U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

July 12, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Comments on EPA's proposed 2022 Construction General Permit under the National Pollution Discharge Elimination System Permit Program of the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0169).

Dear Administrator Regan:

On May 12, 2021 the Environmental Protection Agency (EPA) published a notice of proposed 2022 Construction General Permit (CGP) under the National Pollution Discharge Elimination System Permit Program of the Clean Water Act (CWA).[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed 2022 CGP.

Advocacy believes that EPA must fully comply with the Regulatory Flexibility Act when promulgating the CGP. It must evaluate the economic impacts of the proposed revisions to the CGP on small entities, and it should reconsider the elements of the proposed 2022 CGP that impose an unreasonable burden without a clear scientific justification.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA)[2], as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)[3], gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

[1] 86 Fed. Reg. 26023 (May 12, 2021).
[2] 5 U.S.C. § 601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[5] Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

The Proposed General Permit

Under the Federal Water Pollution Control Act of 1972 (the Clean Water Act or the CWA), EPA is authorized to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of any pollutant into a water of the United States from a point source. Under Section 405 and 402 of the CWA, EPA was required to develop an approach to regulate municipal and industrial stormwater discharges under the NPDES program. In response, EPA created the Construction General Permit (CGP) program in 1992 to regulate discharges of pollutants from construction activities. Since 1992 EPA has been required to issue revised CGPs at least every five years. EPA's most recent CGP was finalized in January of 2017 and regulates an estimated 26,000 operators.

On May 12, 2021 EPA issued its proposed 2022 CGP. The proposed CGP regulates construction sites that disturb at least one acre of land, and requires the regulated community to take certain preventive and corrective actions in relation to stormwater discharges at these construction sites.[7]

Regulatory Flexibility Act Requirements

EPA rules published in the *Federal Register* are subject to the RFA.[8] A "general permit", and specifically a Construction General Permit, falls squarely within the APA's definition of a "rule."[9] As the CGP is a "rule" under the APA[10], EPA must comply with all RFA requirements when proposing and finalizing the CGP by either certifying the proposed 2022 CGP, if promulgated,

[4] Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.
[5] *Id.*
[6] 5 U.S.C. § 601 note.
[7] *See* 86 Fed. Reg. 26023 (May 12, 2021).
[8] *See* 5 U.S.C. § 603.
[9] A "rule" as defined by the Administrative Procedure Act (APA) is "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 . . ."
[10] The D.C. Circuit has affirmed "general permits" under the CWA are "rules" subject to the RFA in both *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1 (D.C. Cir. 2011), in which the Court ruled that so long as EPA certified Vehicle General Permits, issued under the CWA, did not have a "significant impact on a substantial number for small entities," EPA has complied with its obligations under the RFA as well as in *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005), in which the D.C. Circuit ruled that Nationwide Permits, another type of general permit issued under the CWA, were "rules" under the RFA. In addition, EPA has itself previously conceded in the 2008 CGP that it will treat Construction General Permits as "rules" under the RFA.

will not have a significant impact on a substantial number of small entities or preparing an initial regulatory flexibility analysis.[11] EPA failed to do either.

EPA does not provide any estimate of small businesses affected by this rule. EPA states in its cost analysis that the 2017 CGP covered about 26,000 operators. Based on the size distribution of the two industries referenced in the proposed 2022 CGP (Construction of Buildings and Heavy and Civil Engineering Construction), Advocacy estimates that over 25,000 small operators will be affected. EPA should also analyze differences in cost between large and small operators. For example, EPA should include costs to understand the requirements, adapt processes, and train employees in compliance.

Advocacy recommends EPA comply with the RFA by using the certification language required by the RFA if it can conclude the CGP, if promulgated, would not have a significant impact on a substantial number of small entities.

Advocacy's Recommendations

Advocacy is concerned that EPA's failure to comply with RFA requirements when proposing the 2022 CGP has resulted in the agency's failure to address certain impacts on small businesses. With that in mind, we make the following recommendations.

