



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

OFFICE OF WATER

**MEMORANDUM**

**SUBJECT:** Request for a No Action Assurance for New Industrial Facilities Needing Stormwater Permit Coverage under the EPA's Multi-Sector General Permit

**FROM:** David Ross  
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Office of Water (OW)

**TO:** Susan Bodine  
Assistant Administrator  
Office of Enforcement and Compliance Assurance (OECA)

The purpose of this memorandum is to request that the Office of Enforcement and Compliance Assurance (OECA) issue a No Action Assurance (NAA) for operators of new industrial facilities that intend to commence discharging stormwater on or after June 4, 2020, and have not filed a Notice of Intent (NOI) to be covered under the existing permit prior to that date. Such facilities need National Pollutant Discharge Elimination System (NPDES) coverage for their stormwater discharges associated with industrial activity in areas where the U.S. Environmental Protection Agency (EPA or Agency) is the permitting authority, but will be unable to obtain general permit coverage after the expiration of the EPA's 2015 Multi-Sector General Permit (MSGP) on June 3, 2020, at 11:59 PM (Eastern Time).

The Federal Register Notice announcing the proposed reissuance of the MSGP was published on March 2, 2020, for a 60-day comment period that was extended for an additional 30 days, ending June 1, 2020 (85 FR 12288). Due to the timing of the proposal, the EPA will be unable to finalize the new permit prior to the expiration of the 2015 MSGP on June 3, 2020. Facilities that file an NOI to be covered under the 2015 MSGP prior to its expiration are automatically granted an administrative continuance of permit coverage after the 2015 MSGP's expiration, in accordance with the Administrative Procedure Act and pursuant to 40 C.F.R. § 122.6(a). The Office of Water (OW) is strongly encouraging all MSGP facilities that currently have an NOI in draft to submit their NOI before June 3, 2020, in order to cover as many facilities as possible under the administratively continued 2015 MSGP.

The administratively continued 2015 MSGP will remain in force and effect until a covered facility's discharges are authorized under a final 2020 MSGP, provided the facility submits an NOI in accordance with the 2020 MSGP's applicable deadlines and continues to comply with all applicable requirements in the 2015 MSGP. However, operators of "new" facilities (i.e., operators not covered under the 2015 MSGP) that would begin discharging industrial stormwater on or after June 4, 2020, and prior to the issuance of a final 2020 MSGP, but who did not file an NOI to be covered before the 2015 MSGP expires, would not be administratively covered under the 2015 MSGP. Pursuant to 5 U.S.C. § 558(c) and 40 C.F.R. § 122.6(a), an administratively continued general permit cannot be extended for such "new" facilities; therefore, such "new" facilities that need general permit coverage will be unable to

discharge stormwater in compliance with the Clean Water Act (CWA) until such time as the 2020 MSGP is final and effective, unless they apply for and receive individual permit coverage.

As explained further below, the EPA will have signed a final 2020 MSGP no later than November 12, 2020. OW therefore requests that OECA issue an NAA until April 29, 2021, at 11:59PM ET, or 120 days after the effective date of the new MSGP, whichever comes first. This time period is consistent with the previous NAA and NAA extension issued for the 2008 MSGP for new facilities. This time period will allow for publication of the final permit and a 30-day effective date, and also accounts for the number of days the general permit will likely mandate as the final deadline to submit an NOI to obtain coverage (e.g., 90 days from effective date of the final permit) and the number of days the permit will likely mandate for the EPA NOI review time (e.g., 30 days). The NAA should be limited solely to new facilities who cannot obtain coverage under the 2015 MSGP and who would otherwise be in violation of CWA Section 301 for discharging stormwater without a permit, subject to certain conditions outlined in this request.

An NAA is needed for new facilities seeking to commence discharging stormwater to “bridge” the period between June 4, 2020 (the first day after the 2015 MSGP expires), and the effective date of the new 2020 MSGP. During this time, the EPA estimates approximately 82 facilities may commence discharging industrial stormwater in areas where the EPA is the permitting authority. OW recommends that as a condition of the NAA, these new facilities be required to meet the eligibility requirements under the 2015 MSGP, notify the EPA of their intent to operate in accordance with the 2015 MSGP, and fulfill all the requirements of the 2015 MSGP. The NAA would not apply to new facilities who commence discharging after the 2020 MSGP is effective; those facilities would be required to submit an NOI under the new permit. For the reasons outlined below, OW requests that an NAA address the consequences of the EPA’s untimely issuance of the final 2020 MSGP and new facilities’ inability to seek NPDES general permit coverage for their industrial stormwater discharges. Accordingly, I am requesting that OECA issue an NAA to bridge this gap in permit coverage, until these new facilities are authorized under the final 2020 MSGP.

