

2022 Construction General Permit (CGP) Modification - Fact Sheet

Contents

| | | |
|--------------------|---|-----------------|
| <u>I.</u> | <u>Synopsis of Permit Modification</u> | <u>2</u> |
| <u>II.</u> | <u>Background.....</u> | <u>2</u> |
| <u>III.</u> | <u>Modifications to 2022 CGP</u> | <u>5</u> |

I. Synopsis of Permit Modification

The Environmental Protection Agency (EPA) is finalizing, largely as proposed, a narrow modification to its 2022 Construction General Permit (CGP) to expand the list of areas eligible for coverage to include construction projects in all Lands of Exclusive Federal Jurisdiction. This modification is necessary because the EPA is the permitting authority in Lands of Exclusive Federal Jurisdiction, and when the CGP was issued on February 17, 2022, the permit did not specifically provide eligibility for these areas as a class. The modification also clarifies the CGP requirements that apply to projects that discharge to receiving waters within Lands of Exclusive Federal Jurisdiction in response to the Supreme Court's recent decision in *City and County of San Francisco v. EPA*.

This fact sheet provides background to explain the reasons for the modification and a summary of and rationale for the specific changes to the 2022 CGP. This permit fact sheet supplements 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

Under Clean Water Act section 402(p)(2) and (p)(6) and 40 CFR 122.26(a)(1)(ii) and (a)(9)(i)(B), stormwater discharges from certain construction activities into waters of the United States must be authorized by a State or EPA-issued National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342(p)(2), (p)(6). More specifically, NPDES permits are required for discharges from projects that cause one or more acres of land disturbance and for discharges from smaller land disturbances that are part of a common plan of development or sale if the discharges will ultimately disturb one or more acres of land. *Id.*; 40 CFR 122.26(a)(9), (b)(14)(x), (b)(15).

Under these authorities, since 1992 the EPA has issued an NPDES Construction General Permit for stormwater discharges from construction activities (referred to as the "CGP"). The CGP provides permit coverage in areas where the EPA is the NPDES permitting authority. The EPA issued its most recent CGP on February 17, 2022, for stormwater discharges from eligible construction projects in 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 and Preserve.¹ The EPA is also the permitting authority for stormwater discharges from regulated construction activities that take place on all "Lands of Exclusive Federal Jurisdiction."² Refer to section II.B of this document for further explanation of Lands of Exclusive Federal Jurisdiction.

Most recently, the EPA issued its 2022 CGP on February 17, 2022. The 2022 CGP provides coverage for stormwater discharges from regulated construction activities that are located in the specific areas identified in Appendix B of the permit.

¹ 87 FR 3522 (Jan. 24, 2022); 2022 CGP, Appendix B, available at <https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-b-areas-of-permit-cover.pdf>.

² 33 U.S.C. § 1342(a), (b) (providing that the EPA shall issue permits for the discharges of pollutants unless a State receives approval to administer its own permit program "for discharges into navigable waters within its jurisdiction").

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.³ These circumstances include (1) where the Federal Government purchases land with State consent to jurisdiction, consistent with the Enclave Clause; (2) where a State chooses to cede jurisdiction to the Federal Government; and (3) where the Federal Government reserved jurisdiction upon granting statehood.⁴

2. Where Are Lands of Exclusive Federal Jurisdiction Located?

Lands of Exclusive Federal Jurisdiction are all lands where the Federal Government has exclusive Federal jurisdiction in relevant respects, including for purposes of implementing the CWA section 402 NPDES program. The EPA does not maintain a map or list of all Lands of Exclusive Federal Jurisdiction because 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. The EPA is aware that individual Federal land management agencies may maintain partial maps or lists but is unaware of a comprehensive listing of all current Lands of Exclusive Federal Jurisdiction across all agencies. Notably, 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, Mammoth Cave National Park, and Isle Royale National Park.