1. **Coverage Under the Proposed 2022 CGP Should Begin 14 Days After Submission by an Operator of Its Notice of Intent (NOI).**

Under section 1.4.3 and Table 1 of the current CGP authorization for discharges under the CGP is provided to operators "14 calendar days after EPA notifies [the operator] that it has received a complete NOI" for operators of new sites, existing sites, and operators that acquire ownership or operational status in an existing site. EPA is proposing to extend this timeline by an additional 16 days, thus authorizing permit coverage to operators "30 calendar days after EPA notifies [the operator] that it has received a complete NOI."

Advocacy has learned from small entity representatives that EPA does not currently notify operators when it has received a complete NOI. Because EPA consistently fails to notify operators of the status of their NOI, many small entities must assume authorization under the CGP is provided 14 calendar days after the operator has submitted the NOI. Advocacy recommends section 1.4.3 and Table 1 be modified to reflect EPA's established practice permit coverage is authorized 14 days after NOI submission.

Furthermore, EPA should not extend the timeline for authorization from 14 days to 30 days. Many small entities receive expedited project requests, and small entities' ability to quickly begin construction increases their ability to compete with larger entities. The 14-day interval is to allow interested parties to raise concerns about the issuance of the permit. EPA has not provided any data, or instances, where the 14-day period has been too short to allow others, including other government agencies as well as the general public to raise any concerns with EPA.

[11] 5 U.S.C. § 605 (1996).

2. **EPA's Definitions Of "Routine Maintenance" And "Corrective Action" Need to Be Modified.**

Section 2.1.4(b) defines "routine maintenance" as "a repair or replacement that can be completed within 24 hours." In Section 2.1.4(b)-(c), EPA defines "corrective action" as "a repair or replacement that will take more than 24 hours to complete" or "the same routine maintenance . . . [repeated] 3 or more times."

Both "routine maintenance" and "corrective actions" must be reflected in the operator's Storm Water Pollution Prevention Plan (SWPPP) and updated accordingly. However, a "corrective action" must also be documented in the "corrective action log" which adds additional recordkeeping burdens for operators. Furthermore, failure to either document the "corrective action" in the "corrective action log" or conduct the "correction active" itself can lead to permit non-compliance, resulting in significant fines for the operator. Because of the increased financial burden "corrective action" requirements can place upon operators, "corrective action" designations should be reserved for those actions that are more than mere "routine maintenance."

Not all work that takes more than 24 hours to complete, nor machinery or structures that require three or more instances of "maintenance," should be elevated to the status of a "corrective action" unless there has been an unexpected breakdown or failure of the underlying machinery or structure. Completing expected and planned "routine maintenance" for many machines or structures could take more than 24 hours to complete. For example, small entity representatives informed Advocacy "routine maintenance" regularly requires the contracting of a third-party to come to the construction site, examine the machinery or structure, prepare a report and invoice to complete the maintenance for the operator, and schedule a second visit to complete the required maintenance. These necessary steps are inherently contingent upon a third-party's schedule and availability, and, as such, should not cause those who must hire third-party contractors to incur greater financial and regulatory responsibilities because of the elevation of the maintenance items to "corrective actions."

Similarly, some machinery and structures must be regularly maintained on a weekly or monthly schedule. If a construction site is active for more than two weeks, the applicable machinery or structure may very well need maintenance three or more times. Under the proposed definition, these actions would erroneously be characterized as "corrective actions" despite the routine and expected nature of the work provided to safeguard the structural integrity of the machinery or structure.

EPA's definitions of "routine maintenance" and "corrective action" have failed to recognize both the timing necessary to complete expected "routine maintenance" as well as the repeated maintenance required for certain machinery and structures. Advocacy recommends modifying the definition of "corrective action" to those unexpected actions required to fix a structural failure of the applicable machinery or structure.

3. **EPA Should Improve Its Analysis on the Impact of Corrective Actions.**

Despite EPA's definition of a "corrective action" as one that either cannot be completed in less than 24 hours or one that results from three or more routine maintenances, in its cost analysis EPA assumes that each operator will only be required to take one corrective action per year that would take no more than one single hour. EPA should clarify these contradictory statements.

