deadlines that have been altered or superseded by the ISTEA.

FN9. See 55 Fed.Reg. at 48,071-722 (to be codified at 40 C.F.R. § 122.26(e)); 67 Fed.Reg. at 12,100 (to be codified at 40 C.F.R. § 122.26(e)(2)(iii)). EPA changed certain of these deadlines after this case was submitted. These changes are the subject of a separate case.

The EPA rules at issue set no date for final approval or denial of applications from municipal or industrial dischargers, nor for compliance by these regulated entities. See 55 Fed.Reg. at 48,072.

a. Request for Declaratory Relief.

NRDC asks the court to (1) declare unlawful EPA's failure to issue storm water permitting regulations by February 4, 1989; and (2) declare unlawful EPA's extension of deadlines for submission of permit applications by large and medium systems and individual industrial dischargers.

[1] A request for declaratory relief in a challenge to an agency action is ripe for review if the action at issue is final and the questions involved are legal ones. *Public Util. Dist. No. 1 v. Bonneville Power Admin.*, 947 F.2d 386, 390 n. 1 (9th Cir. 1991) (citations omitted), *cert. denied*, 503 U.S. 1004, 112 S.Ct. 1759, 118 L.Ed.2d 422 (1992). Here, the agency regulations are final. *See* 55 Fed.Reg. at 47,990, 56 Fed.Reg. at 12,096. The question of whether the EPA is bound by the statutory scheme set by Congress is a legal one. The request for declaratory relief is therefore ripe for consideration by this court.

[2] The granting of declaratory relief "rests in the sound discretion of the [] court exercised in the public interest." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Civil Procedure* § 2759, at 645 (1983). The guiding principles are whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings. *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (citing *Borchard, Declaratory Judgments* 299 (2d ed. 1941)), *cert. denied*, 385 U.S. 919, 87 S.Ct. 229, 17 L.Ed.2d 143 (1966). A court declaration delineates important rights and responsibilities and can be "a message not only to the parties but also to the public and has significant educational and lasting importance." *Bilbrex v. Bilbrex v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). Because of the importance of the interests and the principles at stake, we grant declaratory relief.

[3] EPA does not have the authority to ignore unambiguous deadlines set by Congress. *Delaney v. EPA*, 898 F.2d 687, 691 (9th Cir.), *cert. denied*, 498 U.S. 998, 111 S.Ct. 556, 112 L.Ed.2d 563 (1990). In arguing against injunctive relief, EPA points to cases recognizing factors indicating that equitable relief may be inappropriate. *See, e.g., In re Barr Laboratories, Inc.*, 930 F.2d 72, 74 (D.C.Cir.) (agency's choice of priorities is an important factor in considering whether to grant equitable relief), *cert. denied*, 502 U.S. 906, 112 S.Ct. 297, 116 L.Ed.2d 241 (1991); *Natural Resources Defense Council v. Train*, 510

As the chart illustrates, EPA made other elaborations on the statutory scheme in extending the deadlines. Medium and large municipal systems and industrial dischargers are now subject to a two-part application process. 55 Fed.Reg. at 48,072. The November 1990 rules allow industrial dischargers to apply for either individual or group permits. *Id.* at 48,066-67. The March 1991 rules further extended the deadline for part 1 of the group industrial discharger permits to September 30, 1991. ^{FN10} 56 Fed.Reg. at 12,098. A final rule published on April 2, 1992 extended the deadline for the part 2 group application for industrial dischargers from May 18, 1992 to October 1, 1992. 57 Fed.Reg. at 11,394. The EPA rules at issue contain neither deadlines for final EPA or state approval of permits nor deadlines for compliance with the permit terms.

FN10. NRDC initially claimed that this extension was unlawful because it was granted without proper notice and comment. However, Congress approved this extended deadline in a supplemental appropriations bill, Dire Emergency Supplemental Appropriations Act of 1991, Pub.L. No. 102-27 § 307, 105 Stat. 130, 152 (1991). This Act moots the procedural and substantive challenge to this extended deadline.

Seeking to compel the EPA to conform to the statutory scheme, NRDC asks this court:

- a) to declare unlawful EPA's failure to issue certain of the storm water permitting regulations by February 4, 1989 and EPA's extension of certain statutory deadlines;
- b) to enjoin EPA from granting future extensions of the deadlines;
- c) to compel EPA to include deadlines for permit approval or denial and permit compliance consistent with the statute; and
- d) to compel EPA to require that medium and small municipal systems meet the same deadlines as large systems.

2. Discussion.

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F.2d 692, 712 (D.C.Cir.1975) (court may need to give *1300 agency some leeway due to budgetary commitments or technological problems); Environmental Defense Fund v. Thomas, 627 F.Supp. 566, 569-70 (D.D.C.1986) (EPA's good faith is a factor). None of these factors militates against an award of declaratory relief. They do not grant an executive agency the authority to bypass explicit congressional deadlines. The deadlines are not aspirational—Congress set them and expected compliance. See 132 Cong.Rec. 32,381-82 (remarks of Senator Stafford, commenting on EPA delay and the establishment of statutory deadlines as “outside dates.”) This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements. For these reasons, we grant NRDC's request for declaratory relief. EPA's failure to abide by the statutory deadlines is unlawful.

b. Request for Injunction.

NRDC asks the Court to enjoin the EPA from further extensions for permit applications from municipal and industrial dischargers. Injunctions are an extraordinary remedy issued at a court's discretion when there is a compelling need. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2942, at 365, 368-69 (1973). We decline to enjoin the EPA on discretionary grounds.

[4] Injunctive relief could involve extraordinary supervision by this court. Injunctive relief may be inappropriate where it requires constant supervision. *Id.* at 376. At issue are deadlines for the three major categories of dischargers, each of which has a two-part application. The permitting process will go on for several years. While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.

