Final Report

of the

SBREFA Small Business Advocacy Review Panel

on EPA's Planned Proposed Rule for the

National Pollutant Discharge Elimination System

Storm Water Phase II

August 7, 1997

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INTRODUCTION

This report describes the review by the Small Business Advocacy Review Panel convened for the proposed rulemaking by the Environmental Protection Agency (EPA) that would revise National Pollutant Discharge Elimination System (NPDES) regulations to address currently unregulated discharges of storm water. On June 19, 1997, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Section 609(b)(1) requires convening of a review panel prior to publication of an initial regulatory flexibility analysis that an agency is required to prepare under the RFA. In addition to its chairperson, the Panel consists of representatives of EPA's Office of Water (the EPA program office responsible for developing the rule), the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel for Advocacy of the Small Business Administration.

This report provides background information on the proposed rule being developed and the types of small entities that would be subject to the proposed rule, describes efforts to obtain the advice and recommendations of representatives of those small entities, and summarizes the comments, advice and recommendations that have been received to date from those representatives. The complete written comments of the representatives are attached to this report.

Section 609(b) of the RFA directs the review panel to report on the comments of small entity representatives and make findings as to issues related to identified elements of an initial regulatory flexibility analysis (IRFA) under section 603 of the RFA. Those elements of an IRFA are:

- The number of small entities to which the proposed rule will apply.
- Projected reporting, record keeping, and other compliance requirements of the proposed rule, including the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record.
- Other relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.

- Any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

Once completed, the Panel report is provided to the agency issuing the proposed rule and included in the rulemaking record. In light of the Panel report, the agency is to make changes to the proposed rule or the IRFA for the proposed rule, where appropriate.

It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process. The Panel makes its report at an early stage of the process of development of a proposed rule and its report should be considered in that light. At the same time, the report provides the Panel and the Agency with a timely opportunity to identify and explore potential ways of shaping the proposed rule to minimize the burden of the rule on small entities while achieving the rule's statutory purposes. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the statute authorizing the proposed rule.

BACKGROUND

In 1987, Congress amended the Clean Water Act to require EPA to develop a phased regulatory program focusing on controlling contaminated discharges associated with storm water runoff.[1] In the 1987 Water Quality amendments, Congress established a tiered approach to address certain industrial, municipal, and other storm water discharges. In the first phase of the program, Congress directed the EPA and authorized States to control discharges of industrial storm water and storm water from municipal separate storm sewer systems (MS4) serving populations over 100,000, with the intent of identifying an appropriate second tier of sources following two Congressionally mandated studies.

To implement these requirements, EPA published the initial permit application requirements (Phase I) for the priority categories of storm water discharges identified by Congress.[2] Generally, Phase I sources include storm water associated with certain industrial activities, medium and large municipalities, and large construction sites. Staggered deadlines were established for permit applications for these sources, with the last of the applications scheduled for submission by May, 1993.

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[1] CWA, § 402(p).

[2] 55 FR 47990 (November 16, 1990).

To control industrial sources, Phase I regulations cover "storm water discharges associated with industrial activity" which means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw material storage areas at an industrial plant. EPA estimates that this definition applies to approximately 100,000 facilities nationwide (U.S. EPA, 1990a). To facilitate permitting, EPA established various permit application options for industrial activity including individual permit applications and group applications. EPA and authorized States have issued (or modified) individual permits and general permits based on these respective forms of application. Large construction sites (disturbing 5 acres or greater) are regulated in Phase I as an industrial activity, but with permit requirements that differ from those applicable to other industrial discharges.

To control municipal discharges, the Phase I rule requires NPDES permits for discharges into municipal separate storm sewer systems serving populations greater than 100,000. This universe of regulated municipalities includes 173 cities and 47 counties having large unincorporated, urbanized areas. EPA regulations require that NPDES permits for municipal storm water programs regulated in Phase I include requirements to effectively prohibit non-storm water discharges into the storm sewers and controls to reduce the discharge of pollutants to the maximum extent practicable (including management practices, control techniques, and system design and engineering methods, and other provisions appropriate for the control of such pollutants).

In March 1995, EPA completed and submitted to Congress a study entitled, *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress*. As required under CWA §402(p)(5), this report identified the remaining unregulated storm water discharges, which by this time were known as Phase II. The report also characterized the nature and extent of pollutants in such discharges. The Phase II storm water report identified two major classes of potential Phase II storm water discharges: discharges from municipal separate storm sewers systems not subject to Phase I regulations and discharges from individual facilities not subject to Phase I. In a document entitled, "President Clinton's Clean Water Initiative" (February 1994), EPA summarized procedures and methods to control Phase II storm water discharges sufficient to mitigate impacts on water quality. This document responded to the requirement for an additional report under CWA §402(p)(5). This document recommended that the second phase of the storm water program focus on urbanized areas because EPA concluded that the urbanized areas that were not regulated under the Phase I requirements contributed 60 percent of the pollutant loads in storm water discharged from urban areas.[3]

[3] Phase I of the NPDES storm water program addresses 81.7 million people in portions of 136 urbanized areas. EPA estimated that 28 percent of pollutant loads in storm water discharged from urbanized areas come from those portions of these 136 urbanized areas not subject to Phase I regulations. In addition, EPA estimated that 32 percent of the pollutant loads in storm water discharged from urbanized areas come from the 269 urbanized areas not regulated under Phase I. Storm Water Phase II Report to Congress, ES-7.

