

The Clean Water Act in Action

Laura L. Mona, Esq.

ASSISTANT GENERAL ATTORNEY

JUNE 16, 2020



BNSF Railway Network



- One of the largest freight railroad networks in U.S.
- 32,500 miles of track
- 28 states
- 3 Canadian Provinces
- 25 Intermodal Facilities
- 40+ Ports
- ~ 8,000 Locomotives
- 40,000+ Employees

BNSF trains can move one ton of freight nearly 500 miles on just one gallon of diesel fuel.

Agenda

- General Permits
 - Stormwater General Permits for Industrial and Construction Activities
 - Recent Developments – EPA’s 2020 MSGP
- BNSF Role in CWA Compliance
- Recent Developments
 - 401 WQC Rule
 - Impacts on Industry
 - 401 WQC Rule
 - WOTUS Rule
 - *Maui* Decision
- Practice Pointers

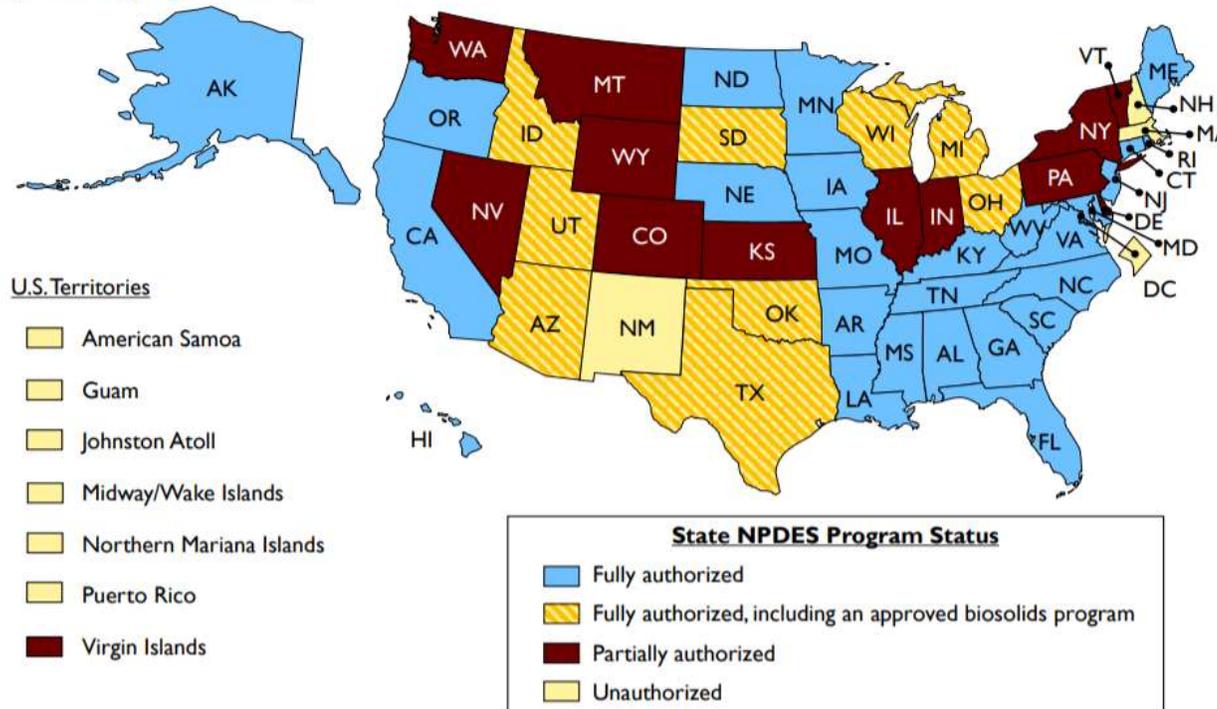


What is a General Permit? [40 CFR § 122.28]

- Covers multiple dischargers with similar operations and types of discharges.
- Establishes the same effluent limitations and requirements for all eligible dischargers.
- Dischargers submit a Notice of Intent (“NOI”) to obtain coverage.
 - Permitting authority can require an individual permit instead.
- Most common - Stormwater discharges associated with industrial activities or construction activities.

Stormwater General Permits – Permitting Authority

NPDES Program Authorizations (as of July 2019)



- Most states are authorized.
- EPA is the permitting authority for:
 - Idaho* (until July 2021)
 - Massachusetts
 - New Hampshire
 - New Mexico
 - District of Columbia
 - U.S. Territories
 - Federal and Tribal Lands

Industrial Stormwater General Permit



Stormwater Discharges from Industrial Activities 40 CFR § 122.26(b)(14)

- Industrial stormwater discharges are required to meet all provisions of CWA §301, including applicable water quality standards of CWA §402(p)(3)(A).
- “Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity.”
- 5 Year term (typ.)