[5] In this situation, we must operate on the assumption that an agency will follow the dictates of Congress and the court. As noted above, the EPA does not have the authority to predicate future rules or deadlines in disagreement with this opinion. See Allegheny General Hosp. v. NLRB, 608 F.2d 965, 970 (3rd Cir.1979). We presume that the EPA will duly perform its statutory duties. See Upholstered Furniture Action Council v. California Bureau of Home Furnishing, 442 F.Supp. 565, 568 (E.D.Cal.1977) (three judge court). Because we decline to take on potentially extensive supervision of the EPA, Congress may need to find other ways to ensure compliance if the agency is recalcitrant.

c. Deadlines for Permit Approval and Compliance.

NRDC requests that the court compel EPA to revise the rules to include deadlines for permit approval or denial and permit compliance consistent with the statute. Section 402(p)(4)(A) calls for the EPA to issue or deny permits for industrial and large municipalities by February 4, 1991, which is one year after the applications are submitted, and states that “[a]ny such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of the issuance of such permit.” CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). The statute sets out a similar schedule for medium municipalities, except that the deadlines are two years later. CWA § 402(p)(4)(B), 33 U.S.C. § 1342(p)(4)(B).

[6] The regulations promulgated by the EPA contain neither final approval deadlines nor compliance deadlines for industrial dischargers or medium and large municipalities. 55 Fed.Reg. at 48,072. By failing to regulate final approval and compliance, EPA has omitted a key component of the statutory scheme. To ensure adherence to the statutory time frame, especially in the face of deadlines already missed, the regulated community must be informed of these deadlines. EPA's failure to include these important deadlines is an arbitrary and capricious exercise of its responsibility to issue regulations pursuant to the statute.

We see no need for additional delay while supplemental regulations are issued. Given the extraordinary delays already encountered, EPA must avoid further delay. *1301 The regulations should inform the regulated community of the statute's outside dates for compliance.^{FN11} See CWA § 402(p)(4)(A)-(B), 33 U.S.C. § 1342(p)(4)(A)-(B).

^{FN11}. In addition, pursuant to the statute, compliance deadlines applicable to each facility shall be contained in its permit.

d. Timeline for Small and Medium Systems.

[7] The parties disagree on when small systems (those serving a population of less than 100,000) should be regulated. As noted above, the temporary statutory exemption for all storm water sources expires on October 1, 1992. The statute requires EPA to establish a comprehensive program to regulate point sources subject to the moratorium, such as small municipalities, by that date. CWA § 401(p)(1), (6), 33 U.S.C. § 1342(p)(1), (6).

The 1987 amendments to the CWA did not contain definitions of "municipal" or "separate storm sewer system," but the CWA amendments enacted in 1972 defined "municipality" as follows:

[e]xcept as otherwise specifically provided, when used in this chapter: ... (4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or authorized Indian tribal organization, or a designated and approved*1302 management agency under section 1288 of this title [33 U.S.C. § 1288].

33 U.S.C. § 1362.

In the November 1990 regulations, the EPA defined "municipal separate storm sewer" as: "a conveyance or system of conveyances ... [o]wned or operated by a State, city, town, borough, county, parish, district, association or other public body...." 55 Fed.Reg. at 48,065 (to be codified at 40 C.F.R. § 122.26(b)(8)). This definition echoes the language of 33 U.S.C. § 1362(4). However, when defining large and medium municipal separate storm sewer systems serving a population of a specified size, EPA brought in other factors. 55 Fed.Reg. at 48,064 (to be codified at 40 C.F.R. § 122.26(b)(4), (7)). EPA defines medium and large separate storm sewer systems using two main categories:

- 1) separate storm sewer systems located in an incorporated place with the requisite population, and

- 2) separate storm sewer systems located in unincorporated, urbanized portions of counties containing the requisite population (as listed in Appendices H and I to the rule), excluding those municipal separate sewers located in incorporated places, townships or towns within such counties. 55 Fed.Reg. at 48,064. NRDC opposes this definition for municipal separate storm sewer systems for the reasons explained below.

FN12. The rule also permits the Administrator to include certain other systems as part of a medium or large system due to the physical interconnections between the systems, their locations, or certain other factors. See 40 C.F.R. § 122.26(b)(4)(iii), (iv) and (b)(7)(iii), (iv).

First, NRDC argues that according to the definitional

Pointing to a perceived statutory gap, NRDC argues that small systems should be subject to the same permitting schedule applicable to medium systems, to assure that they are regulated when the permitting moratorium ends on October 1, 1992. However, the plain language of the statute prohibits this. Section 402(p)(1) forbids requiring a permit for entities not listed as exceptions (such as small municipalities) before October 1, 1992. Yet the deadline for part 1 of the application for medium systems is currently May 18, 1992. 55 Fed.Reg. at 48,072.

Even if NRDC is correct that EPA is not proceeding so that regulations will be in place on October 1, 1992, we cannot ignore the plain language of the statute by adopting NRDC's solution. The CWA does not require regulation of such systems prior to expiration of the moratorium. We therefore reject NRDC's proposal that small systems be put on the same schedule as medium ones.

[8] NRDC asks the court to put the medium systems on the same schedule as the large systems, in order to achieve closer compliance with the timeline set out in § 402(p)(4)(B). However, EPA's current schedule for medium systems, although delayed, is still within the statutory scheme in its relation to the schedule for large systems. That is, Congress placed the medium systems on a staggered permitting schedule to start two years after the large systems and industrial users. The EPA schedule now has medium municipal system applications due six months after the applications for the large municipal systems. 55 Fed.Reg. at 48,072. For this reason, the current deadline for medium municipalities does not appear to be unreasonable despite the unlawful delay.

C. Exclusion of Certain Sources from Regulation.

1. Definition of "Municipal Separate Storm Sewer System."

Section 402(p) refers to "municipal separate storm sewer system[s] serving a population" of a specified size. CWA § 402(p)(2)(C), (D), 33 U.S.C. § 1342(p)(2)(C), (D). NRDC contends that EPA's definition of this term violates the plain language of the statute, fails to take into account the statutory definition of the word "municipality" and is arbitrary and capricious because the agency considered improper factors when it defined the term. All of this, according to NRDC, results in an impermissible narrowing of the municipalities covered by the first two rounds of permitting.