## **Background**

The EPA issues the MSGP under the statutory authority of CWA Section 402(p) and federal regulations at 40 C.F.R. § 122.26(b)(14). The CWA and federal regulations require stormwater discharges associated with 11 specific categories of industrial activity to be covered under NPDES permits. Facilities that discharge stormwater pollutants and fail to obtain coverage under an NPDES permit will be in violation of CWA Section 301.

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 the EPA is the permitting authority (four states: Idaho,<sup>1</sup> 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 the 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.

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

After the EPA issued the 2015 MSGP on June 4, 2015, numerous environmental non-governmental organizations challenged the permit, two industry groups intervened, and a settlement agreement was signed on August 16, 2016, with all parties resolving all challenges to the permit. The settlement agreement required the EPA to fulfil certain terms and propose new or modified conditions for inclusion in the 2020 MSGP by specific deadlines. One key settlement term stipulated that the EPA fund a study conducted by the National Academies of Sciences, Engineering, and Medicine's National Research Council (NRC). The study committee was tasked to: 1) suggest improvements to the current MSGP benchmark monitoring requirements; 2) evaluate the feasibility of numeric retention standards; and 3) identify the highest-priority industrial facilities/subsectors for consideration of additional discharge monitoring. The final study included recommendations on pollutant monitoring requirements and benchmark thresholds; stormwater sampling and data collection; and considerations for retention standards in the MSGP. The EPA agreed to consider all recommendations suggested in the completed NRC study and specifically solicit comment on any recommendations regarding the sectors/subsectors, frequency, parameters, and/or parameter levels in the current 2015 MSGP's benchmark monitoring provisions.

In the settlement agreement, the EPA agreed to propose a draft MSGP by the latter of September 1, 2019, or nine months after the NRC issued its final report, but in any event not after September 1, 2020. The EPA also agreed to finalize the MSGP nine months after proposing the draft MSGP. The NRC issued their final report to the EPA on February 20, 2019, which was later than expected at the time the settlement agreement was finalized, making the deadline for the proposed draft 2020 MSGP November 20, 2019. In November 2019, all parties to the litigation agreed to extend the proposal deadline until February 15, 2020. The EPA signed the draft 2020 MSGP on February 12, 2020, and proposed the draft permit for public comment on March 2, 2020 (85 FR 12288). The amended settlement agreement did not change the formula for calculating the finalization date of the MSGP reissuance (nine months after proposing the draft permit), therefore the EPA must finalize the draft MSGP by November 12, 2020. These dates, however, did not align with the expiration of the 2015 MSGP.

Finally, at the request of many commenters, the original 60-day public comment period on the proposed 2020 MSGP was extended for an additional 30 days until June 1, 2020. Since the 2015 MSGP will expire on June 3, 2020, two days after the close of the comment period, the EPA will not have sufficient time before the expiration date to finalize the new permit.

### **Basis and Need for an NAA**

The reissuance of the 2020 MSGP was unavoidably delayed by several unique circumstances discussed above. However, because the EPA already proposed the draft 2020 MSGP and new facilities could satisfy the conditions of an NAA outlined below, "bridging" the gap between the expiration of the 2015 MSGP and the effective date of the final 2020 MSGP will not interfere with or undermine the integrity of the public notice-and-comment process. Additionally, this request is consistent and supported by the 1984 and 1995 NAA policies. An NAA is necessary because approximately 82 new facilities where the EPA is the NPDES permitting authority will be unable to, through no fault of their own, seek NPDES general permit coverage, which will interfere with their ability to undertake industrial activities that will have stormwater discharges. 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 finally, communities trying to stimulate new business development may suffer.

While new operators could apply for individual permits during the gap in general permit coverage, individual permits can be more costly to obtain for facilities and this additional cost places a greater burden on some facilities, especially small businesses. Moreover, EPA regional offices would struggle to process a large increase in individual permit applications, many of which would be for discharges typically covered by a general permit. Processing these individual permits would likely require a reallocation of resources away from other public health and environmental issues. OW does not anticipate that issuance of the requested NAA will result in any adverse impacts to the human health or environment because the scope of the requested NAA is limited to facilities who, through no fault of their own, are unable to submit an NOI for general permit coverage, but who would comply with the conditions below, which are substantially similar to those requirements for existing facilities under the 2015 MSGP.

