ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 124

[FRL-5271-7]

Amendment to Requirements for National Pollutant Discharge Elimination System (NPDES) Permits for Storm Water Discharges Under Section 402(p)(6) of the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; withdrawal of direct final rule.

SUMMARY: Today, EPA is withdrawing the storm water phase II direct final rule published on April 7, 1995 (60 FR 17950) and promulgating a final rule in its place based on an identical proposal published that same day (60 FR 17958). By today's action, EPA is promulgating changes to the National Pollutant Discharge Elimination System (NPDES) storm water permit application regulations under the Clean Water Act (CWA) for phase II dischargers. Phase II dischargers generally include all point source discharges of storm water from commercial, retail and institutional facilities and from municipal separate storm sewer systems serving

populations of less than 100,000. Today's rule establishes a sequential application process in two tiers for all phase II storm water discharges. The first tier provides the NPDES permitting authority flexibility to require permits for those phase II dischargers that are determined to be contributing to a water quality impairment or are a significant contributor of pollutants to waters of the United States. ("Permitting authority" refers to EPA or States and Indian Tribes with approved NPDES programs.) EPA expects this group to be small because most of these types of dischargers have already been included under phase I of the storm water program. The second tier includes all other phase II dischargers. This larger group will be required to apply for permits by the end of six years, but only if the phase II regulatory program in place at that time requires permits. As discussed in more detail below, EPA is open to, and committed to, exploring a number of non-permit control strategies for the phase II program that will allow efficient and effective targeting of real environmental problems. As part of this commitment, EPA has initiated a process to include stakeholders in the development of a supplemental phase II rule under the Federal Advisory Committee Act (FACA). This rule will

be finalized by March 1, 1999 and will determine the nature and extent of requirements, if any, that will apply to the various types of phase II facilities prior to the end of the six-year application period defined by today's rule.

DATES: The direct final rule published on April 7, 1995 at 60 FR 17950 and corrected on April 18, 1995 at 60 FR 19464 is withdrawn and this final rule is effective on August 7, 1995. In accordance with 40 CFR 23.2, EPA is explicitly providing that this rule shall be considered final for purposes of judicial review at 1 p.m. (Eastern time) on August 7, 1995.

ADDRESSES: The docket for this rulemaking is available for public inspection at EPA's Water Docket, Room L–102, 401 M Street, SW, Washington, DC 20460. For access to the docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m. (Eastern time) for an appointment. Please indicate that the docket to be accessed is for the April 7, 1995 **Federal Register** notice on the storm water phase II regulations. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Nancy Cunningham, Office of Wastewater Management, Permits Division (4203), Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 260–9535.

SUPPLEMENTARY INFORMATION:

I. Overview of Today's Action

Today, EPA is promulgating the phase II storm water application regulations as proposed on April 7, 1995 (60 FR 17958). EPA also is withdrawing the direct final rule published on that same date (60 FR 17950); corrected at 60 FR 19464, April 18, 1995. The direct final and proposed rules contained identical requirements. By today's rule, EPA promulgates changes to the NPDES storm water permit application regulations under the CWA to establish a common sense approach for all phase II storm water dischargers. Phase II storm water dischargers include those storm water discharges not addressed under phase I of the storm water program.1. Generally, phase II dischargers are point source discharges of storm water from commercial, retail,

light industrial and institutional facilities, construction activities under five acres, and from municipal separate storm sewer systems serving populations of less than 100,000.

Today's rulemaking will promote the public interest by relieving most phase II dischargers of the immediate requirement to apply for permits. Consequently, this rule relieves most phase II dischargers from citizen suit liability for failure to have an NPDES permit over the next six years. If a phase II discharger complies with the application deadlines established by today's rule, the facility will not be subject to enforcement action for discharge without a permit or for failure to submit a permit application.

Under today's rule, application deadlines are in two tiers. The first tier allows the permitting authority to focus current efforts on those facilities that will produce the greatest environmental benefit. The first tier is for those phase II dischargers that the NPDES permitting authority determines are contributing to a water quality impairment or are a significant contributor of pollutants to waters of the U.S. Those dischargers that have been so designated are required to obtain a permit and must submit permit applications to the permitting authority within 180 days of being notified that such an application is required. The permitting authority has the flexibility to extend this deadline. Under the second tier, all remaining phase II facilities must apply for permits by August 7, 2001, but only if the phase II regulatory program in place at that time requires permits. EPA is actively exploring alternative control strategies with broad stakeholder involvement. EPA is also establishing application requirements for phase II dischargers, as well as making other conforming changes to other portions of the NPDES regulations in today's rule.

EPA is subject to a court order to propose supplemental rules for phase II sources by September 1, 1997, and finalize them by March 1, 1999. *Natural Resources Defense Council, Inc.* v. *Browner,* Civ. No. 95–634 PLF (D.D.C., April 6, 1995). However, if the CWA is amended prior to these dates to address some of these storm water issues, EPA will, of course, move to expeditiously implement the statutory changes.

II. Background

EPA provided an extensive discussion of the statutory and regulatory background of the storm water program in the direct final rule published in the April 7, 1995, **Federal Register** notice (60 FR 17950). For the sake of brevity, EPA refers the reader to that notice and

¹Phase I dischargers include: dischargers issued a permit before February 4, 1987; discharges associated with industrial activity; discharges from a municipal separate storm sewer system serving a population of 100,000 or more; and discharges that the permitting authority determines to be contributing to a violation of a water quality standard or a significant contributor of pollutants to the waters of the United States.