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

Clean Water Act section 402(a) authorizes the EPA to establish and implement the NPDES permitting program (33 U.S.C. § 1342(a)), and Clean Water Act section 402(b) establishes procedures for States and authorized Tribes to request authorization from the EPA to administer the program in lieu of the EPA within their respective jurisdictions (33 U.S.C. § 1342(b); see id. § 1377(e)). Lands of Exclusive Federal Jurisdiction in relevant respects present a case where States lack authority for administering the NPDES program, as States do not have legislative jurisdiction in these areas absent specific congressional action.⁵ Congress did not take specific action in the Clean Water Act to authorize States to administer the NPDES program in Lands of Exclusive Federal Jurisdiction. 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 the sole 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 Lands of Exclusive

³ U.S. Const. Art. I, § 8, cl. 17 ("The Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever ... over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.").

⁴ 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 Co. v. Cook*, 281 U.S. 647, 650–52 (1930); *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 527 (1895).

⁵ 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").

Federal Jurisdiction, the discharger must obtain permit coverage under an EPA-issued NPDES permit.

C. Reasons for 2022 CGP modification

The 2022 CGP and prior EPA-issued CGPs did not include coverage for all Lands of Exclusive Federal Jurisdiction. As a result, construction projects scheduled to commence during the remaining effective period of the 2022 CGP (i.e., until the general permit expires on February 17, 2027) would be unable to obtain coverage for regulated stormwater discharges under this permit. For example, the U.S. National Park Service and Federal Highway Administration are scheduled in 2025 to commence construction projects requiring NPDES permit coverage in, among other locations, Olympic and Yosemite National Parks, both of which contain Lands of Exclusive Federal Jurisdiction. The EPA finds the most effective way to provide such permit coverage is through a modification to the 2022 CGP. Therefore, the EPA proposed a permit modification to the 2022 CGP to extend eligibility under the permit for construction activities in all Lands of Exclusive Federal Jurisdiction. See 89 FR 100929 (Dec. 13, 2024).

The EPA is finalizing this permit modification to ensure that construction projects within any Lands of Exclusive Federal Jurisdiction are eligible for coverage under the 2022 CGP. This change will not disrupt any permit coverage for construction activities in Lands of Exclusive Federal Jurisdiction that was already provided under the 2022 CGP (e.g., for activities within Denali National Park and Preserve; Federal facilities in the states of Colorado, Delaware, and Vermont; and construction carried out by Federal operators in the state of Washington).

The EPA is modifying the 2022 CGP pursuant to the modification authorities in the applicable NPDES regulations at 40 CFR 122.62(a)(2); 40 CFR 124.5. The Federal Government's authority within Lands of Exclusive Federal Jurisdiction, including the EPA's role as the NPDES permitting authority, pre-dates the 2022 CGP. However, the EPA only became aware of the gap in coverage in 2024, following the issuance of the 2022 CGP when the Agency received requests for permit coverage for construction projects in U.S. National Park Service properties identified as containing Lands of Exclusive Federal Jurisdiction pursuant to 16 U.S.C. chapter 1. The EPA views modification of the 2022 CGP to expand the area of coverage to accommodate projects within all Lands of Exclusive Federal Jurisdiction as the most effective and appropriate means to address this gap in coverage.

Prior to moving forward with this 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 expected final action on the next CGP in 2027. While this alternative remains available for any specific project, relying solely on individual permits is not the most efficient way to authorize regulated stormwater discharges from these projects given the longer timelines typically associated with the application and permit development process for individual permits as 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. Only providing the opportunity for individual permits until the next CGP could potentially result in unnecessary construction delays in Lands of Exclusive Federal Jurisdiction, including for critical infrastructure projects in certain U.S. National Park Service properties that may have limited construction seasons. In light of these considerations, the EPA concluded that modifying the current CGP is 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 would have provided a narrower means to target the permitting of projects in

these areas. The EPA determined, however, that issuing a new general permit would take significantly longer than modifying the 2022 CGP, making a final permit unavailable until later in 2025 and unnecessarily impeding construction projects scheduled earlier in the year. The EPA also determined that issuing an entirely new CGP in 2025 would disrupt the Agency's anticipated reissuance of the CGP prior to its expiration in February 2027 and raise additional implementation questions about the need to provide coverage for already permitted projects. Similar to the standalone general permit option, the EPA also was concerned that it would take longer to reissue the full CGP than to finalize a limited modification. After consideration of public comments received, the EPA is therefore finalizing this narrow modification to the 2022 CGP.

