

**SUPPLEMENTARY INFORMATION:** In the Rules and Regulations section of this **Federal Register**, we are approving the maintenance plan for the Morenci SO<sub>2</sub> nonattainment area. We are also approving the State of Arizona's request to redesignate the Morenci area from nonattainment to attainment for the primary SO<sub>2</sub> NAAQS. We are taking these actions without prior proposal because we believe that the revision and request are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: March 30, 2004.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*  
[FR Doc. 04-9278 Filed 4-23-04; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 450**

[FRL-7644-2]

RIN 2040-AD42

**Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Category**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; Withdrawal.

**SUMMARY:** On June 24, 2002, EPA published a proposal that contained several options for the control of storm water discharges from construction sites, including effluent limitations guidelines and new source performance standards. We have selected the option in that proposal that continues to rely on the range of existing programs, regulations, and initiatives at the Federal, State, and local level for the control of storm water discharges from construction sites rather than a new national effluent guideline or other new rule. EPA determined that uniform national technology-based standards are not the most effective way to address storm water discharges from construction sites at this time. Instead, EPA believes that it is better at this time to rely on the existing National Pollutant Discharge Elimination System (NPDES) storm water program, which requires permit coverage for discharges associated with construction activity disturbing at least one acre of land, and also requires municipalities to reduce

their stormwater discharges of pollutants to the maximum extent practicable, which can include implementation of tailored local programs to reduce pollutant discharges from construction sites.

**DATES:** For judicial review purposes, this action is considered issued as of 1 p.m. eastern daylight time (e.d.t.) on May 10, 2004, as provided in 40 CFR 23.2. Under section 509(b)(1) of the Clean Water Act, judicial review of the Administrator's action regarding effluent limitations guidelines and standards can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is considered issued for purposes of judicial review.

**ADDRESSES:** The docket for today's action is available for public inspection at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** For technical information regarding today's action, please contact Mr. Jesse W. Pritts at (202) 566-1038 or send e-mail to: [pritts.jesse@epa.gov](mailto:pritts.jesse@epa.gov). For economic information, please contact Mr. George Denning at (202) 566-1067 or send e-mail to: [denning.george@epa.gov](mailto:denning.george@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**General Information**

*A. What Entities Are Potentially Interested in This Action?*

Entities potentially interested in this action include businesses that conduct construction and development activities.

Category	Examples of regulated entities	Examples of common North American Industry Classification System (NAICS) codes
Industry .....	Builders, Developers, General Contractors and Heavy Construction operators that perform construction activities.	233, 234

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be interested in today's action. If you have questions this action, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. How Can I Get Copies of This Document and Other Related Information?*

1. Docket

We have established an official public docket for this action under Docket ID

No. OW-2002-0030. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. To view docket materials, please call ahead to schedule an appointment. Every user is entitled to copy 266 pages per day before incurring a charge. The Docket may charge 15 cents for each page over the 266-page limit plus an administrative fee of \$25.00.

2. Electronic Access

You may access this **Federal Register** document electronically through the

EPA Internet under the “**Federal Register**” listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select “search,” then key in the appropriate docket identification number. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section B.1.

### C. What Other Information Is Available To Support This Action?

You can obtain electronic copies of this action as well as copies of the two major supporting documents at EPA Dockets at <http://www.epa.gov/edocket/> and <http://www.epa.gov/waterscience/guide/construction>.

- “Development Document for Final Action for Effluent Guidelines and Standards for the Construction and Development Category” (EPA–821–B–04–001) referred to in the preamble as the Technical Development Document (TDD). This document presents the technical information that formed the basis for our decisions in today’s action, including information on the costs and performance of the pollutant reduction technologies we considered.

- “Economic Analysis for Final Action for Effluent Guidelines and Standards for the Construction and Development Category” (EPA–821–B–04–002) referred to in the preamble as the Economic Analysis (EA). This document presents the methodology employed to assess economic impacts and environmental benefits of the options we considered for today’s action and the results of the analysis.

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### I. Legal Authority

This action withdraws the proposed effluent limitations guidelines and new source performance standards that EPA proposed for the construction and development industry at 40 CFR part 450 and the revisions to 40 CFR part 122 (67 FR 42644, June 24, 2002). We take this action pursuant to sections 301, 304, 306, 308, 402 and 501 of the Clean Water Act, 33 U.S.C. 1311, 1314, 1316, 1318, 1342 and 1361.

### II. Background

#### A. Clean Water Act

Congress adopted the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters” (section 101(a), 33 U.S.C. 1251(a)). To achieve this goal, the CWA prohibits the discharge of pollutants into navigable waters except in compliance with the statute. CWA section 402 requires most “point source” discharges to obtain NPDES permits issued by EPA or authorized State or tribal agencies.

Following enactment of the Federal Water Pollution Control Amendments of 1972 (Pub. L. 92–500, October 18, 1972), EPA and the States issued NPDES permits to thousands of dischargers, both industrial (e.g., manufacturing, energy and mining facilities) and municipal (sewage treatment plants). EPA promulgated effluent limitations guidelines and standards for many industrial categories. NPDES permits incorporate these requirements when permit authorities issue them.

The Water Quality Act of 1987 (Pub. L. 100–4, February 4, 1987) amended the CWA. The CWA was clarified by defining municipal and industrial storm water discharges as point sources. Industrial storm water dischargers, municipal separate storm sewer systems and other storm water dischargers designated by EPA must obtain NPDES permits pursuant to section 402(p) (33 U.S.C. 1342(p)).

#### B. NPDES Storm Water Permit Program

EPA’s initial 1990 storm water regulations identified construction as one of several types of industrial activity requiring an NPDES permit. These “Phase I” storm water regulations require operators of large construction sites to apply for permits (40 CFR 122.26(b)(14)(x)). A large-site construction activity is one that will discharge storm water runoff from the construction site through a municipal separate storm sewer system (MS4) or otherwise to waters of the United States and meets one or more of the following conditions:

- Will disturb five acres or greater;
- Will disturb less than five acres but is part of a larger common plan of development or sale if the larger common plan of development will ultimately disturb five acres or more;
- Is designated by the NPDES permitting authority.

The 1999 “Phase II” storm water regulations generally extend permit coverage to sites one acre or greater (40 CFR 122.26(b)(15)). Collectively, the Phase I and II storm water rules address approximately 97.5% of the annual construction acreage in the U.S. (64 FR 68731) and require permits of over 5,000 municipalities. Additional information on the NPDES storm water program can be found at [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=6](http://cfpub.epa.gov/npdes/home.cfm?program_id=6).

#### 1. Storm Water Permits for Construction: General and Individual

Pursuant to the NPDES Phase I storm water regulations at 40 CFR 122.26, EPA and the States started issuing permits for storm water discharges from large construction sites in 1992. The Phase II regulations require smaller sites to obtain permits starting in March 2003. Construction sites can be regulated through either general or individual permits.

##### a. General Permits

General permits cover the vast majority of construction sites governed by the NPDES regulations. EPA and States use general permits to cover a group of similar dischargers under one permit (see 40 CFR 122.28). General permits simplify the application process for the industry, provide uniform requirements across covered sites, and reduce administrative workload for the permit authorities. EPA and the States published documents containing the construction general permits, along with forms and related procedures. To be covered under a general permit, the permittee (either the developer, builder or contractor for a construction project)

typically submits a Notice of Intent (NOI) to the permit authority. The NOI replaces the lengthier application package that is used for an individual NPDES permit. By submitting the NOI, the permittee generally agrees to the conditions in the published permit. While the specific provisions of State general permits vary, all generally require the permittee to prepare a storm water pollution prevention plan (SWPPP), install and maintain best management practices (BMPs) to prevent soil erosion and control construction site runoff, and conduct periodic inspections of their construction sites. Permittees generally may begin land disturbance activities after a specified period following NOI submission unless the permit authority notifies them otherwise.