In August 1995, EPA published a final rule that established a sequential application process in two tiers for the remaining unpermitted discharges of storm water (Phase II) .[4] This rule allows the NPDES permitting authority to require permits for Phase II dischargers contributing to water quality impairment, and requires all other Phase II storm water dischargers to apply for NPDES permits by August 7, 2001. The August, 1995 Phase II rule was published, in part, to protect Phase II dischargers from CWA citizen suit liability in the absence of Agency action to establish more focused regulations. The preamble to the August 7, 1995 rule explained that the Phase II regulatory program would undergo further development. The Phase II rule would replace the August 7, 1995 rule.

EPA is currently subject to a court order to propose supplemental rules under §402(p)(6) of the CWA by November 25, 1997, and finalize these rules by March 1, 1999. See Natural Resources Defense Council, Inc. v. Browner, Civ. No. 95-634 PLF (D.D.C., April 6, 1995).

OVERVIEW OF PROPOSED PHASE II RULE

EPA's current draft of the proposed Phase II storm water regulation would address storm water discharges associated with two categories of sources: small municipal separate storm sewer systems (small MS4s) and construction activities at small construction sites. Under the draft proposed rule, many of these Phase II sources would be required to obtain NPDES permit coverage under an individual or general NPDES permit to address their storm water discharges.

The small MS4s that would be covered include those located within incorporated places, counties, or other places under the jurisdiction of a governmental entity (including Tribal or Territorial governments) that are located in an urbanized area but not included in Phase I.[5, 6] Also covered would be MS4s that are connected to and contribute substantially to pollutant loadings in another covered MS4. Finally, the rule would cover small MS4s in any incorporated place, county, or other place under the jurisdiction of a governmental entity that is designated by the NPDES permitting authority as requiring a permit based on the system's potential for impacting water quality. The permitting authority would be required to evaluate places outside urbanized areas that have a population density of greater than 1,000 per square mile and a population of greater than 10,000 people against specified water

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[4] 60 FR 40229 (August 7, 1995).

[5] The existing storm water regulations ("Phase I") addresses large and medium MS4s. Generally, a large MS4 includes incorporated places with populations of 250,000 or more, while a medium MS4 includes incorporated places with populations of 100,000 or more, but less than 250,000.

[6] Excluding Federal Indian Reservations located within urbanized areas and having a population of less than 1,000 persons.

quality-related criteria[7] and determine whether these require permits. In addition, the permitting authority may designate other communities as subject to permit requirements based on their contribution to water quality impairment.[8]

Under the draft proposed rule, small MS4s would develop and implement a storm water management program designed to reduce pollutants to the maximum extent practicable and protect water quality. Such programs would include, at a minimum, measures to address requirements concerning public education and outreach, public involvement, illicit discharge detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention and good housekeeping of municipal operations.

The draft proposed Phase II storm water regulation would also address storm water discharges associated with construction activity (e.g., clearing, grading, and excavating activities) resulting in the land disturbance of greater or equal to one acre and less than five acres. In addition, sites disturbing less than one acre would be subject to regulation if they are part of a larger common plan of development or sale. Similar to MS4s, the NPDES permitting authority could designate construction activities as subject to regulation based on the potential for the activity to adversely impact water quality or be a significant source of pollutants. The NPDES permitting authority may also waive storm water discharges from construction activities that disturb less than five acres where specified conditions are satisfied.

The draft proposed rule would maintain the NPDES permitting authority's residual designation authority to require any discharge that contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States to seek coverage under an NPDES permit.

The draft proposed rule also contains a "no exposure" provision that would make all classes of industrial facilities eligible for waivers from the identification as "associated with industrial activity" under the existing regulations. The draft proposal represents a significant expansion in the scope of the no exposure provision originally promulgated in the 1990 rule [55 FR 47990 (November 16, 1990)] for discharges only from facilities classified as "light industry." The intent of this provision is to provide a simplified method of complying with §402(p) for industrial facilities which are entirely indoors, such as

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[7] Under the proposed Phase II regulation, the NPDES permitting authority must develop and apply criteria to evaluate whether a storm water discharge results or has the potential to result in significant water quality impacts (including habitat and biological impacts).

[8] The Phase II rule would also provide that persons can petition the NPDES permitting authority to add an MS4 for coverage under the storm water program. And the permitting authority may waive an MS4 from coverage where specified conditions are satisfied.

within a larger office building, or at which the only items permanently exposed to precipitation are roofs, parking lots, vegetated areas, and other non-industrial areas or activities.

In order to be covered under the no exposure provision, EPA would propose that an owner or operator of an otherwise regulated facility would need to submit to the NPDES permitting authority a certification that the facility meets the no exposure requirements. The facility would need to allow the NPDES permitting authority (or operator of a municipal separate storm sewer system if the discharge occurs through a municipal system) to inspect the facility and to make such inspection reports publicly available, upon request. Finally, EPA would propose that the certification require only minimal amounts of information from the facility claiming the no exposure exemption. The NPDES permitting authority would maintain a simple registration list which should impose minimal administrative burden, but which would allow for a way of tracking which industrial facilities are exercising the exemption. EPA developed these two aspects of the proposed no exposure provision (applicability to all forms of industrial storm water discharge and certification/tracking) in order to respond to a judicial remand that found the original no exposure provision to be "arbitrary and capricious" for its distinction between types of industrial discharge and for failure of the rule to either require self-reporting of actual exposure or to require EPA to inspect and monitor such facilities.

APPLICABLE "SMALL ENTITY" DEFINITIONS

The draft proposed rule to revise existing requirements in the National Pollutant Discharge Elimination System (NPDES) storm water program may impose a regulatory burden on two types of small entities. The first type of small entities that may be affected is a "small governmental jurisdiction".[9] A governmental jurisdiction is usually, though not always, the owner or operator of a small municipal separate storm sewer system (MS4). The second type of small entity is a "small business". One class of small business is the operator responsible for the discharge from a construction activity that results in the land disturbance of between one acre and five acres. The operator of a construction activity is usually a construction contractor. The second class of small business that may be affected by this proposed rule are "light industries" in Category xi that would need to certify to the no exposure provision. The current version of the proposed rule includes a "no-exposure" provision that would provide regulatory relief to Phase I industrial/commercial facilities. This report includes tables showing the estimated numbers of small entities that may be affected by the proposed rule.

MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)

[9] EPA uses the Regulatory Flexibility Act's definition of "small governmental jurisdiction" as the government of a city, county, town, school district or special district with a population of less than 50,000.

Regarding municipal separate storm sewer systems, the proposed rule uses the term "small municipal separate storm sewer system" to refer to all municipal separate storm sewers that are located in an incorporated place with a population of less than 100,000 as determined by the latest Decennial Census by the Bureau of Census. The owner or operator of a covered small MS4 may or may not be a "small governmental jurisdiction" as defined by the Small Business Administration (SBA). The proposed rule would affect three categories of small MS4s that are also small governmental jurisdictions that own or operate a MS4. (See Table 1)

CONSTRUCTION ACTIVITIES

Regarding construction activities, the proposed rule would not directly target individual "small businesses" but the construction activity itself. However, EPA expects most, if not all, construction activities that would be covered by this proposed rule would be performed by construction contractors in Standard Industrial Classification (SIC) Group 15 and 16. The SBA defines small business by the category of business using SIC codes and uses different cut-offs for different SIC codes. (See Tables 2 & 3)

"NO-EXPOSURE" PROVISION

The proposed rule would provide regulatory relief to many small businesses that would not have storm water discharges "associated with industrial activity" if they certify to the "no-exposure" provision. Facilities under the following SIC codes are potentially subject to regulation under Phase I of the NPDES storm water program: 10-14, 20-39, 4011, 4013, 41-42, 4221, 4222, 4225, 4226, 4311, 44, 45, 491, 5015, 5093, and 5171. Therefore, those facilities that would potentially benefit from the no exposure provision are also under these SIC code groups. (See Table 4).

Table 1:
Small Governmental Jurisdictions That May be Affected by Proposed Rule

	Automatic Coverage	**Required Watershed-based Evaluation for Potential Designation/Coverage by NPDES permitting authority**	**Optional Watershed-based Evaluation for Potential Designation/Coverage by NPDES permitting authority**
Coverage	MS4s < 50,000 & Located in an Urbanized Area *Approx. # = 3,031	MS4s from 10,000-50,000 & and population density > 1000/sq mi Located outside an Urbanized Area *Approx. # = 583 MS4 contributing substantially to the pollutant loadings of a regulated MS4. *Number is unknown.	MS4s < 10,000 & Located outside an Urbanized Area *Approx. # = 17,540
Waiver from Coverage	1. MS4s < 1,000 & Located in an Urbanized Area with 1) no water quality impacts and 2) no direct or indirect connection to a regulated MS4. *Number is unknown. 2. Indian Tribes < 1,000 are automatically waived from coverage. *Approx. # is = 8		

Table 2:
Estimated Range of Small Businesses
in SIC Group 15
That May be Affected by Proposed Rule
When They Undertake Construction Activities That
Disturb from 1 to 5 Acres of Land

MAJOR GROUP 15**BUILDING CONSTRUCTION**GENERAL CONTRACTORS AND OPERATIVE BUILDERS				
SIC Code	**Description**	**Size Standard by Millions of Dollars[10]**	**Establish-ments with <10 million annual revenue[11]**	**Establish-ments with ≥10 million annual revenue**
1521	General Contractors -- Single-Family Houses	$17.0	107,289	206
1522	General Contractors -- Residential Buildings, Other Than Single-Family	$17.0	6,367	123
1531	Operative Builders	$17.0	16,200	789
1541	General Contractors -- Industrial buildings and Warehouses	$17.0	7,330	353
1542	General Contractors -- Nonresidential Buildings, Other Than Industrial Buildings and Warehouses	$17.0	27,871	1,868

[10] The Small Business Administration defines a small business within each of these SIC codes as a firm having annual revenue of not greater than $17 million.

[11] Data is from the U.S. Bureau of the Census's Economic Census 1992. The Bureau of the Census uses an "establishment" as the unit of data. A firm may have more than one establishment. As a result, the number of firms is less than the number of establishments listed. The Economic Census 1992 did not have data corresponding to SBA's $17 million size cut-off. The highest cut-off is $10 million in annual revenue. Therefore, the actual number of establishments that are below the $17 million cut-off is greater than the number listed in this column.

Table 3:
Estimated Range of Small Businesses
in SIC Group 16
That May be Affected by Proposed Rule
When They Undertake Construction Activities That
Disturb from 1 to 5 Acres of Land

MAJOR 16**HEAVY CONSTRUCTION OTHER THAN BUILDING CONSTRUCTION**CONTRACTORS				
SIC Code	**Description**	**Size Standard by Millions of Dollars[12]**	**Establish-ments with <10 million annual revenue[13]**	**Establish-ments with ≥10 million annual revenue**
1611	Highway and Street Construction, Except Elevated Highways	$17.0	9,205	885
1622	Bridge, Tunnel, and Elevated Highway Construction	$17.0	878	163
1623	Water, Sewer, Pipeline, and Communications and Power Line Construction	$17.0	9,882	351
1629	Heavy Construction, N.E.C. EXCEPT, Dredging and Surface Cleanup Activities (where size standard cut-off is $13.51)	$17.0	15,311	505

[12] The Small Business Administration defines a small business within each of these SIC codes as a firm having annual revenue of not greater than $17 million.

