

Reducing the Flood of Changes—EPA Issues a More Tempered Final 2021 Multi-Sector General Permit than Originally Proposed



Key Takeaways

- **What Is Happening?** The U.S. Environmental Protection Agency (EPA) finalized the 2021 National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) for stormwater discharges associated with industrial activities, which will take effect and supersede the 2015 MSGP on March 1, 2021
- **Who Is Impacted?** Short term: industrial facilities in jurisdictions where EPA is the NPDES permitting authority. Longer-term: industrial facilities in states that model their NPDES stormwater general permits after EPA’s MSGP.
- **What Should I Do?** For industrial facilities with current coverage under the 2015 MSGP, prompt attention to permit requirement changes is prudent to ensure that all necessary updates to facilities’ Stormwater Pollution Prevention Plans (SWPPPs), a prerequisite of coverage renewal, are made and implemented prior to the May 30, 2021 coverage renewal deadline.

EPA [published](#) its final 2021 MSGP, which authorizes stormwater discharges associated with industrial activity in jurisdictions where EPA is the NPDES permitting authority. The 2021 MSGP will take effect on March 1 and supersede the 2015 MSGP.

As [previously reported](#), EPA published a proposed 2020 MSGP for public comment last March. Many of the proposed revisions from the 2015 MSGP were driven by recommendations in a National Academies of Sciences, Engineering, and Medicine’s National

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Research Council (NRC) study required by a 2016 Settlement Agreement that resolved a lawsuit challenging the 2015 MSGP.

The 2021 MSGP contains a number of significant changes from the current 2015 MSGP. However, the full scope of changes is not as far-reaching as initially proposed. In some instances, EPA adopted modified provisions in lieu of original proposed changes. A closer examination of these deviations and final changes follows.

Significant Changes from the 2015 MSGP

The 2021 MSGP deviates from the 2015 MSGP in a number of respects, including the following:

- **Permit streamlining.** The 2021 MSGP incorporates a number of changes that the agency believes will streamline and simplify permit language, including reordering various sections, revising wording of eligibility requirements, and changing the use of passive voice to active voice.
- **Public signage reflecting permit coverage.** The 2021 MSGP requires operators to post a sign close to their facilities confirming permit coverage.
- **Consideration of enhanced stormwater controls for major storm events.** The 2021 MSGP requires operators of facilities in areas with higher risks of major storm and extreme flooding events to consider implementing enhanced stormwater control measures. It does not define “higher risks,” “major storm” or “extreme flooding event,” however, but it does excuse operators from implementing controls if they determine that enhanced controls are unnecessary.
- **Monitoring changes.** Under the 2021 MSGP, operators in subsectors that do not have sector-specific benchmark monitoring requirements must conduct indicator analytical monitoring for pH, Total Suspended Solids (TSS), and Chemical Oxygen Demand (COD) quarterly for the duration of the permit. Monitoring results do not trigger any follow-up actions; this is a “report-only” requirement.

The new MSGP also requires operators in some sectors to conduct report-only indicator analytic monitoring of polycyclic aromatic hydrocarbons (PAHs) twice a year during the first and fourth years of permit coverage.

- **Updated benchmark monitoring schedule and values.** The new MSGP requires permittees to conduct benchmark monitoring quarterly in the first and fourth years of permit coverage. An operator that does not exceed the four-quarter average for a given parameter in the first four quarters of permit coverage can discontinue monitoring for the next two years (instead of discontinuing for the remainder of the permit, which was the case under the 2015 MSGP). EPA has also updated the benchmark monitoring thresholds for aluminum, copper, and selenium for discharges to freshwater, and cadmium. Furthermore, EPA eliminated iron benchmark requirements for certain sectors (e.g., Sector L (Landfills and Land Application Sites)).
- **Additional implementation measures (AIM).** Traditionally, benchmark monitoring is intended to be a “gauge of the performance of facilities’ stormwater control measures”; benchmarks are not intended to serve as effluent limitations. Under prior versions of the MSGP, and most state NPDES general permits, benchmark exceedances trigger a requirement to evaluate whether modifications to stormwater control measures are necessary to meet effluent limitations. Those permits do not dictate actual implementation of additional control measures. States like Washington and California are an exception—there, benchmark exceedances trigger a tiered structure of advancement and mandatory levels of corrective action responses. In this respect, benchmarks in those states have become somewhat akin to water quality-based effluent limitations.

In the proposed 2020 MSGP, EPA shifted from its traditional approach to one similar to California and Washington by incorporating AIM, a three-level structure of requirements sequentially triggered by continuing benchmark exceedances. However, unlike California and Washington, EPA's AIM requirements, as originally proposed, did not provide any off-ramps (i.e., resetting to baseline status) in the case of effective Level 2 or Level 3 response measures. EPA attempted to address this concern in the final MSGP by purporting to revise the AIM requirements to allow for the "resetting" to baseline status from any AIM level, including Level 2 or Level 3, "if benchmark thresholds and responses are met within the required deadlines."¹

- **Impaired waters monitoring.** Starting in the first full quarter of permit coverage, operators discharging to impaired waters that do not have an EPA-approved or established Total Maximum Daily Load (TMDL) must complete annual monitoring discharges of certain pollutants to those waters. Monitoring is required for one year at each discharge point for all pollutants for which the water body is impaired, after which the operator can discontinue monitoring for any pollutant that is not detected. For any pollutant that is detected, annual monitoring must continue. Required annual monitoring resumes in the fourth year of permit coverage for both those pollutants for which the waterbody is impaired and associated with an industrial activity and/or are a required benchmark parameter for the operator's applicable subsectors. After this fourth-year monitoring, an operator may discontinue monitoring for any pollutant that is not detected for the duration of the permit.