To discontinue permit coverage, an operator must generally complete final stabilization of the site and transfer responsibility to another party (e.g., a developer transferring land to a home builder) or, for a residential property, complete temporary stabilization and transfer the property to the homeowner. The permittee generally submits a Notice of Termination (NOT) form to the permit authority when the appropriate permit conditions are satisfied.

EPA's Construction General Permit (CGP) covers discharges from construction activities in five States, the District of Columbia, Puerto Rico, U.S. territories, and specifically designated portions of other States (e.g., most land in Indian Country and Federal facilities). The current CGP became effective on July 1, 2003, and is available on EPA's Web site at <http://cfpub.epa.gov/npdes/stormwater/cgp.cfm>. The CGP covers any site with one or more acres of disturbed land, including smaller sites that are part of a larger common plan of development or sale, and replaces and updates previous EPA permits. Construction activities on Indian Country land in EPA Region 4 are covered by a separate construction permit.

#### b. Individual Permits

A permit authority can require any site to apply for an individual permit rather than a general permit. The individual permit is most often used for complex projects and/or projects in sensitive watersheds. Additionally, a construction site owner or operator may request an individual permit.

#### 2. Municipal Storm Water Permits and Local Government Regulation of Construction Activity

Local governments have a role in the co-regulation of construction industries

along with States and EPA. In general, the Phase I rule requires that local governments (or MS4s) serving populations of 100,000 or more obtain permits. The Phase II rule extends coverage to most other MS4s in urbanized areas. NPDES permitting agencies may designate additional MS4s outside of urbanized areas for permit coverage based on State-specific criteria. Permitted MS4s are responsible for overseeing long-term maintenance of storm water management facilities and implementation of appropriate erosion and sediment controls at construction sites within their jurisdiction. A variety of State and municipal regulations addressing erosion and sediment control and storm water runoff from construction activities have been in place for some time, but under the NPDES storm water regulations all permitted MS4s are required to develop such programs.

EPA's storm water regulations require that each municipality develop a local storm water management program in order to properly control discharges into, and out of, its MS4. MS4s also have the option to accept end-of-pipe treatment limitations in connection with their stormwater discharges, but MS4s rarely, if ever, pursue this option. The Phase II MS4 regulations contain explicit requirements for a local program to control storm water discharges from construction activities and to manage "post-construction" (long-term) runoff. Phase I MS4s are required to develop programs to control discharges resulting from construction activities and submit them with their permit application. The permit authority uses this application to develop permit requirements to reduce pollutants in discharges to the maximum extent practicable. See 40 CFR 122.26(d) for descriptions of the Phase I MS4 program and 40 CFR 122.34 for a description of the Phase II MS4 program. EPA has provided guidance to permit authorities and MS4s that recommends appropriate components and activities for a well-operated local storm water management program, including appropriate erosion and sediment controls for active construction sites and post-construction storm water management measures. Guidance materials can be found on EPA's Web site at <http://www.epa.gov/npdes/stormwater>.

#### C. Effluent Guidelines Program

Effluent limitations guidelines and standards (called "effluent guidelines" or "ELGs") are technology-based requirements for categories of point source dischargers. These limitations

are incorporated into NPDES permits. The effluent guidelines are based on the degree of control that can be achieved using different levels of pollution control technology, as defined in Title III of the CWA and outlined below.

#### 1. Best Practicable Control Technology Currently Available (BPT)

In guidelines for a point source category, we may define BPT effluent limits for conventional, toxic, and non-conventional pollutants. In evaluating BPT, we generally look at a number of factors. We consider the age of the equipment and facilities, the processes employed and any required process changes, engineering aspects of the control technologies, non-water quality environmental impacts (including energy requirements), and such other factors as the Administrator deems appropriate (CWA section 304(b)(1)(B)). Traditionally, we establish BPT effluent limitations based on the average of the best performance of facilities within the category of similar ages, sizes, processes or other common characteristics. Where existing performance is uniformly inadequate, we may require higher levels of control than currently in place in a category if we determine that the technology can be practically applied (see "A Legislative History of the Federal Water Pollution Control Act Amendments of 1972," U.S. Senate Committee of Public Works, No. 93-1, January 1973, p. 1468).

In addition, we consider the total cost of treatment technologies in relation to the effluent reduction benefits achieved. This inquiry is generally designed to determine, among other things, whether the additional reductions from adopting a potential BPT technology are "wholly out of proportion to the costs of achieving such marginal level of reduction" (see "A Legislative History of the Federal Water Pollution Control Act Amendments of 1972," 1973, p. 170). The inquiry does not require us to quantify benefits in monetary terms, although we generally attempt to do so where feasible. See, for example, *American Iron and Steel Institute v. EPA*, 526 F. 2d 1027 (3rd Cir., 1975).

In balancing costs against the benefits of effluent reduction, we generally consider the volume and nature of expected discharges after application of BPT, the general environmental effects of pollutants, and the cost and economic impacts of the required level of pollution control. The Act does not require EPA to consider water quality problems attributable to particular point sources, or water quality improvements in particular bodies of water when selecting BPT. Rather, the Act provides

for water-quality based effluent limitations (WQBELs) over and above the technology-based limitations established through ELGs to address any water quality issues that may remain after technology-based limitations have been applied (CWA section 301(b)(1)(C)). Accordingly, we did not consider water quality in particular receiving waters in developing today's action. See *Weyerhaeuser Company v. Costle*, 590 F. 2d 1011 (D.C. Cir. 1978).

## 2. Best Available Technology Economically Achievable (BAT)

In general, BAT effluent guidelines (CWA section 304(b)(2)) represent the best available technology economically achievable for reducing discharges of toxic and non-conventional pollutants of direct discharging facilities in the subcategory or category. The factors we consider in assessing BAT include the cost of achieving BAT effluent reductions, the age of equipment and facilities involved, the processes employed, engineering aspects of the control technology, potential process changes, non-water quality environmental impacts (including energy requirements), and such factors as the Administrator deems appropriate. We retain considerable discretion in assigning the weight to be accorded to these factors. An additional statutory factor we consider in setting BAT is "economic achievability." Generally, we determine the economic achievability on the basis of the total cost to the subcategory and the overall effect of the rule on the industry's financial health. As with BPT, where existing performance is uniformly inadequate, we may base BAT upon technology transferred from a different subcategory or from another category. In addition, we may base BAT upon manufacturing process changes or internal controls, even when these technologies are not common industry practice.

## 3. Best Conventional Pollutant Control Technology (BCT)

The 1977 amendments to the CWA required EPA to identify effluent reduction levels for conventional pollutants associated with BCT technology for discharges from existing point sources. EPA generally follows a methodology for evaluating potential BCT limitations using a two-part "cost reasonableness" test. We explained the methodology for the development of BCT limitations in July 1986 (51 FR 24974).

Section 304(a)(4) designates the following as conventional pollutants: biochemical oxygen demand (BOD<sub>5</sub>), total suspended solids (TSS), fecal

coliform, pH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as an additional conventional pollutant on July 30, 1979 (44 FR 44501). Sediment, which is a primary pollutant of concern at construction sites, is commonly measured as TSS.

## 4. New Source Performance Standards (NSPS)

NSPS reflect effluent reductions that are achievable based on the best available demonstrated control technology. New facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. As a result, NSPS should represent the greatest degree of effluent reduction attainable through the application of the best available demonstrated control technology for all pollutants (*i.e.*, conventional, non-conventional, and priority pollutants). In establishing NSPS, CWA section 306 directs us to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements.