[13] Data is from the U.S. Bureau of the Census's Economic Census 1992. The Bureau of the Census uses an "establishment" as the unit of data. A firm may have more than one establishment. As a result, the number of firms is less than the number of establishments listed. The Economic Census 1992 did not have data corresponding to SBA's $17 million size cut-off. The highest cut-off is $10 million in annual revenue. Therefore, the actual number of establishments that are below the $17 million cut-off is greater than the number listed in this column.

Table 4:
Estimated Number of Facilities[14] That Could Potentially Benefit from the "No-Exposure" Provision

Part 1	**Total Facilities Nationwide**	
	Number of Facilities	Source
Total Number of Facilities Nationwide (including Category xi facilities) Potentially Subject to Regulation under Phase I[15]	636,454	Census Bureau; Dunn & Bradstreet
Percentage Range of Facilities That Could Potentially Benefit from the "No-Exposure" Provision	30% - 60%	EPA estimate
Estimated Range of All Facilities (including Category xi facilities) That Could Potentially Benefit from the "No-Exposure" Provision	**210,030 - 388,237**	
Mean	**299,133**	
Part 2	**Category xi Facilities Nationwide**	
Total Number of Category xi Facilities Nationwide Potentially Subject to Regulation under Phase I[15]	394,983	Census Bureau; Dunn & Bradstreet
Percentage of Category xi Facilities That Could Potentially Benefit from the "No-Exposure" Provision	40% - 75%	EPA estimate
Estimated Number of Category xi Facilities That Could Potentially Benefit from the "No-Exposure" Provision	**161,943 - 300,187**	
Mean	**229,090**	

[14]Given the complexity, there has been no attempt to calculate the number of facilities that are both 1) a "small business" as defined by the Small Business Administration and 2) could potentially benefit from the "no-exposure" provision.

[15]Facilities under the following SIC codes are potentially subject to regulation under Phase I: 10-14, 20-39, 4011, 4013, 41-42, 4221, 4222, 4225, 4226, 4311, 44, 45, 491, 5015, 5093, and 5171. The number of facilities was obtained from individual State County Business Patterns 1993, Bureau of the Census, U.S. Dept. of Commerce. Data for SIC codes 4011 and 4013 was obtained from Dun & Bradstreet's database (data run on 7/18/96).

SUMMARY OF SMALL ENTITY OUTREACH

Tribes, States, local governments, industries, and environmental groups have provided extensive input throughout the development of the NPDES Storm Water Phase II proposed rule's draft language. Since 1992, EPA has made a consistent effort to reach out to all stakeholders regarding this proposed rule.

First, EPA provided Tribes, States, local governments, industries, and environmental groups with the opportunity to comment on alternative approaches for the Phase II regulations through publishing a notice requesting information and public comment on the approach for the Phase II regulations required under §402(p)(6) of the Clean Water Act (See 57 *FR* 41344; 9/9/92). The September 9, 1992, notice presented a range of alternatives on a variety of issues in an attempt to illustrate, and obtain input on, the full range of potential approaches for the regulation of unregulated sources to protect water quality. EPA received more than 130 comments on the September 9, 1992, notice. Approximately 43 percent of the comments came from municipalities, 29 percent from trade groups or industries, 24 percent from State or Federal agencies, and approximately 4 percent from other miscellaneous sources. These comments are summarized in Appendix J of *Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress* (March, 1995). EPA considered these comments in developing many of the provisions in today's proposed rule, including reliance on the NPDES program framework (including general permits), providing State and local governments with flexibility in selecting Phase II sources, focusing on high priority polluters and providing certain waivers for facilities that do not pollute, focusing on pollution prevention and BMPs, and incorporating watershed-based concerns in targeting.

Second, in early 1993, EPA and the Rensselaerville Institute held public and expert meetings to assist in developing and analyzing options for identifying unregulated storm water sources and possible controls. These meetings again allowed participants an opportunity to provide input into the Phase II program development process. The proposed rule reflects several of the key concerns identified by these groups, including provisions that provide flexibility to the States and other permitting authorities to select sources to be controlled in a manner consistent with criteria developed by EPA.

Third, EPA convened the Urban Wet Weather Flows Advisory Committee (the "FACA Committee"), including the Storm Water Phase II Subcommittee, to assist EPA in the development of cost-effective solutions for controlling the environmental and human health impacts of wet weather flows with a minimum of regulatory burden. The Phase II proposed rule was discussed in the overall UWWF FACA committee. The UWWF FACA committee has been developing the framework and language of the no exposure provision for two years. Consistent with the Federal Advisory Committee Act, the membership of the Phase II Subcommittee was balanced among the EPA's various outside stakeholder interests, including representatives from municipalities, industrial and commercial sectors, agriculture, environmental and public interest groups, States, Indian Tribes, and EPA. As of February 1997, the Storm Water Phase II Subcommittee has met 11 times for two-day periods, approximately every other month between September 1995 and February 1997. In addition to the FACA Subcommittee meetings, other meetings, conference calls, and correspondence, Subcommittee members were provided three opportunities to comment in writing on the preliminary draft approaches to the Phase II proposed rule. EPA distributed to Subcommittee members three preliminary drafts approaches of the Phase II proposed rule on September 30, 1996, November 15/22, 1996, and February 14, 1997. This resulted in three rounds of written comments from Subcommittee members. These comments were taken into consideration as EPA revised the preliminary draft language to respond to the Subcommittee's concerns. The 32 FACA Subcommittee members have utilized these numerous opportunities for input to shape the development of the Storm Water Phase II proposed rule. The Agency intends to continue to meet with the Phase II Subcommittee in the development of this rule.