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section cited above and principles of statutory construction, general definitions apply wherever the defined term appears elsewhere in the law. See 33 U.S.C. § 1362 (“[e]xcept as otherwise specifically provided” the definitions apply throughout the act); Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir.1985). NRDC argues that the scope of the statutory definition of “municipality” in 33 U.S.C. § 1362(4) and the scope of the phrase “municipal separate storm sewer system serving a population” are the same. NRDC thus proposes that the correct definition is a system of conveyances owned or operated by the full range of entities described at 33 U.S.C. § 1362(4), (cities, towns, etc.) with populations within the ranges designated at § 402(p)(2), i.e., 250,000 or more for large systems and between 100,000 and 250,000 for medium systems.

However, we do not believe that the entire phrase used in the act, “municipal separate storm sewer system serving a population of [a specified size]” can be equated with the term “municipality” in the manner that NRDC proposes. The act contains no definition of either “system” or “serving a population.” The word “system” is particularly ambiguous in the context of storm sewers.^{FN13} We therefore agree with EPA that there is no single, plain meaning for the disputed words.

FN13. Storm sewers located within the boundaries of a city might be part of a state highway system, a flood control district, or a system operated by the state or county. See 55 Fed.Reg. at 48,041.

Because the term is ambiguous, we must look first to whether Congress addressed the issue in another way. See Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C.Cir.1986) (“[i]f the court finds that Congress had a specific intent ..., the court stops there and enforces that intent regardless of the agency’s interpretation”) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43 & n. 9, 104 S.Ct. 2778, 2781 & n. 9, 81 L.Ed.2d 694 (1984)), *aff’d by an equally divided court*, 484 U.S. 1, 108 S.Ct. 252, 98 L.Ed.2d 1 (1987). The legislative history is not illuminating. Although it explains that a purpose of the permitting scheme was to attack the most serious sources of discharge first,^{FN14} this general goal is not helpful in discerning the specific meaning of “municipal separate storm sewer system serving a population.” Without clear guidance from Congress, we turn to the agency’s justifications*1303 for its choices in the face of NRDC’s objections.

FN14. See, e.g., 133 Cong. Rec. 991 (1987) (statement of Rep. Stangeland).

NRDC claims that EPA’s definition is arbitrary and capricious because EPA considered improper factors, including its own work load, the incorporation status of municipalities, and urban density. “[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

EPA’s final definition took into account many issues and concerns of the regulated community. See 55 Fed.Reg. at 48,039. EPA considered eight different options for defining large and medium municipal separate storm sewer systems. 55 Fed.Reg. at 48,038-43. EPA considered focusing on ownership or operation of a system by an incorporated place, but found that this approach did not take into account systems operated by flood control districts, state transportation systems, or concerns relating to watershed management. It instead fashioned a multi-faceted approach. This choice of approach is not unreasonable.

NRDC challenges EPA’s consideration of incorporation as a factor. It claims that limiting regulation to incorporated places of the appropriate size excludes portions of 378 counties that contain over 100,000 people. NRDC essentially contends that because counties are a type of municipality, storm water conveyances in all counties with populations over 100,000 should come within the definition of either medium or large municipal separate storm sewer systems. We have already rejected NRDC’s claim that the definition of regulated “systems” must include conveyances in all “municipalities.”

EPA’s use of incorporation as a factor is not arbitrary and capricious or inconsistent with the statute. The agency proceeded on the reasonable assumption that cities possess the police powers needed effectively to control land use within their borders. See 55 Fed.Reg. at 48,039, 48,043. The first major category within the definition of regulated “systems,” municipal separate storm sewers located within incorporated places having the requisite population, is reasonable.

“municipal separate storm sewer system serving a population” has the plain meaning NRD/C proposes is not persuasive. Although EPA’s definition in the face of the statute’s ambiguity is complex, if not convoluted, it is not arbitrary and capricious, and we therefore reject NRD/C’s request that the definition be declared invalid.

2. EPA Exemption for Light Industry.

[10] NRD/C challenges the portion of the EPA rule excluding various types of “light industry” from the definition of “discharge associated with industrial activity.”

Under CWA § 402(p)(2)(B), a “discharge associated with industrial activity” is an exception to the permit requirement. In the November rule, EPA modified the statutory scheme by drawing distinctions among light and heavy industry and considering actual exposure to industrial materials. Although the statute does not define “associated with industrial activity,” the EPA definition excludes industries it considers more comparable to retail, commercial or service industries. The excluded categories are manufacturers of pharmaceuticals, paints, varnishes, lacquers, enamels, machinery, computers, electrical equipment, transportation equipment, glass products, fabrics, furniture, paper board, food processors, printers, jewelry, toys and tobacco products. 55 Fed.Reg. at 48,008. These types of facilities need apply for permits only if certain work areas or actual materials are exposed to stormwater. *Id.* EPA justifies these exemptions on the assumption that most of the activity at these types of manufacturing takes place indoors, and that emissions from stacks, use of unheated manufacturing equipment, outside material storage or disposal, and generation of large amounts of dust and particles will all be minimal. 55 Fed.Reg. at 48,008.

Thus, EPA considers actual exposure to certain materials or stormwater for the light industry categories, but does not consider actual exposure for the other industrial categories. After careful review of the statutory language and the record, we conclude that this distinction is impermissible.

We note that the language “discharges associated with industrial activity” is very broad. The operative word is “associated.” It is not necessary that storm water be contaminated or come into direct contact with pollutants; only association with any type of industrial activity is necessary.

There is a brief discussion of the issue in the legisla-

NRD/C questions EPA’s second major category, which covers storm sewers located in unincorporated urbanized areas of counties with the designated population, but excludes conveyances located in incorporated places with populations under 100,000 within those counties. The exclusion, however, has a legitimate statutory basis. The statute prohibits EPA from requiring permits for systems serving under 100,000 persons prior to October 1, 1992. CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). EPA reasonably concluded that conveyances within small incorporated places should be considered parts of small systems limited to those incorporated places, rather than parts of larger systems serving whole counties. EPA’s definition attempts to capture population centers of over 100,000 (by including urbanized, unincorporated areas) without violating the congressional stricture against regulation of areas with populations under 100,000 (thus excluding incorporated areas of less than 100,000 within a county).

