

2022 Construction General Permit (CGP) – Proposed Permit Modification
Fact Sheet

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I. Synopsis of Permit Modification

The Environmental Protection Agency (EPA) is proposing a narrow modification to its 2022 Construction General Permit (CGP) to expand the list of areas eligible for coverage to include all Lands of Exclusive Federal Jurisdiction in the U.S. This modification is necessary because EPA is the permitting authority in Lands of Exclusive Federal Jurisdiction, and when the 2022 CGP was issued on February 17, 2022, the permit did not specifically provide eligibility for all of these areas. The proposed modification would also clarify the CGP requirements that apply to projects that discharge to receiving waters within Lands of Exclusive Federal Jurisdiction. EPA is seeking comment only on the proposed permit revisions and the accompanying fact sheet.

This fact sheet provides background to explain the reasons for the proposed modification and a summary of and rationale for the specific changes to the 2022 CGP. This proposed permit fact sheet would supplement the 2022 CGP fact sheet, which can be found at <https://www.epa.gov/npdes/2022-construction-general-permit-cgp>.

II. Background

A. Permitting of stormwater discharges from construction activities

Stormwater discharges from certain construction activities are required under authority of Section 402(p)(2) and (p)(6) of the Clean Water Act and 40 CFR 122.26(a)(ii) and (a)(9)(i)(B) of EPA's regulations to be covered by a state or EPA-issued NPDES permit. More specifically, NPDES permits are required for discharges from projects that cause one or more acres of land disturbance, and smaller land disturbances that are part of a common plan of development or sale if they will ultimately disturb one or more acres of land. Under these authorities, EPA issues an NPDES Construction General Permit for stormwater discharges from construction activities (referred to as the "CGP"). The CGP provides permit coverage in areas where EPA is the permitting authority, which include three states (Massachusetts, New Hampshire, New Mexico); the District of Columbia; Federal facilities in four states (Washington, Colorado, Delaware, and Vermont); all U.S. territories except the U.S. Virgin Islands; all Indian Country, except in Maine; and Denali National Park. EPA is also the permitting authority for stormwater discharges from regulated construction activities that take place on "Lands of Exclusive Federal Jurisdiction." Refer to Section II.B for further explanation of Lands of Exclusive Federal Jurisdiction.

Most recently, EPA issued its 2022 CGP on February 17, 2022. The 2022 CGP provides eligibility for stormwater discharges from regulated construction activities located in the areas identified in Appendix B of the permit. The current permit, however, does not provide specific coverage for all Lands of Exclusive Federal Jurisdiction even though EPA is the exclusive NPDES permitting authority for these lands.

B. Background on Lands of Exclusive Federal Jurisdiction

1. Definition of Lands of Exclusive Federal Jurisdiction

Lands of Exclusive Federal Jurisdiction are lands in the U.S. where the Federal government retains exclusive jurisdiction in relevant respects. Not all Federal lands are lands of exclusive Federal jurisdiction. Rather, exclusive Federal jurisdiction is established only under limited circumstances pursuant to the Enclave Clause of the U.S. Constitution, article 1, section 8, clause 17. These circumstances include (1) where the Federal government purchases land with state consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; (2) where a state chooses to cede jurisdiction to the Federal government; and (3) where the Federal government reserved jurisdiction upon granting statehood. See *Paul v. United States*, 371 U.S. 245, 263–65 (1963); *Collins v. Yosemite Park Co.*, 304 U.S. 518, 529–30 (1938); *James v. Dravo*

Contracting Co., 302 U.S. 134, 141–42 (1937); Surplus Trading Company v. Cook, 281 U.S. 647, 650–52 (1930); Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 527 (1895).

2. Where Are Lands of Exclusive Federal Jurisdiction Located?

Lands of Exclusive Federal Jurisdiction, as defined in Section II.B.1, are all land where the Federal government has exclusive Federal jurisdiction in relative respects. The EPA does not maintain a map or list of all Lands of Exclusive Federal Jurisdiction. The reason for this is that the jurisdictional status of Federal lands is tracked by multiple Federal land management agencies and the jurisdictional status of Lands of Exclusive Federal Jurisdiction may change over time. Individual Federal land management agencies may have such maps or lists, but the EPA is unaware of a comprehensive listing of all current Lands of Exclusive Federal Jurisdiction across all agencies. Notably, however, 16 U.S.C. Chapter 1 identifies the following U.S. National Park Service properties as containing Lands of Exclusive Federal Jurisdiction: Denali National Park, Mount Rainier National Park, Olympic National Park, Hot Springs National Park, Hawai'i Volcanoes National Park, Yellowstone National Park, Yosemite National Park, Sequoia National Park, Crater Lake National Park, Glacier National Park, Rocky Mountain National Park, Mesa Verde National Park, Lassen Volcanic National Park, Great Smoky Mountains National Park, Mammoth Cave National Park, and Isle Royale National Park.