III. Modifications to 2022 CGP

This section of the fact sheet describes the 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)

As proposed, the EPA is expanding the permit eligibility in Appendix B of the 2022 CGP to include coverage for construction projects taking place within any Lands of Exclusive Federal Jurisdiction in the U.S. This expansion covers projects within Lands of Exclusive Federal Jurisdiction in any of the EPA's 10 Regions. The EPA notes that any permitted activities in Lands of Exclusive Federal Jurisdiction that the 2022 CGP already covers (e.g., activities within Denali National Park and Preserve; 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 or subject to the modification, including not being subject to the 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 is also modified to include 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 is also modifying 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)

The EPA is finalizing the proposed definition of Lands of Exclusive Federal Jurisdiction in Appendix A of the 2022 CGP.

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

As proposed, the EPA is requiring in this final modification that operators of projects discharging to receiving waters within Lands of Exclusive Federal Jurisdiction will be held largely to the same discharge requirements in the 2022 CGP that are applicable to discharges to sensitive waters, including outstanding national resource waters, referred to as "Tier 3" waters in the 2022 CGP (see Appendix A at A-1). The reasons for this approach are severalfold. As explained above, the EPA does not have a comprehensive map or list of Lands of Exclusive Federal Jurisdiction and must base this permitting decision on the information available to the

Agency about the location of such lands. As explained in the proposal, the EPA's best available information indicates that Lands of Exclusive Federal Jurisdiction include areas within certain national parks identified as such by 16 U.S.C. chapter 1, such as Olympic and Yosemite National Parks, where construction projects are scheduled to commence in 2025.

Waters of the United States in national parks have the potential to be considered outstanding national resource waters pursuant to the EPA's regulations at 40 CFR 131.12(a)(3).⁶ Under the 2022 CGP requirements prior to this modification, projects that discharge to outstanding national resource waters are required to comply with heightened requirements to protect water quality because those waters are generally classified as "Tier 3" waters. See 2022 CGP at Appendix A, A-1. Projects discharging to Tier 3-designated waters must conduct more frequent inspections, comply with more rapid stabilization timeframes than discharges that fall into other categories, and conduct turbidity monitoring of any dewatering discharges.

The EPA is therefore finalizing its proposal to apply the heightened protections for Tier 3 waters in the 2022 CGP to all newly eligible projects that discharge into waters of the United States within Lands of Exclusive Federal Jurisdiction. Finalizing this approach, as proposed, will protect all receiving waters within Lands of Exclusive Federal Jurisdiction subject to this permit, including those that flow through a national park or other Tier 3 water. The EPA recognizes that some waters subject to this permit in Lands of Exclusive Federal Jurisdiction may not have the potential to be designated as outstanding national resource waters or otherwise be subject to 40 CFR 131.12(a). Given that the EPA knows that some waters in Lands of Exclusive Federal Jurisdiction have the potential for designation as outstanding national resource waters, however, and that the Agency does not have a complete list of all Lands of Exclusive Federal Jurisdiction, requiring heightened protection for all waters within these areas subject to this permit is the most effective and efficient way to ensure that all such waters are appropriately protected. This protective approach is reasonable based on the best information currently available to the Agency.