In arriving at its definition of “municipal separate storm sewer systems serving” a designated population, EPA investigated numerous options and considered comments from a range of viewpoints. We find “a rational connection between the facts found and the choices made.” *Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43, 103 S.Ct. at 2866.*

NRD/C objects to EPA’s use of 1980 census data and EPA’s definition of urban density. While it appears that NRD/C has solid arguments as to why it would be preferable to use 1990 census figures and adopt its method of determining urban density, our role is not to determine whether EPA has chosen the best among all possible methods. We can only determine if its choices are rational. EPA chose the 1980 census data because it was the most widely available decennial census data at the time of rule formulation and promulgation. Neither this choice nor its use of the Census Bureau’s definition of urbanized area is arbitrary and capricious.

EPA took agency work load into account in arriving at its definition. 55 Fed.Reg. at 48,039. NRD/C objects on the basis that Congress considered the issue of work load when it developed the “phase-in” approach and allowed permit applications on a system- or jurisdiction-wide basis. However, this broad congressional scheme does not prohibit further consideration of EPA’s work load as one among many factors in its attempt to fashion a workable program.

[9] In summary, NRD/C’s argument that the phrase

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tive history: “[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.” 133 Cong.Rec. 985 (1987); *see also* 132 Cong.Rec. 31,968 (1986) (same). EPA argues that the words “directly related” indicate Congress’s intent to require permits for only those materials that come in contact with industrial materials. *See* 55 Fed.Reg. at 48,007. However, the examples given—parking lots and administrative buildings—indicate that the intent was to exclude only those facilities or parts of a facility that are completely non-industrial.

EPA’s definition follows the language quoted above: “Storm water discharge associated with industrial activity means the *1305 discharge from any conveyance which is used for collecting and conveying stormwater and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” 40 C.F.R. § 122.26(b)(14). EPA applies this definition differently depending on type of industry. EPA bases its regulation of industrial activity on Standard Industrial Classification (“SIC”) categories. For most of the industrial SIC categories (identified at 40 C.F.R. § 122.26(b)(i-x)), the EPA definition includes all stormwater discharges from plant yards, access roads and rail lines, material handling sites, storage and disposal sites, shipping and receiving areas, and manufacturing buildings. 40 C.F.R. § 122.26(b)(14). However, for the “light industry” categories identified in 40 C.F.R. § 122.26(b)(14)(xi), stormwater must be actually exposed to raw materials, by-products, waste, etc., before permitting is required.

EPA justifies this difference on the ground that for “light industry,” industrial activity will take place indoors, and that generation of large amounts of particles and emissions will be minimal. There is nothing in the record submitted to the Court however, which supports this assumption. *See, e.g.,* 55 Fed.Reg. at 48,008. Without supportable facts, we are unable to rely on our usual assumption that the EPA has rationally exercised the duties delegated to it by Congress. To exempt these industries from the normal permitting process based on an unsubstantiated assumption about the this group of facilities is arbitrary and capricious.

In addition, by designating these light industries as a group that need only apply for permits if actual exposure occurs, EPA impermissibly alters the statutory scheme.

The statute did set up a similar approach for oil, gas, and mining industries. However, no other classes of industrial activities are subject to the more lenient “actual exposure” test. To require actual exposure entirely shifts the burden in the permitting scheme. Most industrial facilities will have to apply for permits and show the EPA or state that they are in compliance. Light industries will be relieved from applying for permits unless actual exposure occurs. The permitting scheme then will work only if these facilities self-report, or the EPA searches out the sources and shows that exposure is occurring. We do not know the likelihood of either self-reporting or EPA inspection and monitoring of light industries, and the regulations appear to contemplate neither for these industries. For this reason, the proposed regulation is also arbitrary and capricious.

In conclusion, we hold that the rule for light industries is arbitrary and capricious, vacate the rule, and remand for further proceedings.

3. *Exclusion of Construction Sites of Less than Five Acres.*

[11] NRDC challenges the exemption for construction sites of less than five acres. EPA concedes that the construction industry should be subject to storm water permitting because at a high level of intensity, construction is equivalent to other regulated industrial activities. 55 Fed.Reg. at 48,033. Construction sites can pollute with soil sediments, phosphorus, nitrogen, nutrients from fertilizers, pesticides, petroleum products, construction chemicals and solid wastes. *Id.* EPA states that such substances can be toxic to aquatic organisms, and affect water used for drinking and recreation. *Id.*

Following its characterization of construction sites as suitable for regulation, EPA defined its task as determining “an acreage limit [] appropriate for identifying sites that amount are (sic) to industrial activity.” 55 Fed.Reg. at 48,036. EPA originally proposed regulations that exempted operations that disturb less than one acre of land and are not part of a common plan of development or sale. 55 Fed.Reg. at 48,035-36. In response to comments by the regulated community about the administrative burden presented by the regulation, EPA increased the exemption to five acres. 55 Fed.Reg. at 48,036. EPA also noted that larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites. *Id.* at 48,036.

*1306 We find that EPA’s rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious. EPA cites no information to support its perception that construction activities on less than five

acres are non-industrial in nature.

[12] EPA also claims agency power, inherent in statutory schemes, to make categorical exemptions when the result is *de minimis*. *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C.Cir.1979). However, if construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity. See *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir.1977) (once Congress has delineated an area that requires permits, EPA is not free to create exemptions).

Further, we find the *de minimis* principle inapplicable here. The *de minimis* exemption is only available where a regulation would "yield a gain of trivial or no value." *Alabama Power Co., supra*, at 361. Because of the lack of data, we cannot know whether exempting sites of less than five acres will indeed have only a *de minimis* effect.

The *de minimis* concept is based on the principle that the law does not concern itself with trifling matters. *Id.* at 360. We question its applicability in a situation such as this where the gains from application of the statute are being weighed against administrative burdens to the regulated community. See *id.* at 360-361 (implied authority to make cost-benefit decisions must derive from statute, and not general *de minimis* doctrine).