## 5. Pretreatment Standards

The CWA also defines standards for indirect discharges, *i.e.*, discharges into publicly owned treatment works (POTWs). These are Pretreatment Standards for Existing Sources (PSES) and Pretreatment Standards for New Sources (PSNS) under section 307(b) and (c). Because we did not identify any specific discharges directly to POTWs, we did not consider PSES or PSNS for the Construction and Development Category. The information that we reviewed indicates that the vast majority of construction sites discharge either directly to waters of the U.S. or through MS4s. In some urban areas, construction sites discharge to combined sewer systems (*i.e.*, sewers carrying both storm water and domestic sewage through a single pipe) which lead to POTWs. Sediment is susceptible to treatment in POTWs using technologies commonly employed such as primary clarification. As a result, we do not expect pollutants in construction site runoff that are discharged to POTWs to pass-through without treatment. In addition, we have no evidence of sediment from construction sites causing interference with or sludge contamination at POTWs.

## 6. Effluent Guidelines Plan and Consent Decree

Clean Water Act section 304(m) requires us to publish a plan every two

years that consists of three elements. First, under section 304(m)(1)(A), we are required to establish a schedule for the annual review and revision of existing effluent guidelines in accordance with section 304(b). Section 304(b) applies to ELGs for direct dischargers and requires us to revise such regulations as appropriate. Second, under section 304(m)(1)(B), we must identify categories of sources discharging toxic or nonconventional pollutants for which we have not published BAT ELGs under section 304(b)(2) or new source performance standards under section 306. Finally, under section 304(m)(1)(C), we must establish a schedule for promulgating BAT and NSPS for the categories identified under subparagraph (B) not later than three years after they are identified in the 304(m) plan. Section 304(m) does not apply to pretreatment standards for indirect dischargers, which we promulgate pursuant to section 307(b) and 307(c) of the Act.

On October 30, 1989, Natural Resources Defense Council, Inc. (NRDC), and Public Citizen, Inc., filed an action against EPA in which they alleged, among other things, that we had failed to comply with section 304(m). Plaintiffs and EPA agreed to a settlement of that action in a consent decree entered on January 31, 1992. (*Natural Resources Defense Council, et al. v. Whitman*, D.D.C. Civil Action No. 89-2980). The consent decree, which has been modified several times, established a schedule by which we are to propose and take final action for eleven point source categories identified by name in the decree and for eight other point source categories identified only as new or revised rules, numbered 5 through 12. We selected the Construction and Development (C&D) category as the subject for New or Revised Rule #10. The decree, as modified, calls for the Administrator to sign a proposed ELG for the C&D category no later than May 15, 2002, and to take final action on that proposal no later than March 31, 2004. A settlement agreement between the parties, signed on June 28, 2000, provided for EPA to develop regulatory options applicable to discharges from construction, development and redevelopment, covering site sizes included in the Phase I and Phase II NPDES storm water rules (*i.e.*, one acre or greater). We also agreed to develop options including numeric effluent limitations for sedimentation and turbidity; control of construction site pollutants other than sedimentation and turbidity (*e.g.*, discarded building materials, concrete truck washout,

trash); BMPs for controlling post-construction runoff; BMPs for construction sites; and requirements to design storm water controls to maintain pre-development runoff conditions where practicable. The settlement agreement also provided for us to issue guidance to MS4s and other permittees on maintenance of post-construction BMPs identified in the proposed ELGs. We developed options and considered all of these provisions, as discussed in the June 24, 2002, proposal. We did not issue guidance for MS4s and other permittees on maintenance of post-construction BMPs at the time of the June 24, 2002, proposal because the proposal did not contain proposed requirements for post-construction BMPs. However, EPA continues to develop and issue a range of guidance materials to support continued implementation of the program.

### III. Summary of Proposed Rule

On June 24, 2002, we published a proposal (67 FR 42644) that contained three options to control storm water runoff from construction sites. Option 1 proposed to modify the existing NPDES regulations to incorporate a series of inspection and certification provisions for site owners and operators. Option 1 would have applied to all construction sites that disturb one or more acres of land and that are required to obtain an NPDES permit under the provisions of 40 CFR 122.26(b)(14)(x) and 122.26(b)(15). Option 2 proposed to create a new part 450 that would codify certain provisions of the EPA construction general permit and establish inspection and certification provisions for site owners and operators as BPT, BAT, BCT and NSPS limitations. These requirements would have applied to all construction sites that disturb five or more acres of land and that are required to obtain an NPDES permit under the provisions of 40 CFR 122.26(b)(14)(x). Option 3 did not establish new regulatory requirements, but instead explained how we would rely on continued implementation of the existing program. In addition to these three options, we solicited comment on implementing Option 1 with applicability to sites with five or more acres of disturbed land (as opposed to one acre as in Option 1). The June 24, 2002, **Federal Register** notice (67 FR 42644) contains detailed descriptions of the regulatory options.

### IV. Summary of Comments Received and Significant Changes Since Proposal

One hundred five organizations and individuals submitted comments on a range of issues in the proposal. You can

find detailed responses to all comments, including the ones summarized here, in our comment response document in the official public docket. Among the most prevalent comments were those questioning the need for new regulations in light of existing programs at the Federal, State, and local level as well as specific comments on our costing, economics and environmental benefits analyses. A number of comments were submitted specifically opposing our proposal of New Source Performance Standards (NSPS). Other comments requested that we re-propose the guideline to incorporate requirements for post-construction storm water management BMPs, and to include more stringent requirements for erosion and sediment controls.

Many commenters were concerned that we were proposing options (Options 1 and 2) that had a low benefit-cost ratio and felt we should not promulgate a rule where the costs outweighed the benefits to such an extent. In a similar vein, several commenters indicated that we did not account for some substantial benefits. We did make changes to our benefits estimation methodologies since the time of proposal, but there are still a range of benefits that cannot be quantified and/or monetized. However, the costs continue to be substantially greater than the monetized benefits of Option 1 and 2.

The National Association of Home Builders (NAHB), the National Multi Housing Council and the National Apartment Association commented on certain issues with our methodology. They also provided data to replace assumptions EPA had made on the duration of projects, timing of expenditures, and financial independence of a firm's individual projects from other projects. We reviewed the information and found that it contained valid assumptions for the modeling. Thus, we now consider single- and multi-family projects to be independent (not cross-subsidized by other projects) and have set the duration of single-family projects to four years and multi-family projects to nine years. However, we still assume that all costs related to erosion and sediment controls are incurred in the first year of a project. This assumption would result in a slight overestimation of the annual costs of the options, since costs incurred in future years would not be discounted back to present values.

We also made changes to the costing analyses since the proposal. For the proposal, we only examined a subset of existing State erosion and sediment control programs in order to establish

the baseline of existing requirements. Since then, we conducted a more detailed evaluation of the programs of all 50 States. This allowed us to construct a more accurate baseline and to calculate compliance costs for the regulatory options on a State-by-State basis. The evaluation for this action still does not fully capture the requirements in place at the county, municipal and conservation district level. As a result, we may have overestimated both the incremental costs and the sediment removals.

We also updated the best management practice (BMP) assumptions in the costing model. Based on a review of existing State programs, we found that all 50 States require basic sediment controls such as silt fencing, inlet protection and check dams as part of their existing programs. In addition, all States require permittees to prepare a SWPPP or equivalent document, such as an erosion and sediment control plan, clearing and grading plan or storm water management plan. The requirements of these plans are essentially equivalent to the requirements for a SWPPP contained in the EPA CGP. The only notable differences between existing programs and the requirements contained in the EPA CGP are variations in the size of sediment basins required, the requirement for installing sediment traps for smaller sites, the time allowed for providing stabilization of exposed soil areas, and the frequency of site inspections. As a result, the cost model we developed for this action only calculates costs of the options we considered for these four elements.