In a key change from the proposal, the EPA is finalizing water quality-based limitations that apply to the newly eligible construction activities in Lands of Exclusive Federal Jurisdiction in light of the Supreme Court's decision in *San Francisco*. In that decision, the Supreme Court held that the Clean Water Act does not authorize "NPDES permit requirements that condition permit holders' compliance on whether receiving waters meet applicable water quality standards." The Court found that these types of requirements, such as permit terms prohibiting discharges that contribute to a violation of a water quality standard in a receiving water, are unlawful under the Clean Water Act. Consistent with this holding, this CGP modification removes the proposed generic narrative prohibition analogous to the permit text rejected by the Court in *San Francisco*, replacing it with final water quality-based limitations that tie compliance to the condition of the discharge (not the receiving water). Section 10 also makes a conforming change to indicate that triggering conditions for corrective actions in Part 5.1.3 and limits on the use of treatment chemicals in Part 7.2.6 focus on conditions within the construction site's discharge. As proposed, the permit addresses all modifications to the water quality-based limitations for Lands of Exclusive Jurisdiction in one place, Part 10.

Even with the changes to Part 10, including the removal of the applicability of the generic water quality-based effluent limitation, the EPA has concluded that the permit contains provisions for newly eligible entities in Lands of Exclusive Federal Jurisdiction as necessary to meet water quality standards as required by CWA section 301(b)(1)(C).⁷ As discussed, the EPA knows that some waters in Lands of Exclusive Federal Jurisdiction have the potential to be designated

⁶ "Where high quality waters constitute an outstanding National resource, such as waters of National . . . parks . . . that water quality shall be maintained and protected." 40 C.F.R. § 131.12(a)(3); see also 33 U.S.C. §§ 1251(a), 1313(a), (c)(2)(A), (d)(4)(B).

⁷ 33 U.S.C. § 1311(b)(1)(C).

as Tier 3 outstanding national resource waters and is therefore applying the approach to water quality-based limitations used for Tier 3 waters in the 2022 CGP to all discharges to waters in Lands of Exclusive Federal Jurisdiction subject to this modification. Given the limits of the EPA's current knowledge about Lands of Exclusive Federal Jurisdiction, however, the EPA welcomes information from prospective permittees to inform the water quality-based limitations for their discharges. If any permittee believes the water quality-based limitations approach adopted in this modification is not warranted for its activity, that permittee may request an individual permit containing permit-specific limitations. The EPA is available to provide technical assistance for such individual permit requests and will endeavor to process them expeditiously. The EPA also plans to continue to evaluate the water quality-based limitations applicable to projects discharging to receiving waters in Lands of Exclusive Federal Jurisdiction for future permit actions as the Agency gains more experience and information with permitting discharges in these locations.

At this time, the EPA is only modifying the conditions of the 2022 CGP to add coverage for all Lands of Exclusive Federal Jurisdiction not already included in the 2022 CGP. The EPA has not reopened and is not reopening any other conditions of this permit as part of this modification in accordance with 40 CFR 122.62 and 40 CFR 124.5(c)(2). As the 2022 CGP (including provisions that are part of this modification) expires on February 16, 2027, the EPA plans to propose the next CGP in the near term and any concerns with other aspects of the permit can be raised at that time. In particular, the EPA intends to propose and take comment on changes to the water quality-based limitations in the underlying CGP to ensure compliance with the Supreme Court's decision in *San Francisco*. In the meantime, the EPA notes that it is working expeditiously to assess the scope of water quality-based limitations implicated by *San Francisco*, and the extent to which existing limitations (including those that continue to appear in Part 3.1 of the 2022 CGP) are enforceable. The EPA hopes to provide clarity to the public, including regulated entities, on this issue in the near future.

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

During the development of the proposed modification, the EPA met with the U.S. National Park Service and other Federal agencies to better understand, among other things, these agencies' typical practices related to compliance with the Endangered Species Act for construction projects.⁸ 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. 16 U.S.C. § 1536. Consistent with this understanding, Federal entities and associated contractors engaged in construction activity within Lands of Exclusive Federal Jurisdiction will be eligible only after completion of Section 7 consultation, consistent with Notice of Intent Criterion E.

⁸ 16 U.S.C. §§ 1531 *et seq.*