



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

OFFICE OF WATER

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

ENTERED
Office of Proceedings
May 19, 2020
Part of
Public Record

Docket No. FD 36369

Dear Ms. Brown:

On behalf of the U.S. Environmental Protection Agency (EPA or Agency), this letter supplements the Agency's initial comments submitted on December 12, 2019, in response to the request for a declaratory order filed by the Association of American Railroads. The purpose of this letter is to provide a brief overview of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program.

The NPDES program, created by Section 402 of CWA, is a regulatory program that controls the discharge of pollutants¹ from point sources² into navigable waters (i.e., waters of the United States). Although the program was created by federal law, pursuant to CWA Section 402(b) and the EPA's regulations at 40 CFR Part 123, the EPA may authorize qualified state, territorial, or tribal government agencies ("state" or "states") to administer and implement all or part of the NPDES program.

If the EPA approves a program, the state assumes permitting authority in lieu of the EPA. States with EPA-approved programs issue NPDES permits to point source dischargers within their borders. State-issued NPDES permits must be consistent with the EPA's federal permitting requirements and may contain more stringent terms and conditions based on state law requirements. The EPA maintains an oversight role for state-administered programs and may object to a state-issued NPDES permit if it does not meet federal CWA and regulatory requirements. Forty-seven states and one territory, the Virgin Islands, have been approved by the EPA to administer the NPDES permit program.

¹ Pollutant is defined in CWA Section 502 (6), which states in relevant part: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

² CWA Section 502 (14) provides, "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

The EPA continues to administer the NPDES permit program for the District of Columbia, Massachusetts, New Hampshire, and New Mexico. The EPA issues federal NPDES permits in these jurisdictions and on tribal lands. Before the EPA issues a federal NPDES permit, it must obtain a water quality certification from the state or tribe where the permitted discharge will occur. The certification is intended to ensure that the federally permitted discharge will not violate state water quality standards. Water quality certifications routinely include state-law specific conditions that, in most cases, are included in the federal NPDES permit and become federally enforceable.

There are two types of NPDES permits: individual and general permits. An individual permit is a permit specifically tailored to an individual discharger or facility. The permitting authority develops an individual permit on the basis of information from the permit application and other sources (e.g., previous permit requirements, discharge monitoring reports, technology and water quality standards, total maximum daily loads, ambient water quality data, special studies). Alternatively, a permitting authority can develop and issue a general permit to cover multiple facilities in a specific category of discharges. States and the EPA may issue individual permits to authorize discharges from a single facility, or a general permit to authorize discharges from a category of facilities. NPDES permits must be issued for a specified period that cannot exceed five years. All EPA-issued NPDES permits are subject to the water quality certification requirement described above.

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by email, consistent with 49 CFR 1104.12(a).

Sincerely,

DAVID
ROSS

David P. Ross
Assistant Administrator

Digitally signed by
DAVID ROSS
Date: 2020.05.19
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OFFICE OF WATER

Ms. Cynthia T. Brown
Chief, Section of Administration
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395 E Street, S.W.
Washington, D.C. 20423

Dear Ms. Brown:

On behalf of the Environmental Protection Agency's (EPA) Office of Water, this letter is in response to the petition for declaratory order filed by the Association of American Railroads (AAR) on November 27, 2019. The EPA is aware that the AAR's petition raises important questions regarding the interplay of the Surface Transportation Board's (STB) jurisdiction over transportation by rail carrier and the applicability of the Clean Water Act (CWA) National Pollutant Discharge Elimination System permit program to incidental discharges of commodities from railcars. If the STB chooses to take further action with respect to the petition, the EPA respectfully requests that the agencies coordinate on the CWA-related issues raised in the petition, and that the STB allows interested stakeholders the opportunity to comment on the issues raised in the petition.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Ross", is positioned below the word "Sincerely,".

David P. Ross
Assistant Administrator