We also updated the unit cost values. For sediment basins and sediment traps, we used at proposal a cost curve for dry extended detention basins. See Thomas R. Schueler and Heather K. Holland, eds., "The Economics of Stormwater Treatment: An Update," *The Practice of Watershed Protection*, Ellicott City, MD, Center for Watershed Protection, 2000, p. 402. However, the costs of dry extended detention basins (which are permanent storm water management facilities) can differ significantly from the costs of temporary sediment basins and sediment traps due to differences in their intended functions and design parameters. Therefore, for the analysis supporting today's action, we instead used values for sediment basins contained in a report issued by EPA in 1993 (see U.S. Environmental Protection Agency, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, EPA 840-B-92-002, Washington, U.S. Environmental Protection Agency, 1993, p. 4-78). We also examined several

more up-to-date references in order to determine if current unit costs vary significantly from the values reported in this document. We examined a number of individual unit cost entries for sediment basins and sediment traps contained in 32 references, including county bonding estimates and State department of transportation contract bids, and found that the values reported in the 1993 document are still valid for sediment basins and sediment traps. Therefore, we used these values for the analysis in support of today's action. As a result of these changes, we believe that the costing analysis presents a much more accurate estimate of the costs of compliance for the regulatory options we considered.

We also revised the pollutant loading estimates for this action. For the proposal, we estimated reductions in pollutant loadings by using the per-site loads from the economic analysis for the Phase II NPDES Storm Water rule and estimates of BMP removals based on our best professional judgment (BPJ). We received several comments that this approach was not clear and that the basis for our BPJ estimates was not fully described. For today's action, we estimated soil erosion on an ecoregion basis using the Revised Universal Soil Loss Equation (see K.G. Renard, *et al.*, *Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE)*, Agriculture Handbook No. 703, Washington, U.S. Govt. Print. Off., 1997) and county-level soil data. We estimated loadings reductions using the SEDCAD model (see Richard C. Warner and Pam Schwab, *SEDCAD 4 for Windows 95/98 & NT. Design Manual and User's Guide*, Ames, IA, Civil Software Design, 1998). We believe that this resulted in a much more accurate estimate of the removals attributable to the various regulatory options we considered.

We also made changes in our benefits assessment methodologies. For the proposal, we estimated the total reduction in discharge of turbidity and suspended solids nationally and then calculated avoided costs associated with reduced water storage capacity in reservoirs, reduced need for navigational dredging, and reduced drinking water treatment costs. We received several comments that indicated there were potentially other benefits that we did not quantify (such as improvements in water quality and associated changes in designated uses, ecological benefits, and human health impacts). For the analysis in support of this action, we calculated monetized benefits of the regulatory options using

the National Water Pollution Control Assessment Model (NWPCAM) developed by Research Triangle Institute for EPA (see Research Triangle Institute, *National Water Pollution Control Assessment Model (NWPCAM) v. 2.0*, Research Triangle Park, NC, Research Triangle Institute, 2000). We believe that the NWPCAM model is a significant improvement over the methodology we used for the proposed rule analysis. We have used NWPCAM to value benefits in other recent effluent guidelines rulemakings, such as Concentrated Animal Feeding Operations and Meat and Poultry Products. You can find additional information on our loadings analysis and benefits assessment in section VIII, in the development document, and the public docket.

#### **V. Decision Not To Establish Effluent Limitations Guidelines**

We have decided not to promulgate effluent limitations guidelines and standards for the construction and development industry and instead have selected the option that relies on the range of existing programs, regulations, and initiatives at the Federal, State, and local level for the control of storm water runoff from construction sites. This option was identified in the June 2002 proposal as Option 3. We made this decision for numerous reasons.

The existing NPDES storm water regulations already require permits for the vast majority of construction sites and municipalities nationwide. The Phase I regulations first required permits for construction sites disturbing 5 or more acres in 1992. The Phase II regulations added permitting requirements for small construction sites disturbing between 1 and 5 acres in early 2003. EPA estimates that the Phase I and II construction site storm water regulations combined require permits for approximately 400,000 construction sites annually. In addition, the Phase I regulations require permits for MS4s that include requirements that they address construction site runoff within their municipal boundaries. Currently, there are nearly 1,000 medium and large MS4 operators permitted, or in the final stages of being permitted, under the NPDES storm water program. The Phase II regulations required permits of small municipalities beginning in 2003. Small municipalities must also develop a program to address construction site runoff within their municipal boundaries. The Phase II permitting requirements add over 5,000 municipalities to the program. The Phase I and II municipal permitting requirements combined require permits

for nearly all of the urbanized area in the United States. Since the NPDES regulations already contain permitting requirements for most construction sites disturbing at least 1 acre, and the municipal permitting requirements also address construction site runoff that occurs within municipal boundaries, EPA believes that construction site storm water discharges are already being adequately addressed through the existing program.

The total annual costs of the proposed ELGs (Option 2) would be more than half a billion dollars. EPA believes that these costs are simply too high and are disproportionately large when compared to the incremental loading reductions over the existing program that would be attributable to the proposed ELG. Our modeling indicates that the existing Phase I and Phase II permit programs as of the year 2003 were already capable of controlling approximately 80–90% of sediment runoff from construction sites, and the proposed rule would remove only 1% more. Furthermore, continued implementation of the Phase II municipal programs and revisions to State construction general permits will likely result in continued improvements in the level of control for construction site storm water discharges nationwide. This will reduce the sediment loading reductions estimated to result from the proposed Option 2 to an even smaller incremental amount. Moreover, EPA estimates that under Option 2 between 673 and 5,178 jobs would be displaced each year—an impact that would fall predominantly on small businesses. The high economic impacts for this industry, coupled with the finding that a national rule would remove only about 1% of the overall loads, persuades EPA that we should not promulgate an ELG based on the June 2002 proposal. EPA concludes that employing the flexibility inherent in the existing programs is a better approach to addressing remaining sediment loadings at this time.

#### **A. Existing Programs**

When we began developing effluent guidelines for the construction and development industry, we expected to find that the existing State and local erosion and sediment control programs were not well developed. At the time of proposal, we had evaluated a subset of existing State programs to compare their requirements to those of the EPA Construction General Permit (CGP). Since proposal, we have evaluated the programs of all 50 States and have determined that these requirements generally are comparable to and in some cases exceed those of the EPA CGP. All

50 States require basic sediment controls such as silt fencing, inlet protection and check dams as part of their existing programs. In addition, all States require permittees to prepare a storm water pollution prevention plan (SWPPP) or equivalent document, such as an erosion and sediment control plan, clearing and grading plan or storm water management plan. The requirements of these plans are essentially equivalent to the requirements for a SWPPP contained in the EPA CGP. The only notable differences between existing programs and the requirements contained in the EPA CGP are variations in the size of sediment basins required, the requirement for installing sediment traps for smaller sites, the time allowed for providing stabilization of exposed soil areas, and the frequency of site inspections. We thus compared the existing State requirements with those of the EPA CGP for each of these components. The results of this evaluation are as follows:

- All 50 States require preparation of a SWPPP, erosion and sediment control plan, or equivalent document;
- 41 States require inspections of the site at least once every 14 days;
- 30 States require sediment basins with at least 3,600 cubic feet of storage per acre disturbed for areas draining ten acres or more;
- 27 States require stabilization of soils within 14 days after construction activities have temporarily or permanently ceased on any portion of the site; and
- 22 States require sediment traps for smaller sites.