Because of EPA's proposal to set a benchmark of 50 Nephelometric Turbidity Units (NTU) for turbidity, many small entity representatives believe that one corrective action per year per operator is a significant underestimate. For example, EPA has failed to recognize that repeat benchmark monitoring exceedances would result in follow-up corrective action requirements especially in areas where there is naturally a high level of NTU.

Both the definition of corrective action discussed in the previous section and EPA's new requirements may cause more repair and maintenance activities to be considered corrective actions. Although this will create additional paperwork burdens for operators, EPA does not include these additional costs in the Cost Analysis or the Information Collection Request (see Table 4 of the ICR).

Advocacy recommends EPA re-evaluate its data and assumptions regarding how many corrective actions would be required for each operator per year and estimate the incremental paperwork cost of corrective actions.

4. **Vegetative Strips Should Be Listed as Acceptable Perimeter Controls.**

In footnote 16 of the proposed 2022 CGP EPA has proposed to remove "vegetative strips" as an example of an acceptable perimeter control. Vegetative strips, or vegetative barriers, are narrow strips typically one to three feet wide of stiff, erect densely growing plants, usually grasses. Vegetative strips retard and reduce surface runoff by promoting detention and infiltration. Vegetative strips have been used for over four decades at construction sites and are an important tool to prevent pollutants from being discharged into waters of the United States.

EPA has not provided any justification for its removal of "vegetative strips" as an example of an acceptable perimeter control. To avoid regulatory confusion, Advocacy recommends EPA continue to list "vegetative strips" as an example of an acceptable perimeter control.

5. **EPA Should Modify the Acreage Threshold for Sites Allowed 14 Calendar Days to Complete Site Stabilization.**

Under the existing and proposed 2022 CGP operators are required to initiate construction site stabilization measures immediately upon the ceasing of any construction activity where soil is exposed. For sites that are equal to or less than five acres, operators have 14 calendar days to complete stabilization requirements. For sites that are larger than five acres, operators only have seven calendar days to complete stabilization requirements. The existing and proposed section

2.2.14(a) of CGP has attempted to incentivize operators to limit the acreage with exposed soil in an effort to limit the amount of sediment discharge at any one moment from a construction site.

Referencing the 2017 CGP Fact Sheet as well as data from the 2012 CGP, EPA has selected the five-acre threshold because it believes the median size of construction sites is five acres and because the definition of "small construction activity" under 40 CFR 122.26(b) is construction activity that "disturbs between 1 and 5 acres." However, data from stakeholders shows that the median size of a construction site within the homebuilding sector has increased to 25 acres,[12] a marked increase since the promulgation of the definition of "small construction activity" in 1990. The median size of commercial construction sites for bridges, piers, utilities, and commercial buildings is even larger. Indeed, as solar and wind projects increase, such construction sites easily can exceed one thousand acres. EPA's desire to use the median construction site size for site stabilization requirements should be updated to reflect current data.[13]

In addition, in part because the average construction site exceeds 25 acres, trying to take advantage of EPA's incentive is not economically feasible for most operators. Certain stabilization machinery is necessary to complete the required stabilization. As operators must bring this equipment to the construction site, equipment transportation costs and fees can run into tens of thousands of dollars per piece of equipment per site. Small entity representatives informed Advocacy if operators for a construction site of 25 acres must multiply that cost five times, the operator will be unwilling to incur the additional expense to simply take advantage of the extra seven days to complete stabilization. The cost to finish site stabilization in seven days considering equipment transportation costs as well as labor costs such as additional staffing and overtime is less than the cost to finish site stabilization in 14 days.

If data are available, EPA could make this incentive more effective by analyzing the net benefits of alternative thresholds. For example, EPA could estimate changes in the number of sites below various sizes under different thresholds, then compare the costs and benefits to the environment and to the affected entities of each approach. Not only would this help EPA choose the best approach, but it would help inform affected parties of the environmental impacts of different discharge site sizes.

In order to incentivize operators to expose less soil at any one time, EPA needs to increase the acreage threshold from five acres to at least 25 acres to allow operators to take advantage of the incentive program as a practical matter. Advocacy suggests that, given the growth of the average size of construction sites as well as improvements in technology and practice, the acreage threshold be set at construction sites larger than five acres.