Further, EPA's claim that the five-acre exemption is *de minimis* is contradicted by the admission that even small construction sites can have a significant impact on local water quality. The EPA acknowledges that "[o]ver a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." 55 Fed.Reg. at 48,033. Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing. We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements, and remand for further proceedings.

4. Exemption for oil and gas activities.

The 1987 amendments created an exemption from the permit requirement for uncontaminated runoff from mining, oil and gas facilities. See Appendix, CWA § 402(f)(2), 33 U.S.C. §§ 1342(l)(2). Section 402(l)(2) states that a permit is not required for discharges of storm water runoff from mining, oil or gas operations composed entirely of flows from conveyance systems used for collecting preci-

pitation runoff and "which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products". NRD/C claims that the November 1990 rule sets up an impermissible standard for determining contamination at oil and gas facilities. The relevant portion of the rule states that at these facilities, an operator is not required to submit a permit application unless the facility has had a discharge of a reportable quantity ^{FN15} since November 1987, or contributes to a violation of a water quality standard. 55 Fed.Reg. 48,067 (to be codified at 40 C.F.R. § 122.26(c)(1)(iii)). A facility which has had a release of oil or a hazardous substance in excess of RQs since *1307 1987 must submit a permit application. *Id.*; 55 Fed.Reg. at 48,029-30.

FN15. "Reportable Quantities" (RQs) are not effluent guidelines setting up permissible limits for pollutants. Rather, they are quantities the discharge of which "may be harmful to the public health or welfare of the United States." CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4). EPA has established RQs for a large number of substances, pursuant to both CWA section 311, 33 U.S.C. § 1321, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 102, 42 U.S.C. § 9602. See 40 C.F.R. Parts 110, 117, 302. The operator of any vessel or facility which releases the RQ of any substance must immediately notify the National Response Center. See, e.g., 40 C.F.R. § 110.10.

NRD/C claims that oil and gas operations should be subject to the stricter standards which apply to mining operations. ^{FN16} It also objects to EPA's use of RQs as the only test for contamination of runoff from oil and gas storm water dischargers, claiming it is inconsistent with the legislative history. We conclude that the legislative history does not support NRD/C's position.

FN16. Operators of mines must submit permit applications whenever storm water discharges come into contact with overburden, waste products, etc. 40 C.F.R. § 122.26(c)(1)(iv).

The conference report states:

[P]ermits are not required where stormwater runoff is diverted around mining operations or oil and gas operations and does not come in contact with overburden, raw

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material, product, or process wastes. In addition, where stormwater runoff is not contaminated by contact with such materials, *as determined by the administrator*, permits are also not required. With respect to oil or grease or hazardous substances, the determination of whether stormwater is "contaminated by contact with" such materials, *as established by the Administrator*, shall take into consideration whether these materials are present in such stormwater runoff in excess of reportable quantities under section 311 of the Clean Water Act ..., or in the case of mining operations, above natural background levels.

H.R.Rep. No. 1004, 99th Cong., 2d Sess., at 151 (emphasis added).

[13] Thus, the EPA Administrator has discretion to determine whether or not storm water runoff at an oil, gas or mining operation is contaminated with two types of materials: (1) overburden, raw material, product, or process wastes and (2) oil, grease or hazardous substances. The report sets out factors for the Administrator to consider in determining contamination for the latter group of pollutants.

NRDC first claims that because section 402(l)(2) treats oil, gas and mining together, the EPA rule must do the same. NRDC's second objection is based on its interpretation of the language in the conference report. Because the conference report lists RQs as only one factor to be taken into consideration, NRDC insists EPA cannot make it the only factor to measure contamination for oil and gas facilities.

Both of these arguments must fail in light of the conference report, which gives the Administrator discretion to determine when contamination has occurred with respect to the substances listed in the statute, i.e., overburden, raw materials, waste products, etc. *See* CWA § 402(l)(2). The conference report states that the Administrator shall take certain factors into account, but the report is clear that the determination of whether storm water is contaminated is within the Administrator's discretion.

NRDC argues that the remarks of certain congressmen during congressional debate show that the mining, oil, and gas exemptions were to apply only if the discharges were entirely free of contaminants. We find these examples less persuasive than the clear language of the conference report. Moreover, in light of the discretion granted the Administrator in the conference report, we cannot say that the rule

as promulgated is an arbitrary and capricious exercise of that discretion.

NRDC also contends that Congress intended that EPA consider reportable quantities only in determining if a discharge is contaminated with oil, grease, or hazardous substances. Other pollutants, according to NRDC, must be found to contaminate the discharge if they exceed background levels.

EPA did not, in fact, limit itself to reportable quantities in determining which oil or gas facilities must apply for a permit. The rule requires a permit for any facility which "[c]ontributes to a violation of a water quality standard." 40 C.F.R. § 122.26(c)(1)(iii)(C). This requirement addresses contamination with substances other than oil and hazardous substances. We find no support in the statute or the legislative history for NRDC's claim that, with respect*1308 to these substances, levels above background must be considered "contamination." The conference report quoted above requires consideration of background levels of any pollutant only with respect to mining operations.

D. Lack of Controls for Municipal Storm Water Discharge.

[14] NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails.

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge. CWA § 402(p)(3)(A), (B), 33 U.S.C. § 1342(p)(3)(A)-(B). The Act states that permits for discharges from municipal storm sewers:

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system,

design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B) (emphasis added).

NRDC charges that the EPA regulations accomplish neither of the goals above, i.e., they do not effectively prohibit non-storm water discharges nor do they require the controls described in ¶ (iii), above. NRDC argues that Congress granted the moratorium precisely to give EPA the opportunity to develop new, substantive standards for storm water control of municipal sources and instead EPA wrote vague regulations containing no minimum criteria or performance standards.^{FN17} However, the language in ¶ (iii), above, requires the Administrator or a state to design controls. Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. NRDC also claims that the testing requirements are inadequate because there is only limited sampling at a limited number of sites. However, we must defer to EPA on matters such as this, where EPA has supplied a reasoned explanation of its choices. See 55 Fed.Reg. at 48,049.