In many cases where the State-level requirements are not equivalent to those contained in the EPA CGP, we expect that local requirements will be equivalent to or even more stringent than those contained in the EPA CGP. We received comments from both NAHB and NRDC citing examples of this. Due to the information burden of collecting this sort of data and the significant analytical complexity of calculating costs and loadings reductions at a level finer than at the State-level, we did not comprehensively collect information on programs currently in place for counties, municipalities, or conservation districts. However, as noted before, municipalities permitted under the Phase I and Phase II storm water regulations are required to develop programs that control discharges of runoff from active construction sites within their jurisdiction to the maximum extent practicable.

Moreover, we have determined that some of the States that do not have

equivalent requirements to those contained in the EPA CGP are located in arid or semi-arid areas of the country. In these States, the additional pollutant load reduction that would result from implementing more stringent requirements is likely minimal, since these areas do not experience a significant amount of rainfall. For example, four of the States (Colorado, Montana, North Dakota and Wyoming) that do not have sediment basin requirements equivalent to the EPA CGP have urbanized areas that are located predominately in arid or semi-arid areas.

Using modeling data, we have determined that existing State and Federal requirements, once fully implemented,<sup>1</sup> will likely result in removal of approximately 80–90% of sediment loads that would otherwise be discharged from active construction sites. This suggests that existing programs are already quite good. Our modeling data indicate that imposing the requirements in the EPA CGP as a uniform technology floor nationwide as proposed, however, would result in an additional capture of relatively little additional sediment—approximately 1% more.

EPA's decision not to go forward with an ELG at this time was also influenced by the Agency's estimate of the relatively small portion of the overall sediment problem the options EPA considered would have addressed. EPA estimates that Option 2 would have resulted in reductions of approximately 1,000,000 tons per year of sediment loadings. While the total amount of sediment reduction may appear quite large, it is small in comparison to the sediment reduction attributable to the existing program and the sediment currently discharged from other sources. As an example, the United States Department of Agriculture (USDA) estimated in the 2001 Natural Resources Inventory (<http://www.nrcs.usda.gov/technical/land/nri01/>) that sediment eroded by water from cropland is approximately 1 billion tons per year. The small amount of expected sediment reductions in comparison to the reductions due to the existing program and the sediment loadings originating from sources outside the scope of this program reinforces our decision not to

<sup>1</sup> Under Phase II, small municipalities and small construction sites were required to obtain permit coverage by March 10, 2003. As most Phase II municipalities are still early in their first permit terms, and storm water programs by nature require a certain amount of local optimization, we believe it likely that many such programs have yet to reach their full potential.

promulgate effluent limitations guidelines and standards at this time.

The remainder of the sediment being discharged from construction sites nationwide would be extremely difficult to capture using the technologies contained in our proposal for a number of reasons. Principal among these reasons is the varying soil types and topography found at construction sites. Certain soil types (e.g., clay) do not settle readily even in sediment ponds that hold stormwater runoff for many days. Even where the runoff itself is amenable to treatment using sediment controls, the topography does not always allow for large sediment basins. We believe that these kinds of site-specific considerations are best addressed by local permit authorities and municipal storm water programs at this time.

#### B. Cost

We also considered the high incremental cost of imposing technology requirements equivalent to the CGP nationwide and determined that the overall cost in absolute dollars spent annually and the resulting annual job displacement was disproportionate to the incremental pollutant reductions that would be achieved. At proposal, EPA estimated the cost of the proposed ELG (Option 2) at \$505 million annually. As a result of further analysis conducted since proposal in response to comments received, EPA now estimates that the cost of the proposed ELG would be \$585 million annually. Even using the smaller \$505 million figure, the ELG would have imposed considerable annual costs on the national economy, with little corresponding pollutant reduction when compared to the existing program.

We are also concerned that, in addition to substantial costs, the ELG considered by EPA would result in significant job displacement. Our estimates for job displacement range from 461 (with a market-based cost pass-through assumption) to 3,847 (with a 0% cost pass-through assumption) annually. Moreover, the cost and job displacement impacts caused by imposing these requirements nationwide would be felt primarily by small businesses. Because of the importance of this sector to the national economy, we determined these economic impacts to be substantial. These impacts also support our decision not to establish effluent limitations guidelines at this time.

Some commenters suggested that the cost of the proposed ELGs per pound of pollutant removed was low by EPA's traditional standards. At proposal, we

estimated a cost of approximately \$0.01 per pound of TSS removed. For this action, we have revised this estimate considerably, based primarily on a significant reduction in estimated removals. We now estimate a cost of approximately \$0.29 per pound of TSS removed. While this is still within the range that EPA has considered acceptable in past cost-reasonableness analyses, we believe the small relative magnitude of these reductions (approximately 1% of total loads generated at construction sites and approximately 0.1% of estimated discharges from cropland), the nature of the pollutants (primarily sediment), the fact that discharges occur only through storm water, and the existence of increasingly effective local erosion and sediment control programs in all urbanized areas, support our conclusion that the cost of the ELGs does not justify a national rule at this time. While no one of these factors in isolation would necessarily lead us to this conclusion, we believe that collectively they support it.

### C. The Importance of Flexibility

The purpose of an effluent limitations guideline is generally to set a technology-based minimum standard of pollution control on dischargers within a given industrial sector. EPA has determined, due largely to the wide variability of conditions under which the construction industry operates, that imposing such national, uniform standards is not the most effective means of controlling sediment discharges from construction sites at this time.

As described above, there is currently variability among the State programs addressing sediment discharges from construction sites, although all require permits that contain provisions to address construction site storm water runoff, such as development of a SWPPP or similar instrument. Moreover, imposing uniform requirements commensurate with the CGP would be very costly, with little incremental pollutant reduction over the existing program. We considered the possibility of crafting a national ELG that incorporated flexibility to allow permit writers to impose different measures in areas where some types of controls would be less effective than in other locations (e.g., different requirements based on varying soil types). The goal of such a flexible approach would be to retain controls on sediment discharge where such controls would yield the best results, while minimizing the considerable costs of such controls where they would do little

good. We ultimately concluded that, at this time, the complexity that would result from such national standards threatened to make the ELG too unwieldy. The existing permit programs already have the necessary flexibility and, in the Agency's opinion, constitute the better tool to address sediment discharges at construction sites at this time. EPA has provided, and will continue to provide, guidance to local authorities on how best to reduce construction site discharges to the maximum extent practicable on a site-specific basis.

Moreover, NPDES permits issued by States are generally submitted to EPA in draft form before issuance, are subject to public notice and comment, and are judicially reviewable. This applies to both permits for construction site operators, and to permits for municipalities that must develop effective programs to control construction site storm water discharges. Hence, EPA may exercise oversight authority to object to inadequate State permits, and the public may comment on, and ultimately challenge in court, permits that they deem inadequate.

### D. Additional Information

EPA is authorized to promulgate BPT/BAT limitations only where we determine that the technologies identified satisfy each element of the statutory test. For BPT, for example, the technology in question must be "best," "practicable" and "currently available." For BAT, the technology basis for the limitations must be "best," "available" and "economically achievable." Hence, EPA need not make a determination that a given technology is economically achievable if that technology is not "best" or otherwise fails another statutory requirement. *See, BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796-97 (6th Cir. 1995). Rather, EPA is authorized to decline to promulgate a nationally applicable effluent limitations guideline where we determine that a national categorical rulemaking is not the best tool to address the problem at hand. Such is the case with today's decision. For the various reasons cited in this action, and further discussed in our responses to comments (e.g., high cost, low rate of pollutant reduction compared to the existing program, adequate existing programs, preference for site-specific flexibility), we have determined that none of the technologies considered for this category is "best" at this time, and therefore we decline to promulgate an ELG for this category.

