

Some commenters stated that the "direct final rule" is not specifically provided for in the Administrative Procedure Act (APA) nor has EPA demonstrated "good cause" to issue a "direct final rule" under 5 U.S.C. section 553. This comment is no longer relevant because EPA is withdrawing the direct final rule and instead issuing a final rule that responds to comments received.

One commenter disputed the assertion that urban storm water runoff is a cause of real water quality use impairment in the United States. The commenter also believed that it is inappropriate to base the implementation of phase II requirements on exceedance of water quality standards associated with urban storm water runoff. The commenter believed that water quality criteria were not developed to regulate many of the chemical constituents in urban storm water runoff. EPA disagrees. The fact that urban runoff is a real cause of water quality use impairment is very well supported throughout the literature and is summarized by EPA in the Water Quality Inventory: Reports to Congress prepared on a biannual basis under section 305(b) of the CWA. EPA believes that basing the implementation of phase II requirements on exceedance of water quality standards is appropriate because attainment of water quality standards is one of the explicit goals of the NPDES program. EPA further disagrees that water quality criteria have not been developed for many of the chemical constituents in urban storm water. To the contrary, water quality criteria exist for many such constituents, particularly heavy metals and oil and grease.

A few commenters argued that comments received on the rule are unrepresentative of the groups affected because small cities and commercial establishments were unaware of the direct final and proposed rules. In response, EPA believes that the 60-day comment period was sufficient for small entities to formulate their comments and/or review those drafted by their representative associations. Many of the comments received were from national organizations representing such small cities and businesses, including, National Association of Counties, National Association of Convenience Stores, Society of Independent Gasoline Marketers of America, National Association of Flood and Stormwater Management Agencies, American Petroleum Institute, National Association of Home Builders, and American Car Rental Association.

One commenter disagreed that this rulemaking significantly reduces the

immediate regulatory burden imposed on phase II facilities because phase II municipalities would have the same burden imposed on phase I municipalities. In response, EPA points out that today's rule provides the Director with discretion to modify the application requirements for phase II dischargers. EPA expects Directors to exercise this discretion to reduce the application burden to both municipalities and individual facilities.

Several commenters questioned the types of permits that will be available to dischargers in 2001. Currently, the permitting authority has the option of individual or general permits. However, EPA does not anticipate that permits will be necessary for all phase II dischargers in 2001. The Agency is committed to promulgate supplemental rules that further consider the scope of the phase II program as well as alternative control mechanisms.

Many commenters made suggestions for the second tier of the phase II regulations such as to allow and encourage phase II municipalities to join phase I municipalities in the same watershed, standardize procedures across the United States, and delegate construction permitting to local governments. Such suggestions will be provided to the FACA subcommittee and will be taken into consideration when developing the subsequent phase II regulations. Commenters also made suggestions for representation on the FACA subcommittee. Such suggestions are being considered in formulating the subcommittee.

## **Supporting Documentation**

### *A. Executive Order 12866*

Under Executive Order 12866, the Agency must determine whether the regulatory action is "significant," and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations, of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this rulemaking significantly reduces the current regulatory burden imposed on phase II facilities. The proposed rule was submitted to OMB for review. OMB cleared the proposed rule with minor changes. Review of this final rule was waived by OMB under the provisions of Executive Order 12866.

### *B. Executive Order 12875*

Under Executive Order 12875, entitled "Enhancing the Intergovernmental Partnership", issued by the President on October 26, 1993, the Agency is required to develop an effective process to allow elected officials and other representatives of State and Tribal governments to provide meaningful and timely input in the development of regulatory proposals.

EPA fully supports this objective and has initiated a consultation process with both States and Tribes which will be continued through the development of additional phase II rules. Specifically, EPA has discussed this action with the representatives of the States, local governments, the Agency's American Indian Environmental Office (AIEO), and parts of the regulated community.

The reaction of the States is positive. The States and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) support the approach that is being taken under existing law; the States and ASIWPCA also support concurrent changes to the law. ASIWPCA has submitted a letter to the Agency dated March 3, 1995, which is included in the record for this matter. EPA has responded to many of ASIWPCA's comments in this preamble.

The reaction of many municipalities is that they prefer a statutory change now to clarify the issue once and for all. Municipalities' representatives (National Association of Counties, National League of Cities, U.S. Conference of Mayors, and the National Association of Flood and Stormwater Management Agencies) have raised many issues to the Agency and have submitted a letter dated February 16, 1995, which is contained in the record for this matter. The municipalities believe that it is inappropriate for EPA to act now when Congress may act on this matter, that the action taken by EPA is not in conformance with the law, and that EPA did not consult with local officials on this matter. EPA has responded to many of the municipalities' concerns in this preamble. EPA did consult with various