3. EPA's NPDES Authority in Lands of Exclusive Federal Jurisdiction

The Clean Water Act provides the EPA at 33 U.S.C. 1342(a) with the authority to establish and implement the NPDES permitting program, while also establishing for states and Tribes at 33 U.S.C. 1342(b) procedures to request authorization from the EPA to administer the program within their jurisdiction. Lands of Exclusive Federal jurisdiction in relevant respects present a case where states lack authority for administering the NPDES program, as states lack legislative jurisdiction in these areas absent specific congressional action. See *Paul*, 371 U.S. at 263 (finding precedent establishes "that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, s 8, cl. 17, by its own weight, bars state regulation without specific congressional action."). Congress did not take specific action in the Clean Water Act to grant authority to states to administer the NPDES program in Lands of Exclusive Federal Jurisdiction in relevant respects. Due to the Federal government's unique jurisdictional authority within Lands of Exclusive Federal Jurisdiction, and the absence of specific congressional action within the Clean Water Act providing otherwise, the EPA has authority to administer the NPDES permitting program on these lands. Therefore, where NPDES-regulated discharges, including stormwater discharges from regulated construction activities, will occur within a Land of Exclusive Federal Jurisdiction, the discharger must obtain permit coverage under an EPA-issued permit.

C. Reasons for 2022 CGP modification

The 2022 CGP and prior CGPs did not include eligibility for all Lands of Exclusive Federal Jurisdiction in the U.S. The effect of this omission would leave construction projects scheduled to commence during the remaining effective period of the 2022 CGP (i.e., the general permit expires on February 17, 2027) without the ability to obtain coverage under this permit. For example, the U.S. National Park Service and Federal Highway Administration are scheduled to commence construction projects in 2025 in Olympic and Rocky Mountain National Parks, both containing Lands of Exclusive Federal Jurisdiction, among other locations, all of which require NPDES permit coverage. The EPA anticipates the most effective way to provide such permit coverage would be through the availability of a general permit, such as the 2022 CGP.

The EPA is proposing this permit modification to ensure that construction projects within any Lands of Exclusive Federal Jurisdiction in the U.S. are eligible for coverage under the 2022 CGP. The EPA notes that this change will not disrupt permit coverage that is already provided for in the 2022 CGP for construction activities within Denali National Park because of its designation as a Land of Exclusive Federal Jurisdiction, as well as any Lands of Exclusive Federal Jurisdiction that may exist within the states of Washington, Colorado, Delaware, and Vermont since the permit provides coverage for Federal Facilities and operators in those states.

This permit modification is proposed under and consistent with the authority of the NPDES regulations for modifications, specifically 40 CFR 122.62(a)(2). The Federal government's (including the EPA's) authority within Lands of Exclusive Federal Jurisdiction pre-dates the 2022 CGP. However, the EPA only became aware of the gap regarding the coverage of the CGP for all Lands of Exclusive Federal Jurisdiction in the U.S. following the issuance of the 2022 CGP. The agency learned of the need for broader coverage for Lands of Exclusive Federal Jurisdiction following requests made in 2024 to the EPA for permit coverage in U.S. National Park Service properties identified as containing exclusive Federal jurisdiction in 16 U.S.C. Chapter 1. Modifying the 2022 CGP to expand the area of coverage to accommodate projects within all Lands of Exclusive Federal Jurisdiction in the U.S. appeared to the EPA to be the most reasonable approach to address this oversight.