The NPDES construction site storm water management regulations have been in place for large sites since 1990 (permits were first required in 1992) and small sites since 1999 (permits were first required in 2003). We expect that implementation of the NPDES permitting program is continuing to raise awareness of erosion and sediment control issues across the industry and leading to improvements in runoff control. This is especially true for operators of smaller sites, which only recently were required to obtain permits. We received many comments questioning the need for additional regulations at this time, given that a large portion of the NPDES program is just being implemented. We agree that since the permitting requirement for discharges from "small" sites (disturbing at least one, but less than five, acres) is now in force, it makes sense to allow additional time for the existing program to be more fully implemented before deciding the need for additional regulation through effluent limitations guidelines.

In the meantime, there are a number of other maturing EPA programs and initiatives that are expected to lead to significant reductions in discharges from construction sites, including:

- Total Maximum Daily Loads (TMDLs) are now being developed at an accelerating pace, which will lead to increased water-quality based management of construction site runoff where sediment and nutrients from such sites contribute to impairments;
- EPA's National Management Measures to Control Nonpoint Source Pollution from Urban Areas, which is a draft technical guidance and reference document for use by State, local, and tribal managers in the implementation of nonpoint source pollution management programs. It contains information on measures for reducing pollution of surface and ground water from urban areas and controlling construction site storm water runoff;
- EPA's Office of Enforcement and Compliance Assurance (OECA) Construction Workgroup has worked with the Associated General Contractors of America (AGC), NAHB and other trade groups to prepare "Federal Environmental Requirements for Construction". This workgroup will also soon release a guide to managing storm water and other environmental requirements for contractors and others who work together in construction and development;
- EPA's Office of Policy, Economics and Innovation through the Sector Strategies Program is partnered with AGC to promote industry-wide

performance improvements in managing storm water using Environmental Management Systems, regulatory burden reduction, and performance measurement; and

- The Construction Industry Compliance Assistance Center, which steers contractors to EPA and State storm water requirements and assistance resources (*see* <http://www.cicacenter.org/>).

As a result of these and other initiatives at the Federal, State, and local level, the sediment reductions we estimated under an ELG for this industry may well be achieved anyway. We expect that the combination of these EPA programs and continued implementation of State, county, and local programs will eventually control the majority of these discharges.

We received comments indicating that there are technologies that would provide incremental pollutant reductions that were not included in our BCT analysis (such as phasing, limiting amount of land exposed at one time, improving sediment basin designs, etc.). For the purposes of today's action, we did not apply the BCT cost test because BPT effluent limitations guidelines themselves were determined not to be feasible or appropriate. While these technologies would provide incremental reductions, they do not change the overall decision process because all of the factors discussed above (high costs, low sediment reduction, effective local programs, need for flexibility) still apply. As a result, we are not promulgating effluent limitations guidelines based on BCT.

We considered the same options for BAT as BPT. We are not aware of any additional technically feasible and economically achievable technologies for the removal of toxics (*i.e.*, priority metals and organic chemicals) and non-conventional pollutants beyond those we considered for BPT. In fact, we do not have data indicating that these pollutants are found in construction site runoff nationwide. As a result, we are not promulgating effluent limitations guidelines based on BAT.

We also did not consider additional options for NSPS. At the time of the proposal, we sought comment on various ways EPA might approach NSPS for the construction industry. We have decided not to promulgate NSPS because we have determined that discharges associated with construction activity generally are not appropriately characterized as "new sources." The CWA defines "new source" as "any source, *the construction of which is commenced after the publication of proposed regulations* \* \* \*" EPA

believes that this definition is best read to generally exclude construction sites. To include construction activity itself within the definition of a "new source" would be to view construction sites as things that are themselves constructed. EPA sought comment on this interpretation of the statute in the June 24, 2002, proposal. This is not, in EPA's view, the best way to read this provision of the CWA. EPA's interpretation of the statute does not, however, foreclose the possibility that the Agency might at a future point promulgate an effluent limitations guideline set in accordance with BPT, BCT and/or BAT. Because construction sites themselves are not "new sources," NSPS is not applicable and the Agency has decided to withdraw the NSPS proposed on June 24, 2002.

For these reasons, we have determined that at this time the existing permit requirements along with existing programs and initiatives at the Federal, State, and local level are adequate to control discharges from active construction sites. Not promulgating effluent limitations guidelines allows for continued implementation of the existing storm water program through appropriately tailored State and local control programs within the existing general and individual permitting systems. This approach allows maximum flexibility for permitting authorities to continue to regulate construction sites reflecting site-specific conditions such as soil types and rainfall patterns, and to develop alternative control strategies or other BMP requirements to respond to local water quality concerns.

#### *E. Other Options*

We eliminated Option 1 from consideration because site inspection and certification requirements by themselves are not technology-based standards (though they may be an important operational component of other technology-based standards) and thus do not constitute an effluent limitations guideline. We eliminated this option from consideration after receiving many comments indicating that these provisions would be too burdensome, especially for small businesses. In addition, many commenters questioned the environmental benefits of such requirements. We agree that these provisions would have been burdensome. Indeed, our analysis indicates that these provisions would have had an aggregate cost of approximately \$278 million annually. Furthermore, we lack the tools to evaluate the pollutant loading

reductions that would likely result from such provisions; we also lack any data that indicates that such provisions would result in notable improvements in implementation of the existing program. At present, site inspections are required under the existing stormwater programs regulating construction activity. We believe at this time that the timing of inspections, as well as any certification requirements, are best determined by permitting authorities in accordance with existing Federal, State and local requirements reflecting local conditions (*e.g.*, rainfall patterns).

As noted above, under the June 28, 2000, Settlement Agreement, EPA agreed to develop options that included BMPs for controlling post-construction runoff and requirements to design storm water controls to maintain pre-development runoff conditions where practicable. Prior to publishing the proposed rule, EPA developed such options, including an option that would require developers to implement post-construction stormwater controls to reduce pollutant discharges by 80% from uncontrolled levels and maintain peak post-development flows at pre-development levels. EPA ultimately decided, however, not to propose controls on post-construction flows for several reasons. (67 FR 42644, 42660 (June 24, 2002))

First of all, EPA noted that the choice of such controls has traditionally been left to State and local governments, who use a variety of regulatory and non-regulatory programs (such as land use planning) to address post-construction runoff to protect infrastructure and achieve local resource goals. The Clean Water Act recognizes the primary responsibility of States in the planning and use of land and water resources (section 101(b), 33 U.S.C. 1251(b)). Furthermore, many of the approaches used by State and local governments to address post-construction flows, such as low impact development, do not lend themselves to uniform standards, but require integration with land use decisions and site design. EPA supports these approaches and does not want to limit local flexibility. In addition, EPA determined that adopting uniform national standards for post construction flows would be very expensive. For the particular option that would have required maintaining peak post-construction flows at pre-development level, EPA estimated national costs of about \$3.3 billion per year. This includes only monetized costs, and does not include costs such as safety and communities preferences for sewer design, road width, sidewalk placement, and other amenities that might be

adversely impacted by the need to minimize impervious surface in order to maintain pre-development flows. The primary benefit of this option would have been the reduction in adverse impacts to small streams from increased peak flows during storm events. Based on preliminary effort to quantify these benefits, EPA believes that the high costs of this option are likely disproportionate to the benefits.