[12] *See* Attachment 1, National Association of Home Builders, Average Subdivision Survey Results (May of 2016).
[13] *See* 2017 CGP Fact Sheet, *available at* https://www.regulations.gov/document/EPA-HQ-2021-0169-0016.

6. **Uncontaminated Dewatering Water Should Be Exempt from Control Routing Requirements.**

EPA has proposed to delete footnote 42 in the proposed 2022 CGP, which clarified in the 2017 CGP that "[u]ncontaminated, clear (non-turbid) dewatering water can be discharged without being routed to a control." There is no benefit to treating non-turbid water for turbidity. Advocacy recommends EPA reinsert footnote 42 to expressly exempt "uncontaminated, clear (non-turbid) dewatering water" from any sediment control requirements meant to treat turbid water.

7. **EPA Has Underestimated the Cost of Turbidity Monitoring, Which Should Be Required Only in Limited Circumstances.**

EPA has proposed under section 3.3 of the proposed 2022 CGP to require operators to monitor for turbidity at all sites that discharge dewatering water into waters of the United States designated as Tier 2, 2.5, or 3. Tier 2, 2.5, and 3 waters of the United States are those waters that are considered high use or waters that may be more susceptible to environmental changes from discharges.

EPA's cost analysis of this requirement is deficient for several reasons. First, as EPA conceded, the median cost of a turbidity meter is $1,064. However, the expected life of a turbidity meter is only three to four years. Each construction site must also have its own turbidity meter. Thus, if an operator has five construction sites, they will be required to pay for ten turbidity meters over the 5-year period of the CGP.

Second, EPA has identified 29 as the average number of dewatering water discharges per site per year without providing any data to substantiate this figure. EPA's mean of 29 is not reflective of the diversity of construction sites, which can have dewatering water discharges from 1 to thousands per year. For example, some small entity representatives have noted that if a bridge or bridge-type structure is being constructed, the number of dewatering water discharge days will rise to 365 days per year. Within that same site, there could be more than one dewatering water source. Some small entity representatives have communicated the range of dewatering water sources within a single site could range from one to fifteen.

Third, EPA has further assumed in its cost analysis that it will only require 15 minutes to collect and analyze a dewatering water sample. Preparing, cleaning, and conducting an informal calibration to ensure the turbidity meter is functioning properly alone takes 15 minutes. The time to collect and analyze the sample ranges from one to three hours. This doesn't consider the resources and time needed to train an in-house employee to properly collect and analyze the sample. For entities using outside vendors to collect and analyze turbidity data, the total time would rise to two to four hours based upon port-to-port fees for these vendors. The hourly cost of hiring these outside vendors is far greater than the $36.13 per hour rate that EPA assumes for in-house work. In addition, turbidity meters, outside of data collection and testing use, must be formally calibrated quarterly per turbidity meters' instruction books.

As EPA has noted, many states already have dewatering water requirements in place. For example, Massachusetts and New Hampshire have a dewatering water permit. Their requirements expressly include the collection and analysis of total suspended solids (TSS), a measurement that is comparable to turbidity in determining amount of pollutants discharged into waters. Advocacy recommends operators already required to collect and analyze for TSS should submit this information to EPA in lieu of being required to collect and analyze for the comparable turbidity.

8. **Inspections Should Be Required Only When There Has Been a Snow Event With at Least 3.25 Inches of Snow Accumulation.**

EPA revised section 4.2.2 to require site inspections either (1) every seven calendar days, or (2) every fourteen calendar days and within 24 hours of a storm event with 0.25 inches or greater of rain or 3.25 inches or greater of snow accumulation. Previously, EPA did not provide guidance on how to convert the amount of snow accumulation to a rain metric. Small entities appreciate the clarity EPA has provided regarding snow accumulation.

EPA has however proposed to modify section 4.3.1, which requires site inspection where the anticipated discharge will flow into a Tier 2, 2.5, or 3 water of the United States. Under the proposed section 4.3.1, site inspection must be conducted every seven calendar days as well as within 24 hours of a storm event with 0.25 inches or great of rain or when any snowmelt will result in a discharge.