FN17. The requirements for permit applications are set forth at 40 C.F.R. § 122.26(d). Individuals NPDES permit writers (EPA or state officials) will decide whether application proposals are adequate. Applicants must submit information on source control methods and estimate the annual pollutant load reduction to be achieved from their proposed management programs, but they are not required to achieve any specified level of reduction of any pollutants. See 55 Fed.Reg. at 48,070-71.

NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. Congress could have written a statute requiring stricter standards, and it did not. We therefore reject NRDC's argument that EPA's storm water control regulations fail to comply with the statute.^{FN18}

FN18. We base our holding on NRDC's challenge to the regulations at issue. Whether a specific permit complies with the requirements of section 402(p)(3)(B) would, of course, be another matter not controlled by this decision.

E. Lack of Notice and Comment on the Approval of Part 1 of Industrial Group Storm Water Applications.
NRDC objects to the lack of opportunity for notice and comment before EPA approval of part 1 of group applications for industrial dischargers. Each member of a proposed group must submit part 1 of the application.^{FN19} If EPA approves part 1, only *1309 a small subset of the member facilities need submit part 2 of the application. 55 Fed.Reg. at 48,072 (to be codified at 40 C.F.R. 122.26(e)(2)). NRDC claims that because approval of part 1 waives the requirement of filing part 2 for most members of a group, EPA's decision on part 1 is equivalent to a "rule" requiring notice and comment from the public. The issue thus presented is whether EPA's decision on a part 1 group permit application is a "rule" as defined in 5 U.S.C. § 551(4) (1988).^{FN20} Requiring public notice and opportunity to comment under 5 U.S.C. § 553 (1988), or its otherwise subject to the notice and comment requirement.

FN19. Part 1 must include the identity of the group's participants, a description of the participants' industrial activities, a list of significant materials exposed to precipitation and the identity of the subset of the group's members who will submit quantitative data in part 2 of the application. 55 Fed.Reg. at 48,067.

FN20. A rule means "the whole or part of 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...." 5 U.S.C. § 551(4). [15] NRDC argues that approval or disapproval of a part 1 application requires public comment because it has "general applicability" pursuant to 5 U.S.C. § 551(4) and because it will have a "palpable effect" in that it will relieve the majority of entities in the group from submitting data in part 2 of the application. NRDC cites *NRDC v. EPA*, 683 F.2d 752 (3rd Cir.1982) and *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C.Cir.1981) in support of its argument. Both cases involved the postponement of regulations. See *NRDC*, 683 F.2d at 753-54. 764 (indefinite postponement of effective date of final amendments to regulations dealing with the discharge of toxic pollutants requires notice and comment because it has a substantial impact on the public and the industry); *Council of Southern Mountains, Inc.*, 653 F.2d at 575, 580 n. 28 (deferral of implementation of regulations requiring coal operators to supply life-saving equipment ordinarily

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would require notice and comment because it has a "palpable effect" upon the industry and the public).

We find these cases to be distinguishable. Both involve the postponement of rules of general applicability to an entire industry, or to a large class of pollutants. In contrast, although the part 1 application process will relieve some entities from the need to furnish further data, the decision is specific to a particular permit application and approval of a preliminary application will not implement, interpret or prescribe any general law or policy pursuant to 5 U.S.C. § 551(4). Rulemaking ordinarily involves "broad judgments, legislative in nature rather than the resolution of a particular dispute of facts." *Washington Utilities & Transportation Com'n v. Federal Communication Commission*, 513 F.2d 1142, 1160 (9th Cir.1975), cert. denied, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975). The decision to approve a part 1 permit application, although it may affect a large number of applicants, is nevertheless focused on a specific factual question: whether the application adequately designates a representative smaller group subject to the more extensive data gathering requirements in part 2 of the application. See 55 Fed.Reg. at 48,028. Because the decision involves a discrete, factual issue, the better view is that it is neither a rule nor otherwise subject to the notice and comment requirement.

Because approval of a part 1 application is essentially a factual determination, we hold that EPA's group permit application process for industrial dischargers is not invalid by its failure to provide for notice and comment.

III. CONCLUSION

In summary, we grant and deny relief as follows:

1. "*Deadlines*" issue. We grant the request for declaratory relief and deny the request for injunctive relief. We deny the request to place small, medium and large municipalities on the same permitting schedule. We hold that EPA's failure to include deadlines for permit approval or denial and compliance consistent with CWA § 402(p) is arbitrary and capricious.

2. *Exclusion of Sources from Regulation*. We uphold the definition of "municipal*1310 separate storm sewers serving a population." We hold that the exemption for construction sites of less than five acres is arbitrary and capricious and remand for further proceedings. Based on the record before us, we vacate that portion of the rule regulating "light industry" and remand for further proceedings.

3. *Other issues*. We uphold the rule as to oil and gas operations and storm water control. We further hold that EPA approval of part 1 of a group application for an industrial discharger is not a rule requiring notice and comment from the public.

Petition for Review GRANTED IN PART and DENIED IN PART.

APPENDIX A

CWA § 402, 33 USCA § 1342

(f) Limitation on permit requirement

....

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

....

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge
Permits for discharges from municipal storm sewers-

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or *1311 the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges

described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges
Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies
The Administrator, in consultation with the States, shall conduct a study for the purposes of-

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater dis-

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charges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II.A, II.C.1, II.C.4, II.E, and much of Part II.B of the majority opinion. I dissent from Part II.B.2.c, directing EPA to issue supplemental regulations. I dissent also from Parts II.C.2 and II.C.3, in which the court invalidates EPA's exclusion of storm water discharges from certain light industrial and small construction sites from the definition of "discharges associated with industrial activity." Finally, I concur in the result, but not the reasoning, of Part II.D, holding that EPA has not acted unlawfully by failing to include specific control requirements in the permit application regulations.