Recently, EPA conducted additional outreach to representatives of small entities that would be affected by the proposed rule as required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). EPA, in consultation with the Small Business Administration, invited 29 small entity representatives and streamlining representatives to participate in this outreach. Many of these small entity representatives have been working

closely with EPA in developing this proposed rule through the FACA process.[16] Small entity representatives included the following Phase II Subcommittee and Urban Wet Weather Committee members: Dr. Roy Cameron, Mr. Tom Delaney, Ms. Beth Gotthelf, Mr. Roger James, Mr. Stephen Jenkins, the Honorable David Kubiske, the Honorable Jean Michaels (alternate: Ms. Diane Shea), Mr. Don Moe, the Honorable Jim Naugle (alternate: Ms. Carol Kocheisen), the Honorable Jeffrey Wenneberg, and the Honorable Annabeth Surbaugh. Although Ms. Shea and Ms. Kocheisen are alternate small entity representatives, they are full fledged FACA members.

EPA's Office of Wastewater Management distributed a briefing package to each representative and prepared additional documents in response to requests from the representatives. EPA conducted two telephone conference calls on May 14 and May 15, 1997 to brief representatives on the draft proposed rule. In addition, an all-day meeting was held at EPA Headquarters on May 22, 1997, with representatives. OMB and SBA officials participated in the conference calls and all-day meeting. In addition, EPA's Small Business Advocacy Chairperson participated in the all-day meeting. As of June 13, 1997, EPA received 12 sets of written comments from representatives. These comments as well as all documents distributed to representatives were presented to the Panel for its review. On June 23, 1997, EPA's Small Business Advocacy Chairperson sent a letter to each small entity and streamlining representative requesting any additional or remaining comments that they would like to communicate directly to the Panel. In his letter, the Chairperson included a summation of the comments that representatives had submitted to EPA's Office of Wastewater Management for their review and comment.

The Chairperson received one comment. This comment was a re-submission of a comment that had been previously received by EPA's Office of Wastewater Management during its outreach. A summary of all comments is attached to this report.

[16] EPA has concluded that the RFA does not require an agency to conduct an initial regulatory flexibility analysis for a rule that significantly reduces the regulatory impact on a substantial number of small entities. RFA sections 603 and 604 both require an agency in conducting regulatory flexibility analyses to identify and consider regulatory alternatives that would "minimize" any significant economic impact on a substantial number of small entities. Since it would make no sense to minimize the beneficial impacts of deregulation, EPA interprets the RFA as requiring analyses of only new or additional regulatory requirements. However, EPA has agreed in the case of this rule to include in the Panel's outreach efforts representatives of small entities that might benefit from the rule's deregulatory aspects. In this document, EPA refers to the representatives of these small entities as "streamlining representatives."

SMALL-ENTITY REPRESENTATIVES

EPA, in consultation with the Small Business Administration, invited the following 12 small entity representatives to participate in its outreach efforts on the Storm Water Phase II proposed rule. Many of these representatives also submitted written comments.

Indian Tribes

Dr. Roy Cameron
Tribal Advisor
Representing--Certain New England Indian Tribes

Municipalities

Mr. Stephen Jenkins
Director, Env. & Engineering Dept.
City of San Marcos

Ms. Carol Kocheisen-ALTERNATE
National League of Cities

The Honorable David Kubiske
Supervisor
Ida Township, MI

The Honorable Jean Michaels
Chair, Board of County Commissioners
Olmstead County, Minnesota

The Honorable Jim Naugle
Mayor, City of Ft. Lauderdale

Ms. Diane Shea-ALTERNATE
National Association of Counties

The Honorable Annabeth Surbaugh
County Commissioner
Johnson County Board of Commissioners

The Honorable Jeffrey Wenneberg, Mayor of Rutland,
Vermont

Construction

Ms. Lee Garrigan
Associated General Contractors of
America

Mr. Don Moe
National Assoc. of Homebuilders

Mr. Michael Wilson
Associated Builders and Contractors

STREAMLINING REPRESENTATIVES

EPA, in consultation with the Small Business Administration, invited the following 17 streamlining representatives to participate in its outreach efforts on the Storm Water Phase II proposed rule. Many of these representatives also submitted written comments.

Industrial/Commercial

Mr. Brian Bursiek
American Feed Industry Association

Mr. Tom Delaney
Professional Lawn Care Assoc. of America

Mr. Clay Detlefsen
International Dairy Foods Association

Mr. John DiFazio Jr.
Chemical Specialties Manufacturers Association

Ms. Beth Gotthelf
National Association of Metal Finishers

Mr. Steve Hensley
American Trucking Associations

Mr. John Huber
Petroleum Marketers Assoc of America

Mr. Roger James
American Public Works Assoc.

Mr. Jeffrey Longsworth
American Car Rental Association
Independent Lubricant Manufacturers Association
National Association of Convenience Stores
Society of Independent Gasoline Marketers of America

Ms. Tracy Alaimo Mattson
Automotive Recyclers Association

Mr. Mark Morgan
Petroleum Transportation and Storage Association

Mr. John Oliver
Porcelain Enamel Institute, Inc.

Mr. Russ Snyder
Roof Coatings Manufacturers Association
Asphalt Roofing Manufacturers Association

Mr. William Sonntag
National Association of Metal Finishers
American Electroplaters and Surface Finishers Society
Metal Finishers Suppliers' Association

Mr. Jack Waggener
Resource Consultants Inc.

Ms. Robin Wiener
Institute of Scrap Recycling Industries

Mr. John Whitescarver
National Stormwater Center

INPUT FROM REPRESENTATIVES

The Panel received 12 sets of written comments from representatives. In addition, oral comments were submitted during the two telephone conference calls on May 14 and 15, 1997 and during the all-day meeting on May 22, 1997, at EPA Headquarters. A summary of the written comments and those oral comments that raise issues not raised in the written comments is attached as Appendix A. The complete written comments of representatives are attached at the end of this document as Attachment A. A summary of the telephone conference calls and a record of the all-day meeting are found on pages 91-105 of Attachment B.