What is an “Industrial Activity”?

- Material handling, storage, loading or unloading.
- Equipment maintenance and cleaning.
- Specific categories of facilities or SIC codes listed in 40 CFR 122.26(b)(14).

For example:

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have **vehicle maintenance shops, equipment cleaning operations, or airport deicing operations**. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity[.]

- Primary industrial activity may be included in a “Sector” which may have additional sector-specific requirements in the MSGP.

Construction Stormwater General Permit (“CGP”)



- Discharges from construction activities:
 - Disturb one acre or more; or
 - Part of a larger common plan of development or sale.
- Coverage required from “commencement of construction activities” until a condition qualifying for termination is met.
- Submit a Notice of Termination (“NOT”)
 - Once site is “permanently stabilized”; or
 - Control transferred to another operator.

Stormwater General Permits – Common Elements

- Storm Water Pollution Prevention Plan (“SWPPP” or “SWP3”)
- Pollution prevention controls
- Best Management Practices (“BMPs”)
 - Diversion ditches or berms
 - Silt fence
 - Housekeeping
 - Cover storage areas
- Inspections / Monitoring
- Corrective actions
- Reporting



EPA's MSGP - Recent Developments



- 2015 MSGP Litigation
 - *Waterkeeper Alliance v. USEPA* (2d Cir. 15-02091)
- 2016 Settlement Agreement
 - EPA agreed to:
 - Fund a study conducted by the National Academies of Sciences, Engineering, and Medicine's (NAS) National Research Council (NRC).
 - Review effluent limitations set by states.
 - Include Additional Implementation Measures ("AIM") for benchmark exceedances.
- 2019 NRC Study Completed
- 2020 Proposed EPA MSGP [Docket: EPA-HQ-OW-2019-0372]
 - Comment period closed June 1, 2020.
- Final 2020 MSGP expected in November 2020(?)

How BNSF Complies with the CWA

Examples:

- NPDES
 - Stormwater Individual and General Permits
 - Industrial Activities:
 - Fueling
 - Locomotive and equipment washing
 - Maintenance shops
 - Pretreatment
 - Wastewater Treatment Plants
 - Construction General Permits
 - Track construction
 - New facilities (e.g. intermodal facility or yard expansion)
 - SWPPs, BMPs, sampling, inspections, reporting (e.g. DMRs), as applicable.
 - Audits

How BNSF Complies with the CWA

- Bridge Construction
 - 404 Permits
 - 401 Water Quality Certifications



How BNSF Complies with the CWA



- Spill Prevention
 - Oil Pollution Prevention [40 CFR §112]
 - Spill Prevention, Control, and Countermeasure Plans (“SPCC”)
 - Facility Response Plans (“FRPs”)
- Spill Reporting
 - Discharges of Oil [40 CFR §120.2]
 - Reportable Quantities of Hazardous Substances [40 CFR §§116, 117]
 - Notifications to appropriate state and federal agencies and National Response Center (“NRC”) of spills above reportable quantities.

Recent Developments - 401 WQC Rule



- June 1, 2020 – EPA finalized the new 401 WQC Rule [EPA-HQ-OW-2019-0405]
 - Restricts the ways in which states and tribes can deny 401 WQC.
 - States/tribes must act within 1 year, or authority is considered waived.
 - Clock starts with receipt of “certification request,” not when the state/tribe deems application complete.
 - Limits evaluation to only pollution discharges.
 - Federal agencies can impose shorter periods, if reasonable.
- New rule will go into effect 60 days after the date of publication in the Federal Register.

Recent Developments – Impacts on Industry

- 401 WQC Rule
- WOTUS definition
- *Maui*



Putting it All Together

Key Considerations

- Site Activities
- Type of Discharge
- Type of Pollutants
- Location
- Pre-Treatment
- Jurisdiction
- Permits and Plans
- Controls / BMPs
- Regulatory and Legal Developments



Helpful Links

Federal Register Dockets:

EPA 2020 MSGP [EPA-HQ-OW-2019-0372]

<https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0372>

401 WQC Rule [EPA-HQ-OW-2019-0405]

<https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0405>

EPA NPDES Stormwater Program

<https://www.epa.gov/npdes/npdes-stormwater-program>

Industrial Stormwater Permitting

<https://www.epa.gov/npdes/stormwater-discharges-industrial-activities>

Construction Stormwater Permitting

<https://www.epa.gov/npdes/stormwater-discharges-construction-activities>





Thank
You

DED *