A number of other issues were raised, both by other Federal agencies during interagency review of the proposed rule, and subsequently by commenters, which EPA considered in its decision not to propose and promulgate post-construction stormwater controls (see e.g., March 30, 2004, letter from Thomas M. Sullivan, Chief Counsel for Advocacy, Small Business Administration, to Benjamin Grumbles, Acting Asst Administrator for Water, USEPA, and accompanying March 30, 2004, Memorandum from Kevin Bromberg, Assistant Chief Counsel for Advocacy, to Marvin Rubin, Chief Environmental Engineering Branch, Engineering and Analysis Division, USEPA Office of Water; March 30, 2004, letter from Mary E. Peters, Administrator, Federal Highway Administration, to Benjamin H. Grumbles, Acting Asst Administrator for Water, USEPA; and March 31, 2004, letter from A. Bryant Applegate, Director, America's Affordable Communities Initiative, U.S. Department of Housing and Urban Development, to Jesse Pritts, P.E., USEPA). Concerns were raised about a number of human health and safety risks potentially associated with structural and non-structural BMPs to address stormwater runoff. EPA has included materials in the record describing these risks.

EPA's analysis indicated that the average incremental cost of construction and post-construction controls for a single family house would have ranged from about \$1,000 to \$2,200, depending on the degree of implementation of the Phase II stormwater program. These cost increases were projected to make new homes unaffordable for between 135,000 and 325,000 families. These estimates accounted only for up-front capital costs. They did not include the costs that homeowners would ultimately bear through fees and local property taxes for long-term maintenance of the control structures.

Concerns were also raised about impacts of post-construction stormwater requirements on small businesses and employment. EPA estimated that up to 800 construction firms, almost all of which are small, might close as a result

of these requirements. About 1,300 firms would experience impacts in excess of 3% of gross revenues, and about 8,000 firms would experience impacts in excess of 1% of gross revenues. EPA has traditionally used these threshold to evaluate impacts on small businesses. Net job losses in the economy were estimated at between 9,000 and 18,000 jobs, depending on whether infrastructure cost savings were assumed or not.

Finally, concerns were raised about the impacts of post-construction controls on road and highway construction. Roadways are generally limited to fairly narrow, linear rights-of-way that may lack sufficient land to construct structural BMPs (detention basins). LID controls are also not practical because roadways are by definition impervious, and need to be able drain water quickly from road surfaces for safety reasons. If land for infiltration beside the roadway is limited, it will likely not be possible to maintain pre-construction runoff patterns.

For all of these reasons, EPA is reaffirming its decision not to propose and promulgate post-construction stormwater controls.

## VI. Compliance Cost Estimates of Options We Considered

Since we are not promulgating effluent guidelines for the construction and development industry, there are no compliance costs associated with today's action. However, we did estimate costs for the regulatory options we considered. You can find more information on the costing analysis in the Development Document and in the public record for this action.

We estimate that the national annual compliance costs of the options we considered, in 2002 dollars, are \$278 million annually for Option 1 and \$585 million annually for Option 2.

We evaluated per-site costs individually for a series of model construction sites. We based per-site costs on model construction sites that reasonably represent common construction site features and factors related to State regulations, topography, and hydrology. Using estimates of the amount of new construction acreage developed annually in the U.S. obtained from the 1997 USDA National Resources Inventory ([http://www.nrcs.usda.gov/technical/NRI/1997/national\\_results.html](http://www.nrcs.usda.gov/technical/NRI/1997/national_results.html)) and the U.S. Census Bureau, we computed State total costs by multiplying modeled per-site costs by the number of construction sites in each land use/site-size combination for 48 States. Costs for

Alaska and Hawaii, as well as the U.S. territories were not estimated because we lacked sufficient data for these areas. However, since there is little construction in these areas compared to national development rates, we expect that excluding these costs has little impact on the results we obtained. We calculated national-level costs by summing State costs.

We used a three-step process to compute the total national compliance costs of the options we considered:

- (1) Estimated model site costs using national average unit costs;
- (2) Calculated model site costs using State-specific cost adjustment factors; and
- (3) Summed State totals to produce the national compliance cost estimates.

We collected and compiled data on State construction general permits, erosion and sediment control regulations, and storm water management regulations to determine if existing State programs were at least equivalent to requirements contained in the July 2003 EPA CGP. To determine whether a State program was equivalent to the EPA CGP, we focused on six main areas:

- (1) Requirements for preparing a storm water pollution prevention plan (SWPPP) or equivalent document and for installing general erosion and sediment controls (such as silt fencing, inlet protection and soil stabilization);
- (2) The amount of time allowed for stabilization of exposed soil when construction activities have temporarily or permanently ceased;
- (3) Requirements for installing sediment traps for drainage areas of less than 10 acres;
- (4) Requirements for installing sediment basins for drainage areas of 10 or more acres;
- (5) Requirements for removing accumulated sediment from sediment controls when sediment storage capacity has been reduced by at least 50%; and
- (6) Requirements to conduct inspections at least every 7 days OR every 14 days and following rainfall of 0.5 inches or more.

We found that many States have requirements similar to those contained in the EPA construction general permit, which is the basis for the requirements contained in Option 2. No States currently have requirements equivalent to the inspection and certification provisions of Options 1 and 2. For each State, we determined if certain key BMPs are required and for what construction site size a particular BMP is required. We used this information to determine the baseline BMP sizes and quantities for each of the 24 model

construction sites in each State across the U.S. We then calculated the incremental BMP quantities and size increases by comparing these sizes and quantities with those required under each regulatory option. For sediment basins and sediment traps, we also noted the size of the BMP required by the State program. Where a State program did not note a sediment basin size, we assumed based on BPJ that the baseline size was 1,800 cubic feet per acre.

## VII. Economic Impact Analysis of Options We Considered

Since we are not promulgating effluent guidelines for the construction and development industry, there are no economic impacts associated with today's action. However, we did conduct an analysis of the economic impacts of the options we considered for today's action. Our economic analysis describes the impacts of the options in terms of firm financial stress, employment effects, and market changes, such as housing prices. In addition, the Economic Analysis contains information on the impacts on sales and prices for residential construction. This section presents selected information from the economic analysis that supports this action. For more complete information on the economic analysis, you may review the economic analysis and the official public docket for this action.

### A. Description of Economic Activity

For the purposes of these analyses, the Construction and Development Category is comprised of industries that are involved in building, developing and general contracting (NAICS 233) as well as heavy construction (NAICS 234). We estimated that in 1997 there were approximately 262,000 employer establishments in construction and development industries. By subtracting establishments that are engaged in remodeling and establishments that are unlikely to disturb more than 5 acres of land, we estimated that under Option 2 about 82,883 establishments (of which about 84% are small businesses) would potentially be affected. Census data for 2002 were not available for today's action.

### B. Methodologies for Estimating Economic Impacts

We assessed how incremental costs of the options considered would be shared by developers and home builders, home buyers, and society using a cost pass-through (CPT) analysis and a partial equilibrium analysis. We analyzed these impacts on projects, firms and markets.

We analyzed impacts on consumers and on the national housing market, regional markets and the U.S. economy. Moreover, we analyzed economic impacts to small businesses.

We estimated project-level costs and impacts for a series of model projects to evaluate the options we considered. The models establish baseline economic and financial conditions for C&D projects and assess the significance of the change in cash flow that results from the incremental compliance costs.

We conducted the economic impact analyses using three CPT scenarios. We analyzed the regulatory cost impacts on the model projects using zero and 100% CPT. In the first scenario (100% CPT), we assumed that the developer-builder can pass through all of the incremental compliance costs to the final customer (e.g., the new home buyer, office lessee, or taxpayer). Under this scenario, we assume all costs are borne by the customer in the form of higher prices for completed construction. In the second scenario (zero CPT), we assumed that the builder-developer cannot pass any of the cost increases through, and therefore must absorb all of the costs. For the market analysis, we used a partial equilibrium model with a market-based CPT and reflecting price elasticities observed in the marketplace.

The outputs of the project and firm models include the cost increases that might fall on consumers under the 100 percent CPT scenario and the reductions in profits that industry might incur under the zero percent CPT scenario. In the market models, we analyzed the likely changes in market variables such as prices and quantities that could occur with each option.