Table 5:
SBREFA Outreach Written Comments Received
on the Storm Water Phase II Proposed Rule

Number	Name	Organization	Date Received	Number of Pages
1	John Huber	Petroleum Marketers Association of America	5/28/97	1
2	Municipal Representatives a. Jim Naugle b. Jean Michaels c. Scott Tucker d. Carol Kocheisen e. Diane S. Shea f. Susan Gilson	 a. National League of Cities b. National Association of Counties c. Nation Association of Flood & Stormwater Management Agencies d. National League of Cities e. National Association of Counties f. Nation Association of Flood & Stormwater Management Agencies	6/5/97	11
3	Steve Hensley	American Trucking Associations	6/6/97	2
4	Stephen Jenkins	City of San Marcos, Texas	6/6/97	2
5	Lee D. Garrigan	Associated General Contractors of America	6/6/97	2
6	Donald Moe	National Association of Home Builders	6/6/97	14
7	Michael E. Wilson	Associated Builders & Contractors	6/6/97	4

Number	Name	Organization	Date Received	Number of Pages
CONTINUATION OF TABLE 5				
8	John Whitescarver	National Stormwater Center	6/6/97	2
9	Industrial Representatives a. Brian Bursiek b. John E. DiFazio Jr. c. John Huber d. Tracy Alaimo Mattson e. John Oliver f. William Sonntag g. Jack Waggener h. Clay Detlefsen i. Steve Hensley j. Jeffrey S. Longsworth k. Russell Snyder l. Tom Tyler (for Robin Wiener) m. John Whitescarver	 a. American Feed Industry Association b. Chemical Specialties Manufacturers Association c. Petroleum Marketers Association of America d. Automotive Recyclers Association e. Porcelain Enamel Institute, Inc. f. American Electroplaters and Surface Finishers Society Metal Finishers Suppliers' Association National Association of Metal Finishers g. Resource Consultants, Inc. h. International Dairy Foods Association i. American Trucking Associations j. American Car Rental Association Independent Lubricant Manufacturers Association National Association of Convenience Stores Society of Independent Gasoline Marketers of America k. Asphalt Roofing Manufacturers Association Roof Coatings Manufacturers Association l. Institute of Scrap Recycling Industries m. National Stormwater Center	6/6/97	10
10	Dave Kubiske	Ida Township, Michigan	6/10/97	3
11	Mark S. Morgan	Petroleum Transportation & Storage Association	6/11/97	4
12	Jack E. Waggener	Resource Consultants	6/13/97 (re-submitted 6/27/97)	3

PANEL FINDINGS AND DISCUSSION

The Panel's findings and discussion are arranged below according to the elements of the IRFA and the category of activity that would be regulated by the proposed rule, where appropriate.

The Types and Number of Small Entities to Which the Proposed Rule Would Apply

As indicated earlier in the report, the types of small entities to which the Storm Water Phase II proposed rule would apply include small governmental entities that own or operate a municipal separate storm sewer systems and small businesses. Small businesses include small construction firms and small industrial facilities. The Panel considers the ranges that EPA has provided (listed in this report as Tables 1, 2, 3, and 4) as reasonable indicators, given the available data, of the number of small entities that would be affected by the proposed rule.

The Panel notes that small entities raised comments concerning the existing permit requirements applicable to storm water discharges from Category xi facilities in general. In addition, the Panel also received small entity comments on the issue of whether the proposed rule increases burden on Category xi facilities with no exposure. EPA has stated that it believes all Category xi facilities are currently subject to NPDES coverage. Category xi facilities with exposure to storm water were required to obtain a permit by October 1994 [57 FR 60446]. Category xi facilities where there is no exposure to storm water are required to obtain permit coverage effective August 2001 [60 FR 17953]. The Panel finds that the proposed rule would not affect Category xi facilities with exposure. However, the Panel also finds that, as a practical matter, the proposed rule would represent additional burden for Category xi facilities with no exposure. [see Classes of Small Entities below]

Projected Reporting, Record Keeping, and Other Compliance Requirements of the Proposed Rule, Including the Classes of Small Entities Which Will Be Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record

The above section entitled, "Overview of Proposed Phase II Rule" describes the basic elements of the proposed rule. The record keeping, reporting, and other compliance requirements associated with the construction component of the proposed rule would be similar to those required by currently regulated Phase I construction activities. However, EPA anticipates that the best management practices (BMPs) that typically would be implemented on construction sites below 5 acres to achieve compliance would be less sophisticated and less expensive than those BMPs implemented on a Phase I site. The proposed rule would provide the NPDES permitting authority with the discretion not to require notices of intent (NOIs) in general permits for storm water discharges from Phase II construction activities. NOIs are required of Phase I construction activities. The record keeping and reporting requirements for the municipal component of the proposed rule would be substantially less than those required for municipalities under the Phase I program. Currently regulated Phase I facilities that claim no exposure would need to file a self-certification form to document their exemption from otherwise applicable permit requirements.

Projected Reporting, Record Keeping, and Other Compliance Requirements

The Panel received many comments stating that the proposed rule would impose administrative and compliance burdens on small entities. The Panel supports EPA's efforts to explore ways to reduce these burdens on small entities while protecting water quality.

