



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

June 3, 2020

MEMORANDUM

SUBJECT: No Action Assurance for the NPDES Stormwater Multi-Sector General Permit for Industrial Activities

FROM: Susan Parker Bodine

TO: David P. Ross, Assistant Administrator
Office of Water

This memorandum responds to your May 28, 2020 request for a No Action Assurance for New Industrial Facilities Needing Stormwater Permit Coverage under the EPA's Multi-Sector General Permit (attached). The current Multi-Sector General Permit (referred to as the 2015 MSGP) under the National Pollutant Discharge Elimination System (NPDES) program will expire at midnight on June 3, 2020. The proposed succeeding permit (referred to as the 2020 MSGP or the new MSGP) was published on March 2, 2020 (85 FR 12288). We understand that the final 2020 MSGP will be signed no later than November 12, 2020, with a likely effective date in late December 2020. Facilities with coverage under the 2015 MSGP will automatically be granted an administrative continuance of permit coverage and are required to continue to comply with the 2015 MSGP after its expiration. Any new facilities, however, located in areas where EPA is the NPDES permitting authority, that begin discharging stormwater associated with industrial activity after June 3, 2020, and that have not submitted a Notice of Intent (NOI) to be covered by the 2015 MSGP prior to its expiration will not be able to obtain general permit coverage until a new permit is issued.

Because EPA has not yet promulgated a new general permit that will cover such new facilities during the period after expiration of the 2015 MSGP and the effective date of the new 2020 MSGP, I have determined that it is appropriate to exercise my enforcement discretion and issue this no action assurance (No Action Assurance) to address this gap in coverage. Specifically, in areas where EPA is the NPDES permitting authority, EPA is providing a No Action Assurance for operators of new industrial facilities who intend to commence discharging stormwater between June 4, 2020, and the effective date of the EPA 2020 MSGP and who have not filed an NOI to be covered under the EPA 2015 MSGP prior to June 4, 2020. As explained more fully below, this No Action Assurance establishes that EPA will exercise its enforcement discretion to not pursue a civil or administrative enforcement action against new operators for violations of the Clean Water Act's (CWA) prohibition against the discharge of pollutants except in conformance with an NPDES permit, 33 U.S.C. § 1311, if the operator satisfies the conditions in this memorandum.

Background

EPA issues the MSGP under the statutory authority of section 402(p) of the CWA. The MSGP is an NPDES general permit that covers stormwater discharges associated with industrial activity from approximately 2,400 facilities in 30 different industrial sectors in areas where EPA is the permitting authority (four states: Idaho,¹ Massachusetts, New Hampshire, New Mexico; plus the District of Columbia; federally-operated facilities in Colorado, Delaware, Vermont, and Washington; most Indian country lands; all U.S. territories except the Virgin Islands; and other designated activities in specific states (e.g., oil and gas activities in Texas and Oklahoma)). To obtain coverage under the MSGP, industrial facilities must submit an NOI that provides information on the facility's operator, industrial activities, pollutant discharges, and Stormwater Pollution Prevention Plan, and certifies to EPA that the facility has met all of the eligibility conditions in the permit, including those related to protection of endangered species and preservation of historic properties.

The current MSGP was issued on June 3, 2015 and will expire on June 3, 2020. For many reasons, including EPA's obligations under a federal settlement agreement that resolved several challenges to the 2015 MSGP, a new multi-sector permit is not expected to be issued and in effect until late December 2020. While facilities that have already submitted an NOI under the 2015 MSGP will remain covered by that permit, new facilities will not have a general permit under which to apply for coverage

Until a final 2020 MSGP is in effect, new facilities will have to file for an individual NPDES permit. However, EPA's Office of Water does not believe that individual permits are a practical solution for these facilities during the six months between the time the 2015 MSGP expires and a final 2020 MSGP would be in effect. Applicants for an individual permit must file six months prior to discharging because of the amount of time needed to process the permit, including a mandatory public notice and comment period on the proposed individual permit. While EPA does not charge operators a fee to apply for an individual permit, it can be costly to collect the information needed and to shepherd the application through the EPA process especially for the small businesses who make up most of the operators who typically file for coverage under the MSGP. Moreover, EPA Regional offices would struggle to process a large increase in individual stormwater permit applications. Processing these individual permits would likely require a reallocation of resources away from other public health and environmental issues.

Without a general or individual NPDES permit, new facilities will be unable to discharge in compliance with the CWA, and most new facilities will therefore be unable to lawfully begin operating their facility. This barrier to facilities' operations could potentially cause an undue loss in productivity, revenue, and jobs during the gap in permit coverage; current and future supply chains and business relationships could be hindered; and communities trying to stimulate new business development in these difficult economic times may suffer. For these reasons, EPA's Office of Water has requested that EPA's Office of Enforcement and Compliance Assurance provide a No Action Assurance to address the temporary gap in permit coverage until the 2020 MSGP is in effect, provided that new facilities satisfy certain conditions, primarily compliance with most of the requirements in the 2015 MSGP.