Finally, there are no other legal mechanisms that are available to address this situation. The EPA could not have issued a stop-gap general permit because an interim permit would still need to go through the same processes required by applicable statutes, regulations, and Executive Orders, including notice-and-comment procedures, which would take away resources that would otherwise be dedicated to issuing a new MSGP and delay reissuance substantially. The settlement agreement also required the EPA to propose certain conditions when issuing the next proposed MSGP, which means the Agency could not have reissued the 2015 MSGP “as is.”

### **Recommended Conditions for Affected Facilities**

Because new facilities discharging stormwater on or after June 4, 2020, will not have the ability to obtain coverage under a general permit for their stormwater discharges associated with industrial activity until the EPA issues a new MSGP, OW requests that OECA provide an NAA to address this temporary gap in general permit coverage. As conditions of an NAA, we are requesting that these facilities must meet the following conditions to be covered:

- (1) Eligibility: Any new facility must meet the 2015 MSGP eligibility criteria (Part 1);
- (2) Prior Notification to the EPA: Prior to the discharge of stormwater associated with industrial activity by a new facility on or after June 4, 2020, until the effective date of the 2020 MSGP, such facility must notify the EPA 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, subject to a 30-day review period; and
  - Note: new facilities that will commence discharging after the effective date of the 2020 MSGP should not be covered by this NAA and should submit an NOI under the new permit.
- (3) Compliance: Any new facility must satisfy all requirements of the 2015 MSGP. These obligations include, but are not limited to:
  - a. Develop a Stormwater Pollution Prevention Plan (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 should be kept at the facility and be made available to the EPA upon request.<sup>2</sup>

Thank you for your consideration of this request. If you have questions or require additional information, please contact me or Emily Halter of my staff at 202-564-3324 or Halter.Emily@epa.gov.

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<sup>2</sup> This footnote is provided for the OECA's information only: Regarding letter (h) above, OW suggests that facilities covered by an NAA keep monitoring reports at the facility during the gap in permit coverage. In previous NAAs, new facilities were required to submit their monitoring reports directly to the EPA via mail or email on a quarterly and/or annual basis, depending on which monitoring requirements applied. Individual hard-copy reports were kept in paper or email attachment format at the respective EPA Regional Office and it is unclear how and to what extent these data were processed or utilized. The EPA's MSGP now requires facilities to submit all forms and monitoring reports electronically, pursuant to NPDES electronic reporting requirements, except in very limited circumstances. Since new facilities will not have NPDES general permit coverage, those operators will not have an account or profile in the systems that generate and track monitoring reporting requirements (ICIS and NetDMR) and therefore there is no place to enter their monitoring data electronically. Requiring facilities under an NAA to mail in or email their monitoring reports would now potentially be overburdensome to the facility and the EPA Regional Offices since the program has moved to electronic reporting.

From OW's perspective, not regularly collecting these facilities' monitoring data during the gap in permit coverage would not have a significant impact. In fact, in previous NAAs, new facilities were also required to submit a hard copy notice to the EPA of their intent to operate in accordance with the 2008 MSGP. In anticipation of the gap in permit coverage, OW worked with OECA to develop an electronic "Intent to Operate" (ITO) form (per #2 above) that will allow the EPA Regions to keep track of new facilities electronically in NeT during the gap in permit coverage. Unlike ICIS and NetDMR, NeT is able to accept the ITO form, which is substantially similar to an NOI, without the facility being associated with an NPDES permit. The benefit of this approach is that now all new facilities that are covered under an NAA will be tracked in a centralized database and information on their facility can be queried nationwide relatively quickly. Once the 2020 MSGP is effective, new facilities will be able to transfer their ITO information to a new NOI, making the process to seek permit coverage under the new MSGP streamlined and efficient for facilities covered by the NAA. While there are challenges with collecting monitoring reports from new facilities, through the ITO form, their basic facility data will now be systemically tracked for the duration of an NAA. Ultimately, OECA could require EPA Regional Offices to do an audit of some new facilities during the NAA period to review their monitoring records to ensure facilities are complying with letter (h) above.