Proposed Changes Not Included in the Final 2021 MSGP

While the final 2021 MSGP tracks the 2020 draft MSGP in some respects, a number of the proposed changes did not end up in the final version. Most notably, EPA decided against the following, but states could decide that any of these requirements are valuable additions in their next permit cycle:

- **Expansion of eligibility criterion for stormwater discharges to a federal CERCLA site.** The 2015 MSGP requires facilities in EPA Region 10 to notify the Regional Office prior to submitting a notice of intent for permit coverage if the facility discharges stormwater to sites that have undergone or are undergoing remedial actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Region 10 then evaluates whether the facility has appropriate stormwater controls to prevent recontamination of the CERCLA site. EPA requested comment on whether it should expand this permit eligibility criterion to all regions for the 2020 MSGP. Following review of public comments, it decided not to do so.
- **Eligibility criteria regarding coal-tar sealcoat.** EPA sought public comment on whether to make eligibility for permit coverage contingent on a facility not sealing (or resealing) paved surfaces where industrial activities are located with coal-tar sealcoat during the duration of coverage. EPA decided to "instead implement a holistic activity-based approach for addressing discharges of PAHs in stormwater associated with industrial activity," discussed above.
- **Discharge authorization waiting period for new facilities with pending enforcement actions.** EPA had proposed a 60-day discharge authorization waiting period for new notices of intent to obtain coverage submitted by facilities subject to a pending enforcement action (including a notice of intent to bring a Clean Water Act citizen suit). According to EPA, the waiting period would have allowed the agency to more adequately review an operator's stormwater control measures, SWPPP, and permit eligibility. In the 2016 Settlement Agreement mentioned above, EPA agreed to propose and

¹ Id. at 10273.

solicit comments only for a 30-day waiting period. As [previously noted](#), the proposed 60-day discharge authorization waiting period could have had significant consequences for those operators whose discharges were not covered under the 2015 MSGP who are recipients of a notice of intent to bring a citizen suit. Ultimately EPA decided against any waiting period, opting instead to add questions regarding pending stormwater enforcement actions to the NOI form.

- **Universal benchmark monitoring.** EPA had proposed a universal benchmark monitoring requirement for pH, total suspended solids (TSS), and chemical oxygen demand (COD) that would apply to all facilities and sectors subject to the MSGP. EPA explained that universal monitoring would provide a baseline assessment to better understand “industrial stormwater risk, broader water quality problems, and stormwater control effectiveness across all sectors.” In lieu of this proposal, EPA instead adopted a new requirement for indicator monitoring for pH, TSS, and COD by subsectors that do not have sector-specific benchmark monitoring requirements.
- **New sector-specific benchmark requirements for Sector I (Oil and Gas Extraction), Sector P (Land Transportation and Warehousing), and Sector R (Ship and Boat Building and Repair Yards).** EPA had initially interpreted the NRC study as recommending the same. In the preamble to the final 2021 MSGP, EPA explained that it “now recognizes that the NRC did not recommend the Agency require benchmarks for these sectors, but rather provided them as examples of ‘Sectors Not Subject to Benchmark Monitoring’ and for highlighting the ‘Need for Periodic Monitoring Reviews.’” EPA further explained that it plans on “us[ing] the results of the [new] indicator monitoring” to “re-assess the need for additional chemical-specific benchmark monitoring for the next reissuance of the MSGP.”²
- **Requiring sector-specific fact sheet checklists to be used as part of AIM Tier 2.** As discussed above, the 2021 MSGP creates a three-level series of required responses (i.e., AIM) when discharges exceed a benchmark. Initially, in the proposed 2020 MSGP, EPA proposed that after a facility triggers AIM Level 2, the facility would need to work through a sector-specific checklist of potential additional control measures outlined in the proposed [Appendix Q to the 2020 MSGP](#). Ultimately EPA decided against this measure. In dropping Appendix Q from the final 2021 MSGP, EPA is affording facilities more flexibility in how they meet AIM requirements, as well as reducing the cost of the process of selecting control measures.

Implementation

Facilities currently covered under the 2015 MSGP have until May 30, 2021 to reapply for coverage under the 2021 MSGP by submitting a new Notice of Intent (NOI). As noted above, the 2021 NOI form is revised from its earlier version. Before facilities can renew coverage, however, they must update and implement SWPPPs to reflect any applicable permit changes.

The 2021 MSGP will apply to facilities in jurisdictions where EPA is the permitting authority: Idaho (until July 1, 2021, at which time NPDES permitting authority will be transferred to the state), Massachusetts, New Hampshire, New Mexico, Indian country lands, Puerto Rico, the District of Columbia, and most U.S. territories and protectorates. Many of the remaining states model their MSGPs and industrial stormwater general permits on the federal permit and, historically, those states have considered and frequently adopted innovations in the federal permit. Therefore, one can expect states with NPDES industrial general permits modeled after the MSGP to incorporate revisions in the final 2021 MSGP, once those states consider their respective permits for renewal.

² [86 FR 10269](#), 10274 (Feb. 19, 2021).

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