To estimate firm-level impacts, we developed the costs per housing start and then assessed the effect of the annual compliance costs of the options at the firm level on key business ratios and other financial indicators. We examined impacts on the gross profit, current ratio, debt-to-equity ratio and return on net worth. Industry publications cite these financial ratios as particularly relevant to the construction industry (see D. Linda Kone, *Land Development*, Washington, Home Builders Press, 2000, and M. Benschhof, "An Inside Look at Builders' Books," *Housing Economics*, Washington, National Association of Home Builders, 2001). Two of the ratios are based on operating income (gross profit, return on net worth), and two are based on the balance sheet statement (current ratio, debt to equity). We examined the compliance cost impacts by calculating the values of each ratio with and without the compliance costs,

using a zero CPT assumption and a market-based CPT assumption.

We used the changes in financial ratios to develop probability distributions of changes in financial status. We used these distributions to estimate the number of firms that might experience financial stress based on the likelihood that their financial ratios might fall below benchmark criteria we assume are indicators of financial stress. We define financial stress as a situation where the firm may have to change their way of doing business to adjust to the changing business climate. The most extreme adjustments are associated with downsizing or closure, but financial stress does not necessarily imply either of these. We then combined the number of firms estimated to experience financial stress with employment figures for the relevant size firms to estimate the numbers of employees that could potentially be affected by the options we considered. These effects might not occur if the firms experiencing financial stress are able to respond to the changing conditions without downsizing or closing. Our analyses project that 31 firms would experience financial stress and 673 employees would be displaced under Option 2, with the market-based cost pass-through assumption. Using the zero cost pass-through assumption, we estimate that 258 firms would experience financial stress and 5,178 employees would be displaced under Option 2.

We used the Small Business Administration's definitions of "small entity", which includes firms ranging from \$5.0 million in gross revenue for NAICS 23311 (Land subdivision and development) to \$27.5 million in gross revenue for the majority of industries within NAICS 233 and 234. The small entities potentially impacted by the options we considered are small land developers, small residential construction firms, small commercial, institutional, industrial and manufacturing building firms, and small heavy construction firms. We estimated that under Option 2 the number of small firms that would have compliance costs exceeding 1% of revenue to be 1,376–1,811 and the number with compliance costs exceeding 3% of revenue to be 42–571, under the zero cost pass-through assumption. Under the market-based CPT assumption, we estimated that 0–213 firms would have compliance costs exceeding 1% of revenue and 0–71 firms would have compliance costs exceeding 3% of revenue. The ranges are a result of two different distributions we used to model impacts across firms of varying revenue.

### VIII. Pollutant Reductions and Environmental Benefits of Options We Considered

Since we are not promulgating effluent guidelines for the construction and development industry, there are no pollutant reductions or environmental benefits associated with today's action. However, we did estimate reductions in discharge of pollutants and the associated water quality improvements and environmental benefits of the options we considered.

#### A. Pollutant Reduction Estimation

We estimated that Option 2 would result in approximately 1,000,000 tons per year of sediment load reduction. There are no reductions attributable to Option 1. Under Option 2, additional reductions would also likely occur in the discharge of other pollutants that may be associated with sediment, such as phosphorus and certain metals. Due to data limitations regarding the amounts of pollutants attached to sediment from construction sites, we did not estimate national reductions for any pollutants other than sediment. To the extent there are additional discharges, local programs are best to address them at this time.

Our estimate of 1,000,000 tons of annual sediment reduction differs significantly from the estimate at the time of proposal. For the proposal, we made a BPJ estimation of the incremental sediment reductions of the options. This estimation assumed a degree of non-compliance with the existing NPDES storm water regulations. For the analysis in support of today's action, we assumed full compliance with existing regulations. This is consistent with EPA's analysis for other ELGs. Furthermore, we conducted modeling that considered regional soil types and regional-specific pollutant removal estimates of various technologies used on model construction sites. As a result of these changes and the use of modeling, the estimates of pollutant reductions attributable to the options in support of today's action are much lower than EPA had estimated at proposal.

#### B. Environmental Benefits Estimation

For this action analysis, we calculated benefits using the National Water Pollution Control Assessment Model (NWPCAM). NWPCAM is a national-scale water quality model that simulates water quality and economic benefits resulting from water pollution control policies. NWPCAM characterizes water quality of the Nation's network of rivers and streams and, to a limited extent, its

lakes. The model can translate spatially varying water quality changes resulting from different pollution control policies to reflect the value individuals place on water quality improvements. In this way, NWPCAM can estimate economic benefits of the regulatory options that we considered.

We calculated economic benefits using a four-parameter continuous Water Quality Index (WQI4), representing a composite measure of water quality. We calculated benefits for each State at the local and non-local scales. Local benefits represent the value that a State population is willing to pay for improvements to waters within the State, while non-local benefits represent the value that a State population is willing to pay for improvements to waters in all other States in the conterminous 48 States. Using this approach, the sum of local and non-local benefits represented a total WTP of approximately \$19.5 million annually (2002 dollars) for Option 2. We could not attribute any benefits to Option 1.

Some categories of economic benefits, such as reduced need for navigational dredging, reduced loss of water storage capacity in reservoirs, and reduced drinking water and industrial water treatment costs, were not included in this estimate. For the proposal, these benefits were estimated to have annual value of \$22 million for Option 2. Since proposal, we have substantially reduced our estimate of the reduction in sediment loading that would result from the proposed ELG. We expect the monetized benefits of these categories estimated at proposal would be correspondingly reduced.

### IX. Non-Water Quality Environmental Impacts

Sections 304(b) and 306 of the CWA require us to consider the "non water quality" environmental impacts when setting effluent limitations guidelines and standards. As described in the June 2002 proposal, we did consider the non-water quality environmental impacts of the options we developed. We estimated, however, that these impacts would be negligible. We are not promulgating effluent guidelines for the construction and development industry. Therefore, there are no non-water quality environmental impacts associated with today's action.

### X. Statutory and Executive Order Reviews

Today's action does not constitute a rule under section 551 of the Administrative Procedure Act, 5 U.S.C. 551. Hence, requirements of other

regulatory statutes and Executive Orders that generally apply to rulemakings (e.g., the Unfunded Mandate Reform Act) do not apply to this action.

Dated: March 31, 2004.

**Michael O. Leavitt,**  
Administrator.

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. NHTSA 2001-8876]

RIN 2127-AG92

### Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Withdrawal of rulemaking.

**SUMMARY:** In 2001, the agency granted a petition for rulemaking submitted by the United States Motorcycle Manufacturers Association, Inc. (USMMA). Petitioners asked NHTSA to amend the Federal motor vehicle lighting standard to allow a lower minimum mounting height for side reflex reflectors on motorcycles. The granting of the petition commenced agency rulemaking on the petition. Before taking further action in this area, the agency would like to expand its knowledge base with further research and more supporting data. Accordingly, this document withdraws the open rulemaking.

**FOR FURTHER INFORMATION CONTACT:** The following persons at the NHTSA, 400 Seventh Street, SW., Washington, DC 20590.

For non-legal issues, you may call Mr. Richard VanInderstine, Office of Crash Avoidance Standards (Telephone: (202) 366-2720) (Fax: (202) 366-7002).

For legal issues, you may call Mr. George Feygin, Office of Chief Counsel (Telephone: (202) 366-2992) (Fax: (202) 366-3820).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment*, establishes lighting requirements for motor vehicles. Table IV of FMVSS No. 108 specifies that all reflex reflectors on motorcycles (including side reflectors) be located not less than 15 inches (381 mm) nor more than 60 inches (1524