Prior to moving forward with this proposed modification, the EPA considered the alternative option of issuing individual permits for projects within Lands of Exclusive Federal Jurisdiction at least in the interim period prior to the reissuance of the CGP in 2027. While this remains an alternative available for any specific project even if the proposed modification is finalized, relying solely on individual permits would not be the most efficient way of authorizing discharges from these projects, given the longer timelines typically associated with the application and permit development process for individual permits compared to the more streamlined authorization approach of the CGP. Moreover, the EPA is not currently certain how many projects may be planned within Lands of Exclusive Federal Jurisdiction before February 2027, making it hard to estimate how long the individual permitting process could take for all of these projects. This could potentially result in unnecessary construction delays in Lands of Exclusive Jurisdiction, such as for critical infrastructure projects in certain U.S. National Park Service properties that may have limited construction seasons. After considering all of these factors, the EPA concluded that proposing to modify the current CGP would be the most effective way to provide permit coverage for these projects.

The EPA also considered whether to issue a standalone general permit for Lands of Exclusive Federal Jurisdiction or to reissue the full CGP prior to its expiration in February 2027. A standalone general permit may provide a means to narrowly target the permitting of projects in these areas. The EPA is concerned, however, that issuing a new general permit would take significantly longer than the proposed modification, so that a final permit might not be available to provide coverage for the projects that may be scheduled to begin in early 2025, and therefore unnecessarily impede construction projects. The EPA also has concerns about full permit reissuance because it could disrupt the typical five-year cycle for reissuing the CGP; this could raise additional implementation questions about the need to provide coverage for already permitted projects. Similar to the standalone general permit option, the EPA also is concerned that it would take longer to reissue the full CGP than finalize the proposed modification. Given these concerns, the EPA is proposing the more narrow modification to the 2022 CGP.

III. Proposed Modifications to 2022 CGP

This section of the fact sheet describes the proposed modifications to the 2022 CGP and provides an explanation for EPA's reason for the change.

A. Expanded eligibility for Lands of Exclusive Federal Jurisdiction (CGP Appendix B)

The EPA proposes to expand the permit eligibility in Appendix B to include coverage for construction projects taking place within any Lands of Exclusive Federal Jurisdiction in the U.S. This proposed expansion would cover projects within Lands of Exclusive Federal Jurisdiction in any of EPA's 10 Regions. The EPA notes that any projects that are already covered under the 2022 CGP for construction activities within Lands of Exclusive Federal Jurisdiction (i.e., Denali National Park, Federal facilities in the states of Colorado, Delaware, and Vermont, and construction carried out by Federal operators in the state of Washington) are not affected by the proposed modification, including not being subject to the proposed new Part 10 requirements (discussed under Clarification of requirements for projects discharging to receiving waters within Lands of Exclusive Federal Jurisdiction in this section).

Appendix B would also include proposed new permit identification numbers that correspond to the EPA Region where the construction activity within a Land of Exclusive Federal Jurisdiction will occur. Construction activities occurring within Denali National Park or within Lands of Exclusive Federal Jurisdiction in Colorado, Delaware, and Vermont will continue to use the existing permit numbers in Appendix B for those areas. EPA also notes that if the proposed modification is finalized, EPA will also modify its electronic system for submitting Notices of Intent (NOIs), Notices of Termination (NOTs), and other reports (where applicable) to accommodate the new permit numbers.

B. New definition of Lands of Exclusive Federal Jurisdiction (CGP Appendix A)

EPA proposes to add a definition of the term "lands of exclusive federal jurisdiction" to explain what is meant by the addition of these areas as eligible for CGP coverage in Appendix B.

C. Clarification of requirements for projects discharging to receiving waters within Lands of Exclusive Federal Jurisdiction (CGP Part 10)

EPA proposes to include a new Part 10 of the 2022 CGP ("Additional Permit Conditions Applicable to Lands of Exclusive Federal Jurisdiction") that clarifies what requirements apply to construction stormwater discharges to receiving waters within Lands of Exclusive Federal Jurisdiction.

Part 10 (10.1 – 10.4)	Permit Requirements
All projects that discharge to receiving waters located within Lands of Exclusive Federal Jurisdiction must comply with the provisions in this Part in addition to Parts 1 thru 8 of this permit. ^{96, 97}	
10.1 INSPECTION FREQUENCIES	You must comply with the increased inspection frequencies specified in Part 4.3.1.
10.2 STABILIZATION DEADLINES	You must comply with the stabilization deadlines specified in Part 2.2.14b.iv.
10.3 TURBIDITY BENCHMARK MONITORING FOR DEWATERING DISCHARGES	You must comply with the benchmark monitoring requirements in Part 3.3 for sites discharging dewatering water.
10.4 EFFLUENT LIMITATIONS FOR STORMWATER AND AUTHORIZED NON-STORMWATER DISCHARGES	

Your discharge must not contain or result in:

- a. Observable deposits of floating solids, scum, sheen, or other substances;
- b. An observable film, sheen, or discoloration from oil and grease; or
- c. Foam or substances that produce an observable change in color, odor, or cloudiness.