***1312 I**

The majority holds that EPA has violated statutory requirements by failing to set dates for approval of, and compliance with, permits as part of its permit application program. *Ante* at 1300. Despite the holding in Part II.B.2.b that injunctive relief is inappropriate (with which I agree), the majority in Part II.B.2.c orders EPA to issue supplemental regulations setting such deadlines immediately.

I am not convinced that the statute requires EPA to set these deadlines as part of the permit application process. The provision at issue reads, in relevant part:

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event

later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

CWA § 402(p)(4); 33 U.S.C. § 1342(p)(4) (1988).

While the statute establishes a time line EPA must follow, it does not, in my view, require that EPA include the deadline for permit approval in the permit application regulations. I agree that, given EPA's past delays and the fact that the statutory dates for issuance or denial of permits are now long past, it is appropriate for this court to declare that the statute requires EPA to issue or deny permits within one year of the application deadline. I do not, however, see that any purpose is served by requiring EPA to issue supplemental regulations setting out these deadlines, and I doubt our authority to do so.

With respect to compliance deadlines, the statute contemplates that such deadlines will be set in individual permits as they are issued. *See* CWA § 402(p)(4)(A), (B) ("Any such permit shall provide for compliance...."). Each permit must contain a compliance deadline, which may not exceed three years from the date of issuance. Nothing in the statute requires EPA to establish compliance deadlines now, before any permits have been issued. Accordingly, in my view, NRDC's challenge to the lack of compliance deadlines in EPA's current regulations is premature. I therefore dissent from Part II.B.2.c of the majority opinion.

II

I dissent also from Parts II.C.2 and II.C.3. In my view, EPA's definition of "discharge associated with industrial activity" is a reasonable construction of an ambiguous statute, entitled to deference. While my colleagues acknowledge that we may not overturn an agency rule that represents a "permissible construction" of a statute, *ante* at 1297 (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S.

837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984))
they fail to apply that axiom.

A

EPA's rule excludes from the permitting requirement certain light industry facilities at which "areas where material handling equipment or activities, raw materials, intermediate*1313 products, final products, waste materials, byproducts, or industrial machinery" are not exposed to storm water. See 40 C.F.R. § 122.26(b)(14). EPA determined that discharges from such facilities do not fall within the definition of "discharges associated with industrial activity." In my view, this determination was reasonable.

The majority concedes that the statute does not define "discharge associated with industrial activity." *Ame* at 1304. The operative phrase, as my colleagues note, is "associated with." See *id.* For purposes of evaluating the light industry exemption, I concede that manufacturing falls within the generally accepted meaning of "industrial activity," and that many of the facilities exempted by the EPA rule are manufacturers. Nonetheless, that concession does not compel the conclusion that discharges from such facilities are "associated with industrial activity."

The majority concludes, without explanation, that the phrase "discharges associated with industrial activity" is "very broad." *Ame* at 1304. Neither the plain meaning of the term "associated" nor the legislative history of the statute support this conclusion. "Associated with" means closely related to or connected with. See Webster's Ninth New Collegiate Dictionary 110 (1986). To the extent it casts any light on the subject, the legislative history supports a narrow reading of the phrase "associated with." Four members of the House, in the course of floor debates on the measure both before and after President Reagan's veto, explained that:

[a] discharge is associated with industrial activity if it is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. Discharges which do not meet this definition include those discharges associated with parking lots and administrative and employee buildings.

133 Cong. Rec. 985 (1987) (statement of Rep. Hamerschmidt) (emphasis added).^{FNL} The underscored language suggests that Congress intended to regulate only discharges directly related to certain activities at industrial facilities. EPA's interpretation, that discharges are "di-

rectly related" to these activities only if storm water may reasonably be expected to come into contact with them before its discharge, is eminently logical.

^{FNL} This statement was repeated verbatim by Reps. Stangeland and Snyder. 133 Cong. Rec. at 991-92; 132 Cong. Rec. at 31,959, 31,964 (1986). Rep. Rowland offered a slight variation on the theme:

One of the discharge categories is "a discharge associated with an industrial activity." A discharge is not considered to be associated with industrial activity unless it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Such discharges include [sic] those from parking lots and administrative areas and employee buildings.

132 Cong. Rec. at 31,968. Rep. Rowland apparently misspoke; he probably meant, like the other legislators who addressed the topic, to say "[s]uch discharges do not include" those from parking lots.

The majority opinion interprets the exclusion of parking lots as an expression of congressional intent "to exclude only those facilities or parts of a facility that are completely nonindustrial." *Ame* at 1304. My colleagues' reliance on the second sentence of the statement quoted above to establish this intent, however, is misplaced. The sentence relied on cannot assist us in our search for the meaning of "associated with" because it employs that very term. Moreover, it does not pretend to establish an exhaustive list of areas excluded from regulation. Legislators listed discharges from parking lots and administrative and employee buildings as *among those* not directly related to industrial activity; no one suggested that *only* discharges associated with those structures were to be excluded.

EPA's definition is consistent with the plain words of the statute and, to the extent any intent is discernible, the congressional intent. EPA has defined the term "storm water discharge associated with industrial activity" to cover only those discharges reasonably expected to come into contact with industrial activities. A large number of facilities automatically fall within EPA's definition and are required to *1314 apply for permits. Because facilities falling within certain specified classifications under the Standard Industrial Classification manual generally con-

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duct their operations entirely indoors, minimizing the likelihood of contact with storm water, EPA has not automatically included them within the regulations. However, these facilities *are* required to apply for permits if “areas where material handling equipment or activities, raw materials, intermediate products, final products, waste materials, byproducts, or industrial machinery at these facilities are exposed to storm water.” 40 C.F.R. § 122.26(b)(14). If a storm water discharge is in fact directly related to or associated with the industrial activity carried on at a facility falling within the light industry category, the facility must obtain a permit.^{FN2}

FN2. Thus, nothing turns on the assumption, attacked by my colleagues as unsupported by the record, *ante* at 1304, that industrial activities at this category of facilities will take place largely indoors. Where the assumption does not hold true, the permit requirement applies with full force. I also note that NRDC has pointed us to no evidence undermining EPA's assumption.