The Office of Water does not believe that a No Action Assurance would have an adverse impact on public health and the environment because new facilities covered by the No Action Assurance would meet all the pollution reduction requirements that current permittees must meet under the 2015 MSGP. These

¹ The schedule for the transfer of NPDES Permitting Authority to Idaho for stormwater general permits is July 1, 2021.

requirements include development and implementation of a Stormwater Pollution Prevention Plan (SWPPP), installation and maintenance of stormwater control measures, periodic site inspections, benchmark monitoring, and corrective action measures where necessary. Based on historical information, the Office of Water believes that approximately 80 new facilities will begin operating and need coverage under the No Action Assurance between the expiration of the 2015 MSGP and the expected effective date of the 2020 MSGP in December of 2020.

No Action Assurance

In light of the undue economic hardship that would be imposed on new facilities, through no fault of their own, and the communities where they are located due to the gap in general permit coverage, EPA will exercise its discretion not to pursue civil and administrative enforcement for the following violation:

- The discharge of stormwater pollutants into navigable waters by any person from a point source not in compliance with an NPDES permit. 33 U.S.C. §1311.

This exercise of enforcement discretion extends only to the following new facilities:

- Facilities that commence discharging stormwater on or after June 4, 2020, but prior to the expected effective date of the 2020 MSGP in December of 2020, that have not submitted an NOI for coverage under the 2015 MSGP prior to its expiration.

Facilities that commence discharging after the effective date of the final 2020 MSGP are not be covered by this No Action Assurance and must submit an NOI under the final 2020 MSGP.

This exercise of enforcement discretion is subject to the following conditions:

- (1) Eligibility: Any new facility must meet the 2015 MSGP eligibility criteria (Part 1 of the permit);
- (2) Prior Notification to EPA: Prior to the discharge of stormwater associated with industrial activity, the new facility must provide EPA 30-days advance notice of their operator status and their intention to operate in accordance with the 2015 MSGP by submitting an “Intent to Operate” (ITO) form through the NPDES eReporting Tool (NeT) for MSGP, to allow EPA time to review the notice;
- (3) Compliance: Any new facility must satisfy all requirements of the 2015 MSGP, except for submittal of an NOI before June 4, 2020. These obligations include, but are not limited to:
 - a. Develop a SWPPP prior to submission of an ITO form, and subsequent implementation of the SWPPP (Part 5).
 - b. Proper installation and maintenance of stormwater control measures (Part 2).
 - c. Conduct site inspections (Part 3);
 - d. Conduct applicable effluent limit, impaired waters, and benchmark monitoring (Part 6);
 - e. Implement corrective action measures, if necessary (Part 4);
 - f. Meet any sector-specific requirements (Part 8);
 - g. Meet any permit conditions applicable to specific States, Indian Country Lands, or Territories (Part 9); and
 - h. Complete any recordkeeping and reporting under the permit (Part 7), except for those requirements related to reporting in NetDMR (Part 7.4). All discharge

monitoring data collected pursuant to the permit must be kept at the facility and be made available to EPA upon request.

- (4) Obtain coverage.—A facility that is covered by this No Action Assurance and intends to continue discharging after the effective date of the final 2020 MSGP must submit a NOI to be covered by the final 2020 MSGP within 90 days of its effective date (which will provide permit coverage 30 days after submission of the NOI).

This No Action Assurance does not apply to criminal violations or to situations where circumstances exist that may cause serious harm or that may present an imminent and substantial endangerment to public health or the environment. The Agency also reserves the right, at any time, to exercise its discretion to address a specific discharge should circumstances warrant.

This No Action Assurance will terminate at 11:59 PM Eastern Time on April 29, 2021, or 120 days after the effective date of the final 2020 MSGP, whichever comes first. Covered facilities are encouraged to submit an NOI for the 2020 MSGP as soon as it is available. However, EPA is providing additional time after the effective date of the 2020 MSGP, if needed, for facilities covered by this No Action Assurance (i.e., those that commence discharging between June 4, 2020, and the effective date of the final 2020 MSGP) to submit an NOI. As noted in your request for this NAA, this additional time is likely to be consistent with the time provided in the 2020 MSGP for facilities to submit an NOI along with the time for EPA NOI review. EPA reserves the right to withdraw or revise this No Action Assurance at any time.

If you have questions about this matter, please call Mark Pollins, Director of the Water Enforcement Division, at (202) 564-4001.

Attachment

cc: Regional Administrators, Regions 1-10
Rosemarie Kelley, Director, Office of Civil Enforcement
Mark Pollins, Director, Water Enforcement Division