If any of these conditions are observed, except with respect to dewatering discharges, you must treat this as triggering corrective action under Part 5, which requires that you take corrective action and document the corrective actions as required in Part 5.2.

For sites discharging from dewatering operations, you must implement corrective actions if any of the conditions described in Part 5.1.5 occur and comply with the requirements of Part 5.2.2 for responding to these conditions.

⁹⁶ EPA notes that the requirements of Part 9 do not apply to projects within Lands of Exclusive Federal Jurisdiction.

⁹⁷ EPA notes that this section does not apply to projects within Denali National Park and Preserve or projects that are eligible for coverage in Appendix B for federal facilities in Vermont, Delaware, and Colorado and for areas in Washington where construction activities are carried out by a Federal Operator.

The EPA proposes to clarify that operators of projects discharging to receiving waters within Lands of Exclusive Federal Jurisdiction should be held to the same type of discharge requirements that are used in the CGP for discharges to sensitive waters, including Tier 3 outstanding national resource waters. The reasons for this proposed change are severalfold. As the EPA has mentioned in this notice, the EPA does not maintain a comprehensive map or list of Lands of Exclusive Federal Jurisdiction, and for this reason relies on and bases its permitting decisions on the information it does have about the location of such lands. The EPA's best available information indicates that Lands of Exclusive Federal Jurisdiction are within certain national parks established under 16 U.S.C. Chapter 1. In addition, the waters that flow through these areas have the potential to be afforded strong protections consistent with Tier 3-designated waters under the EPA's regulations at 40 CFR 131.12(a)(3), which cite "waters of National ... parks" as examples of potential Tier 3 waters. Under the current 2022 CGP requirements, projects that discharge to waters that are designated as "Tier 3" waters, and therefore "sensitive waters," are required to conduct more frequent inspections, comply with more rapid stabilization timeframes, and, in some cases, conduct turbidity monitoring of dewatering discharges. Relying on the linkage in the regulations at 40 CFR 131.12(a)(3) between waters flowing through national parks and their potential designation as Tier 3 waters, for the purposes of this permit, the EPA proposes to apply the same protections for waters within Lands of Exclusive Federal Jurisdiction that are established for Tier 3 waters under the CGP. For this reason, the EPA believes it is reasonable to apply these same requirements to projects discharging to receiving waters located within Lands of Exclusive Federal Jurisdiction. Adopting this approach means that the EPA would assume that all waters within Lands of Exclusive Federal Jurisdiction are worthy of treatment as a sensitive water, regardless of whether the waters flow through a national park or other Tier 3 water. Additionally, the EPA acknowledges that applying the same sensitive water requirements to all discharges to waters within Lands of Exclusive Federal Jurisdiction may be, in some instances, overly protective given that some of these waters in some locations may not be of the same high water quality as others. Given that the EPA does not have a complete list of all Lands of Exclusive Federal Jurisdiction, however, the agency believes that requiring treatment of all waters within these areas as sensitive is reasonable based on the best information currently available to the agency.

The EPA notes that additional conforming changes are also proposed to the corresponding sections of the permit to help clarify which requirements apply to discharges to receiving waters within Lands of Exclusive Federal Jurisdiction. See proposed revisions to Parts 2.2.14.b.iv and 4.3.1.

Under the proposed modification, the EPA is also clarifying in Part 10.4 which discharge conditions would be considered triggers for Part 5.2 corrective action.

D. Clarification of eligibility requirements related to endangered species (CGP Appendix D)

During the development of this proposed modification, the EPA met with the U.S. National Park Service, among other Federal agencies, to better understand, among other things, their agencies' typical practices related to compliance with the Endangered Species Act for construction projects. Based on these conversations, it is the EPA's understanding that these agencies complete their Section 7 Endangered Species Act consultations for these projects prior to commencing construction. Consistent with this understanding, the EPA is proposing to restrict the permit eligibility under Appendix D for construction within Lands of Exclusive Federal Jurisdiction by any Federal entities and associated contractors to the current eligibility criterion that requires completion of Section 7 consultation prior to NOI submittal (Criterion E).