No Exposure:

Municipal representatives questioned the need for facilities with no exposure to so certify if they are not required, as a matter of law, to obtain an NPDES permit anyway. Industrial representatives stated that a five year certification and a one-time notice of termination (NOT) would be an acceptable burden for the small businesses they represent. However, industrial representatives and other commenters had significant concerns regarding the language in the "no exposure" self-certification form itself. They believe that to determine if there is an "interference" with water quality standards would require significant financial costs, for example, the need to hire a qualified engineer to make a determination. Additionally, both municipal and industrial representatives stated that there should be no requirement to assess flow impacts in the certification form. [see Type of Professional Skills below]

The Panel notes that, since the discussion in the first Panel meeting, EPA has responded to some commenters' concerns by deleting the requirement for "self-certifiers" to determine "no interference" with water quality standards in the no exposure self-certification form, thus, also removing any requirement to assess flow impacts. EPA has substituted a new question to ask whether actions to qualify for no exposure result in increased impervious surface area. Answering "yes" to this question would not disqualify a facility from the no exposure exemption. The answer to this question and other information, however, would enable the NPDES permitting authority to determine if the discharge would be likely to interfere with attainment of water quality standards, in which case, the permitting authority could exercise its existing authority under the Clean Water Act to disallow the no exposure exemption and require coverage under either a general or an individual permit, as appropriate.. The Panel supports this revision to the earlier draft of the self-certification form and expects that it would reduce the administrative and financial burden on small industrial facilities wishing to make use of the no exposure self-certification provision. [see Type of Professional Skills below]

Classes of Small Entities

As noted above, the Panel received comments stating that Category xi facilities are not currently subject to NPDES coverage and that therefore this proposed rule would expand coverage to a new class of small entities. EPA disagrees with these comments and maintains that Category xi facilities are currently covered under the NPDES program and that in fact many Category xi facilities with actual exposure have sought coverage under NPDES permits. Under EPA's interpretation of the current regulations, Category xi facilities with no exposure are required to obtain NPDES permits by August 2001.

The Panel notes that the proposed rule does not include any regulatory requirements applicable to Category xi facilities except the no exposure self-certification provision and therefore imposes no regulatory burden on Category xi facilities other than those wishing to make use of this provision. However, as a practical matter the Panel also finds that the proposed rule would represent additional burden for Category xi facilities claiming no exposure and considers this group to be a newly regulated class of small entities. At the same time, the Panel notes that EPA has attempted, both through consultation with its Stormwater Phase II Subcommittee and in response to comments from small entity representatives, to structure the no exposure self-certification provision in a way that minimizes the burden on facilities making use of it. In addition, by expanding the availability of the no exposure provision to all Phase I facilities that meet its requirements, EPA would provide significant regulatory relief to a large number of currently regulated entities, both large and small.

Type of Professional Skills

Municipal Program:

Municipal representatives stated, and the Panel agrees, that implementation of some program elements would not necessarily require staff with education beyond a high school diploma. However, municipal representatives also stated that some of the minimum control measures would definitely require a person with advanced education or significant work experience beyond high school. Specifically, these municipal representatives referred to the minimum control measures for: (1) post-construction storm water management, (2) pollution prevention, and (3) evaluation and effectiveness.

EPA has stated its commitment to develop guidance materials and training to ensure that the level of professional skills required to implement the municipal program would be kept to a minimum. The Panel supports EPA's efforts in providing guidance materials and training to assist in the implementation of the proposed program.

No Exposure:

The Industrial Representatives expressed concern that, as previously drafted, the no exposure provision would require someone with an advanced degree in engineering, chemistry, and/or water hydrology to properly determine whether actions taken to satisfy the no exposure requirements would result in "interference" with water quality standards. As indicated above, the Panel notes that EPA has made revisions to the no exposure self-certification provision that address this concern.

Other Relevant Federal Rules Which May Duplicate, Overlap, or Conflict with the Proposed Rule

The Panel received comments that the proposed rule may conflict with the requirements of the Clean Air Act, the Endangered Species Act, the Great Lakes Initiative, and Section 404 of the Clean Water Act as administered jointly by the EPA and the Corps of Engineers. Municipal representatives

indicated that street sweeping activities designed to reduce pollutants in urban run-off may create "dust" or "soot" that could cause a violation of the National Ambient Air Quality Standards for particulate matter.

The Panel recommends that the Agency further evaluate in its regulatory flexibility analysis whether the proposed rule would conflict with those federal rules identified by commenters and revise the rule to address such conflicts as appropriate.

Any Significant Alternatives to the Proposed Rule which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Before addressing specific alternatives suggested by commenters during the SBREFA outreach process to minimize the impacts of the rule on small entities, the Panel wishes to note and commend EPA's efforts over the past two years to work with stakeholders, including small entities, through the Stormwater Phase II Subcommittee of its Urban Wet Weather Flows Advisory Committee, as described above. Because of the extensive outreach already conducted and the Agency's responsiveness in addressing stakeholder concerns, commenters during the SBREFA process raised fewer significant concerns than might otherwise have been the case. However, the Panel did receive comments on the following issues.

Municipal Coverage

Municipal representatives expressed concern that the waiver provision for municipalities in urbanized areas with populations under 1,000 would be difficult to use in practice because these are exactly the municipalities that would be unlikely to have the resources to demonstrate that their activities have no water quality impacts. Furthermore, they raised concerns that tying the waiver provision to TMDL or watershed assessments will make it even more difficult to use. The Panel notes that where EPA or a State has conducted such the watershed assessments and developed any necessary TMDLs (as the Agency fully anticipates will occur), the municipal concern should prove unwarranted. In such cases, a municipality would not need to make any such demonstration but merely certify that a TMDL (or watershed plan) applies and does not assign any responsibilities to reduce pollutant loads. In cases where such assessment work is not completed by EPA or a State, however, the Panel shares the concern and recommends that the preamble invite comment on the concern.

