water discharges to be regulated to protect water quality and (2) establish a comprehensive program to regulate those sources, including, among other things, expeditious deadlines. In today's rule, EPA relies on section 402(p)(6) to designate all phase II discharges for regulation under a comprehensive program which, for most of those dischargers, does not require permits for 6 years. During the six-year period, EPA will investigate alternative control strategies for the phase II program and will develop supplemental regulations through the FACA process.

Commenters also raised concern regarding the potential for citizen suits. As explained above, today's final rule effectively protects most phase II dischargers from citizen suit liability for failure to have an NPDES permit for up to six years

A few commenters criticized EPA for the delay in publishing a Report to Congress on storm water discharges not covered under phase I. Further, they did not believe that President Clinton's Clean Water Initiative adequately addressed procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. The Agency believes that the Storm Water Report to Congress, which incorporates the President's Initiative, fulfills the requirements of section 402(p)(5). The Report to Congress cites to data confirming the continuing threat to surface waters caused, in significant part, by unregulated storm water discharges. The Administration's Clean Water Initiative proposed a variety of procedures and methods through which permitting authorities could most flexibly address remaining unregulated discharges of storm water to the extent necessary to mitigate impacts on water quality.

Several commenters questioned whether State and local officials had been consulted in developing the proposed rule as directed by CWA section 402(p)(6). In a September 9, 1992, **Federal Register** notice, EPA invited public comment on reasonable, alternative approaches for the phase II storm water program. Prior to publication of the direct final and proposed rules on April 7, 1995, EPA met with representatives of key municipal organizations to discuss the content of the rule and to gather feedback and input. EPA will continue its outreach efforts by seeking additional public input through FACA subcommittee participation, and other means, in developing supplemental regulations for the phase II program.

Commenters expressed their opinion that the proposed rule should be

considered an unfunded mandate as described under the Unfunded Mandate Reform Act of 1995. That is, the commenters believed that the estimated cost of the regulation to State, local, or tribal governments, or to the private sector, will be \$100 million or more in any one year. EPA disagrees. This rulemaking actually reduces the immediate regulatory burden imposed on phase II facilities. EPA believes that the cost to phase II dischargers that are immediately designated under tier 1 will be small due to the extremely few designations that are anticipated. Furthermore, EPA has the authority to modify permit application requirements to require less information and alleviate unnecessary burden on all phase II facilities. Because of these reasons, costs are expected to be well below \$100 million for each of the next six years. EPA believes that any costs that might be imposed after the sixth year will still be below \$100 million because of the application flexibility, but in any event, those costs will not exceed existing costs (multiplied by the rate of inflation) because of the current statutory requirement that phase II dischargers apply for permits immediately, absent promulgation of today's rule.

The costs of a "comprehensive" phase II program after the sixth year will be more fully characterized through additional rulemaking as a result of the FACA process. Under a judicial consent order in Natural Resources Defense Council, Inc. v. EPA, Civ. No. 95-0634 PLF (D.D.C. April 6, 1995), EPA is required to propose by September 1, 1997, and take final action by March 1, 1999, supplemental rules which clarify the scope of coverage and control mechanisms for the phase II program. The cost to potential dischargers of this action will be identified in the subsequent rulemaking and cannot be accurately predicted in today's final rule. However, EPA does not expect that regulation to cost over \$100 million in any one year.

Commenters questioned EPA's justification to designate all phase II dischargers to protect water quality. Many commenters argued that construction sites that disturb less than 5 acres should not be so designated because they do not present significant water quality concerns. In response, EPA relies on the Report to Congress to conclude that unregulated storm water discharges remain a significant threat to the health of surface water quality. While EPA recognizes that individual facilities within the total phase II universe may not represent equal threats, EPA believes that there is sufficient information concerning water

quality problems to designate the entire class of phase II dischargers as an interim matter pending further study in the context of the rulemaking described above. EPA will make more specific designations in the context of that rulemaking. In response to comments about small construction sites, EPA notes that these commenters did not present any data to support a conclusion that small construction presents only negligible water quality concerns. As explained in the earlier notice, the FACA subcommittee will explore the appropriate scope of the phase II program.

Today's rule states that permit applications are required within 180 days from receipt of notice for those phase II discharges that the NPDES permitting authority determines are contributing to a water quality impairment or are a significant contributor of pollutants. Commenters requested and suggested further clarification on both of these determinations. EPA purposefully did not provide explicit definitions of these phrases in order to provide flexibility to permitting authorities. Interpretive flexibility is warranted due to climatic and geographic differences across the United States. EPA published guidance for designations under phase I of the storm water program. Such guidance is also applicable for the phase II program designations and is included in the record of this rulemaking.

One commenter took issue with the 180-day deadline for permit applications, particularly for municipal separate storm sewer systems that are designated under tier 1. The commenter felt that such a short period of time would not be sufficient to prepare and submit a municipal application. In response, EPA reminds the commenter that the Director has the authority to grant permission to submit the application at a later date. Some municipalities may not need more time because they may be able to simply reference information already submitted for an adjacent or nearby large or medium municipality under phase I. Additionally, the permitting authority is able to modify the permit application requirements and may require much less information than what was required for phase I dischargers.

Another commenter asked that the period during which a permitting authority may designate a facility be limited to one year. EPA is not limiting the time frame for designations because the permitting authority will need to account for changing conditions and new information that becomes available

over time.