The inconsistent measurement of snow accumulation that would trigger a site inspection requirement should be corrected. Advocacy recommends modifying section 4.3.1 to require site inspection every seven calendar days as well as within 24 hours of a storm event with either 0.25 inches or greater of rain or 3.25 inches or greater of snow accumulation.

9. **EPA Should Not Require Operators to Take Action Beyond Their Construction Site.**

Section 4.6.1(d) of the proposed 2022 CGP requires operators to check for signs of erosion and sedimentation beyond the construction site. In some circumstances, the property beyond the construction site may be owned or controlled by the same operator. In many circumstances, however, the property "downstream" from the construction site is controlled by an unaffiliated person. Requiring operators to examine sites downstream from the permitted construction site is opening up the possibility of requiring operators to take certain actions beyond their control, including entering onto others' properties. Advocacy recommends EPA modify any requirement to check downstream sites with the express statement that operators must only conduct a visual inspection of downstream sites that are visible from the applicable construction site.

10. **Operators Should Only Be Required to Take Corrective Action If Their Construction Site Is the Source of a Sediment Plume or Hydrocarbon Deposit.**

Section 5.1.5 of the proposed 2022 CGP requires operators to suspend all activities if the operator discovers a sediment plume, visible sheen, or hydrocarbon (HC) deposit at the receiving water of

any discharge. This broad statement must be narrowed to account for the multiple origins of the plume, sheen, or HC deposit. Advocacy recommends that operators be exempt from this suspension requirement upon them confirming the plume, sheen, or HC deposit does not originate from their construction site or contribute to it.

11. **EPA Should Eliminate Any Requirement or Reference to EPA's Construction Inspection Course Not Yet Developed.**

Section 6.3 of the proposed 2022 CGP requires all personnel conducting site inspections to either (1) have completed EPA's construction inspection course and passed the associated exam, or (2) hold a construction inspection certification or license from a program that covers (i) erosion and sediment control and pollution prevention, (ii) design, installation, and maintenance of erosion and sediment controls, and (iii) performance of inspections.

Many of Advocacy's stakeholders support the requirement that personnel conducting inspections under the proposed 2022 CGP be properly trained. However, many small entities are concerned with EPA offering its yet-to-be-developed construction inspection course as one of only two ways to achieve this training requirement. The referenced course has not yet been published or been published for notice and comment, which would allow the regulated community to provide helpful comments to better finetune the training course. [14]

Advocacy recommends EPA remove any reference to EPA's inspection course until it is made publicly available. Advocacy further recommends EPA clarify what licensing and certification boards or organizations may provide training for licensure or certification under the proposed section 6.3, and update its cost analysis to reflect that, in many cases, an operator's entire stormwater team will undergo training.

12. **EPA Should Create a Safe Harbor Period to Ensure Operators Receive Confirmation Their Notice of Termination (NOT) Has Been Accepted as Complete By EPA.**

Section 8.5 of the current 2017 CGP and the proposed 2022 CGP state that an operator's "authorization to discharge under [the CGP] terminates at midnight of the calendar day that a complete NOT is submitted to EPA."

Many small entities are concerned with EPA's failure to confirm receipt of a complete NOT. As operators transition from one construction project to another, the regulatory uncertainty of potentially having an active CGP with continuing inspection and other requirements despite a NOT submission is a serious concern. Advocacy recommends EPA establish a safe harbor period of 14 days after submission of the certified NOT.

[14] In addition, the *Federal Register* prohibits the publication of any reference of any regulation, including a construction inspection course developed and implemented by EPA, that is not already published in the Code of Federal Regulations or otherwise made publicly available. As EPA's course is yet to be finalized, EPA is prohibited from referencing the unfinished course in the *Federal Register*.

Conclusion

Advocacy is concerned that EPA's failure to comply with RFA requirements when proposing the 2022 CGP has resulted in the agency's failure to address certain impacts on small businesses. Advocacy encourages EPA to revise the proposed 2022 CGP to comply with all RFA requirements and to address small entities' concerns outlined in this comment letter. If you have any questions, please contact me or Assistant Chief Counsel Astrika Adams at Astrika.adams@sba.gov. Thank you for your consideration.

Sincerely,

/s/
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