The municipal representatives also questioned the rationale for treating Tribes under 1,000 differently from municipalities under 1,000. OMB and SBA recommend that the preamble invite public comment on whether both municipalities and Tribes under 1,000 located within an urbanized area should be treated like MS4s under 10,000 located outside an urbanized area, which is the approach EPA is proposing for Tribes under 1,000. That is, the preamble should invite comment on whether both municipal separate storm sewer systems serving a population of less than 1000 and urban Tribes with a population of less than 1000 should be exempt unless either (1) they contributed significantly to

the pollutant loadings of a covered MS4 or (2) the permitting authority determines that they have a significant impact on water quality. This alternative would place the burden of proof for coverage on the permitting authority, which would have better resources for making the appropriate water quality impact determinations than the very small municipality or small urban Tribe. EPA believes that the rationale for inclusion of very small municipal separate storm sewer systems differs from the rationale for exclusion of small urban tribes. EPA believes that small urban tribes should be treated differently because it believes the population density should be much lower than the very small municipal separate storm sewer systems and because small urban tribes cannot rely on a State in the same way as a very small municipal separate storm sewer system (a political subdivision of a State).

Construction:

The Panel received many comments questioning the need to regulate construction activities that result in land disturbance of 1 to 5 acres. Several of the small entity representatives noted that there are many local control programs already in place. They stated that regulation below 5 acres would have significant economic impact on small businesses and that the proposed rule would greatly increase the number of affected small businesses. Several commenters also questioned whether regulation of such activities would provide significant water quality benefits.

Some of the commenters provided advice and recommendations. One commenter suggested an exemption for "routine maintenance" activities such as repairing potholes, clearing out drainage ditches, and maintaining fire breaks because these activities often involve rights-of-way extending across multiple regulatory jurisdictions. The commenter suggested that, at most, these activities be required to adhere to generic best management practices. A number of commenters encouraged EPA to adopt a voluntary program, including guidance and perhaps incentives, for construction sites below 5 acres. One commenter stated that many small operators may lack the resources to put together a good site plan.

Municipal commenters stated that regulation of construction sites below 5 acres will create a major burden to local governments and should be at the discretion of the permitting authority. Another commenter suggested that construction sites, regardless of size, that are located within a Phase I regulated MS4 be required only to comply with the requirements of the municipality. Several commenters suggested that if EPA does regulate construction sites under 5 acres, NOIs should not be required for these sites.

While the Panel has not thoroughly evaluated the merits of each of the small entity concerns, the Panel recommends that the preamble to the proposed rule invite comments on alternatives to the proposed requirements for regulation of construction sites that result in the disturbance of 1 to 5

acres.[17] The request for comments should include a discussion of concerns expressed by small entity representatives and suggestions they have made for addressing them. The request should ask for comment on the extent to which a nonregulatory voluntary program, or one that relies on the discretion of the permitting authority or covered MS4, would provide adequate protection against water quality impairment due to run-off from small construction sites, and on any specific experience commenters may have had in the past with voluntary regulation of discharges from such sites based on best management practices. The Panel also encourages EPA to consider revisions to the proposal itself that address some of the technical concerns raised by small entity commenters, such as the difficulty of obtaining permits for routine right-of-way maintenance involving multiple jurisdictions.

The Panel also received comments from municipal and industrial representatives suggesting that construction activities undertaken by municipalities or industrial facilities could be covered under these entities' existing stormwater permits, provided that such existing permits detail soil and erosion controls. Municipal representatives also recommended that any industrial facility operated by the municipality be covered by its MS4 permit and that the municipality be allowed to determine if there is exposure for these facilities as part of its MS4 plan without filing a separate no exposure self-certification. The Panel recommends that the preamble to the proposed rule explore and request comment on the ideas discussed in this paragraph. The Panel believes that the option for construction sites may be appropriate for municipalities or industrial facilities with individual NPDES permits but may be administratively difficult to implement under NPDES general permits. The Panel also supports and encourages efforts to minimize paperwork burden on municipalities, which are ultimately responsible for the success of their stormwater plans.

No Exposure:

The Panel received comments suggesting that the no exposure self-certification provision as written would not allow facilities that undergo a "temporary operational change" or transportation facilities that provide "non-pollutant generating outdoor maintenance of vehicles" to make use of the provision. One commenter suggested that concern over temporary operational changes could be addressed through the requirement of a management practice designed to prevent exposure as a result of a tempory change in operations. Commenters were also concerned about the requirement that there

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[17] In order to avoid unnecessary regulatory duplication, the Small Business Administration recommends that EPA consider a regulatory option that would allow permit authorities to rely solely on the local program where the local program exceeds reasonable minimum criteria for program effectiveness. Many localities and states have sediment and erosion control programs that target the primary pollutants of construction sites. These local programs are often specifically designed to address the watershed specific issues and resources of those local areas. SBA also suggests that EPA relax the stringency of some of the draft minimum criteria of the proposed regulatory option, or SBA's suggested option, where applicable. In SBA's view, the minimum criteria would not necessarily require regulation for sites smaller than five acres in size. An NPDES permit would not be required to be issued for each site. Regular inspections of these small sites would not be required as part of the minimum criteria.

be no exposed containers that "might leak," since any container "might leak," and suggested that the provision should only prohibit exposed containers that are actually leaking.

The Panel is aware that EPA has been developing the no exposure language with extensive stakeholder involvement through the Urban Wet Weather Flows Federal Advisory Committee for the past two years. The Panel suggests that EPA examine these comments and discuss them with the Advisory Committee. The Panel hopes that the no exposure language can be revised to allow, to the extent possible, all facilities with no actual discharge of pollutants to make use of the no exposure self-certification provision.

Appendix A: Document: "Summary of Written Comments"

Attachment A: Complete Written Comments Received from Representatives

Attachment B: All Documents that Were Distributed to Representatives