Unlike my colleagues, I decline to assume that EPA will not carry out its responsibility to identify and to require permits of facilities where industrial activities are in fact exposed to storm water, or that such facilities will ignore their statutory duty to apply for permits. Should that occur, a lawsuit challenging EPA's failure to enforce its regulations might well be in order. An unsubstantiated suspicion that EPA may not vigorously enforce its regulations, however, does not make those regulations arbitrary or capricious.

In my view, the statute's treatment of oil and gas facilities supports EPA's reading of the term “associated with industrial activity.” Congress specifically exempted from the permit requirement discharges from oil and gas facilities and mining operations which have not come in contact with raw materials, finished products, or waste products. CWA § 402(f)(2). This section indicates a congressional intent to exempt uncontaminated discharges which have not come into contact with “industrial activities” from regulation. For oil, gas, and mining operations, Congress in this section supplied a specific, and quite limited, definition of “industrial activities.” For other facilities, that definition was left to the discretion of EPA, which has adopted a much broader definition, encompassing contact with such things as industrial machinery and materials handling equipment. *See* 40 C.F.R. § 122.26(b)(14).

I do not mean to suggest that the majority's construction of the statute is untenable. It may even be preferable to the reading chosen by the agency. Nonetheless, in my view the statute is ambiguous and the legislative history does not demonstrate any clear congressional intent. The question before this court, therefore, is not whether “the agency construction was the only one it permissibly could have adopted” or even whether it is the “reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 n. 11, 104 S.Ct. 2778, 2782 n. 11, 81 L.Ed.2d 694 (1984). We need only inquire if the agency's construction is a permissible one. *Id.* at 843, 104 S.Ct. at 2781. EPA's definition falls well within permissible bounds, and should be upheld.

B

Although the issue is closer, I also am not persuaded that EPA's exemption for construction sites under five acres should be struck down. EPA has not conceded that “construction activity is industrial in nature.” *Ante* at 1306. In the preamble to its final rule, EPA noted that “Construction activity *at a high level of intensity is comparable to other activity that is traditionally viewed as industrial, such as natural resource extraction.*” ^{FN3} 55 Fed.Reg. 48,033 (1990) (emphasis added). EPA explained that it was “attempting to focus [regulation] only on those construction activities*1315 that *resemble industrial activity.*” 55 Fed.Reg. at 48,035 (emphasis added).

FN3. EPA did admit that “[e]ven small construction sites may have a significant negative impact on water quality in localized areas,” 55 Fed.Reg. at 48,033. In the absence of any indication of what EPA meant by “small,” however, that statement does not undermine EPA's exemption of sites under five acres.

Neither NRDC nor the majority point to anything in the statute or the legislative history that would require the agency to define “industrial activity” as including all construction operations. Accordingly, I believe deference is due EPA's definition, provided it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A.*, 467 U.S. at 844, 104 S.Ct. at 2782.

In trying to determine when construction should be treated as industrial activity, EPA considered a number of possible approaches. *See* 55 Fed.Reg. at 48,035. Exempting construction that would be completed within a certain

designated time frame was deemed inappropriate, because the work could be both intensive and expansive but nonetheless take place over a short period of time. Basing the limit on quantity of soil removed was also rejected as not relating to the amount of land surface disturbed. EPA finally settled on the surface area disturbed by the construction project as a feasible and appropriate mechanism for "identifying sites that are [sic] amount to industrial activity." 55 Fed.Reg. at 48,036.

Having determined that not all construction amounts to industrial activity, and that the appropriate basis for differentiation is land area disturbed, EPA then had to determine where to draw the line. Initially, EPA proposed to exempt all construction operations disturbing less than one acre of land, as well as single family residential projects disturbing less than five acres. 53 Fed.Reg. 49,431 (1988). In the final rule, however, EPA adopted a five-acre minimum for all construction projects. 55 Fed.Reg. 48,066 (1990): 40 C.F.R. § 122.26(b)(14)(x).

Admittedly, the final rule contains little in the way of justification for treating two-acre sites differently than five-acre ones, but that does not necessarily make it arbitrary and capricious. Line-drawing is often difficult. NRDRC was apparently willing to accept EPA's proposed one-acre/five-acre rule. Although NRDRC now challenges the blanket five-acre rule, it offers no evidence that sites excluded from the permitting requirement constitute "industrial activity." In such absence of any evidence in the record undermining EPA's conclusion on an issue squarely within its expertise, I believe the rule must be upheld.^{FN4}

^{FN4}. Because I conclude that the rule falls within the permissible bounds of the statutory definition of "discharges associated with industrial activity," I need not consider the applicability of the *de minimis* exception.

III

Finally, while I concur in the result reached by the majority in Part II.D, rejecting NRDRC's claim that EPA has unlawfully failed to require substantive controls on municipal discharges, I disagree with the majority's reasoning. In my view, NRDRC's claim is premature, and we should decline to address its merits.

NRDRC contends that the 1987 amendments require EPA to establish substantive controls for municipal storm water discharges. In support of this argument, NRDRC relies on CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B).

which provides:

Permits for discharges from municipal storm sewers-

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable....

This section refers only to *permits*, and says nothing about permit applications. Because EPA has yet to issue any permits, NRDRC's claim on this point is premature. In the absence of any indication to the contrary, we must assume that any permit issued will comply with all applicable statutory requirements. The statute does not require that EPA detail the substantive controls to be imposed when establishing permit application requirements. Accordingly, I would reject NRDRC's claim without *1316 reaching the issue of the Administrator's discretion in selecting those controls.

IV

In sum, I join much of my colleagues' opinion. However, I would not require EPA to issue supplemental regulations detailing the time line for issuance of and compliance with permits, and I would uphold EPA's definition of "discharge associated with industrial activity." Finally, I would reject NRDRC's claim that EPA is required to detail control measures in the permit application regulations on the grounds that the statute requires control measures only in the permits themselves.

C.A.9, 1992.

Natural Resources Defense Council, Inc. v. U.S. E.P.A. 966 F.2d 1292, 34 ERC 2017, 61 USLW 2015, 22 Env't. L. Rep. 20,950

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