

Oregon Adopts a Significantly Modified (and Legally Vulnerable) Industrial Stormwater General Permit



Oregon Department of Environmental Quality’s (DEQ’s) policy and rulemaking board [adopted](#) rules renewing Oregon’s National Pollutant Discharge Elimination System (NPDES) Stormwater Discharge General Permit No. 1200-Z (1200-Z General Permit), which regulates industrial stormwater discharges to waters of the state.ⁱ Under the rules, the new 1200-Z General Permit will take effect July 1, 2021, superseding the current 1200-Z General Permit issued in October 2018.

Key Permit Changes

- **Questionable expansion in scope of regulated transportation sector stormwater discharges.** The new 1200-Z General Permit expands regulatory control of transportation sector discharges beyond the stormwater from the limited areas regulated under the Clean Water Act (CWA)—transportation facility vehicle maintenance shops, equipment cleaning operations, and airport deicing operations—to require control of discharges from the entire site of the transportation facility.ⁱⁱ DEQ’s authority to do so is vulnerable to legal challenge and presents the risk that similarly problematic expansions of the scope of regulation of transportation facilities may be adopted as other states renew their industrial stormwater general permits (ISGPs).
- **Reduced monitoring for impaired waters.** The permit reduces by up to 38 different contaminants the scope of pollutants dischargers to waters listed as impaired under CWA section 303(d) must monitor.

May 4, 2021

AUTHORS

[Richard Davis](#)

Principal
+1.202.789.6025
rdavis@bdlaw.com



[Erika Spanton](#)

Associate
+1.206.315.4815
espanton@bdlaw.com



[Allyn Stern](#)

Of Counsel
+1.206.620.3027
astern@bdlaw.com



[Tim Sullivan](#)

Principal
+1.410.230.1355
tsullivan@bdlaw.com



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- **Questionable framework for impairment monitoring exceedance response.** Impairment monitoring exceedances will no longer trigger Tier 1 corrective action. Instead, the new 1200-Z General Permit sets forth a parameter-specific response scheme, ranging from the imposition of numeric water quality-based effluent limits (WQBELs) equal to the impairment monitoring concentrations to no required response. This passive adoption of impairment criteria as WQBELs—without observing the requirements for formally establishing WQBELs—is also legally vulnerable and a dangerous precedent for renewal of ISGPs in other states.
- **Benchmark monitoring changes.** In some instances statewide and sector-specific benchmark concentrations increased, while in other instances they decreased or stayed roughly the same.
- **Electronic reporting and increased visibility.** Data will be readily accessible to the public, including the location of the facility, stormwater discharge locations, monitoring results, and stormwater pollution control plans (SWPCPs).

Background

Section 301 of the CWA generally prohibits the discharge of a pollutant from a point source to a water of the United States without a National Pollutant Discharge Elimination System (NPDES) permit (or in the case of dredged or fill material a section 404 permit). 33 U.S.C. § 1311(a). Despite section 301's broad prohibition, federal CWA authorized EPA to limit the requirement to obtain a permit for stormwater discharges from industrial facilities, and in 1999 the Agency took advantage of that authority to limit NPDES permitting of industrial stormwater to discharges associated with specific categories of industrial activity set forth at 40 C.F.R. §122.26(b)(14)(i)–(ix), (xi). In Oregon, the EPA has authorized the state DEQ to administer the NPDES program.

There are two types of NPDES permits: general and individual. Oregon's 1200-Z General Permit allows facilities within Oregon to apply for coverage in lieu of applying for an individual discharge permit. Once covered, the facilities must comply with all 1200-Z General Permit terms. There are more than 860 "permit registrants" covered under the 2018 1200-Z General Permit.

A number of the significant changes in the 2021 1200-Z General Permit are driven in whole or in part by a 2018 Consent Judgment and [Settlement Agreement](#) that resolved a petition for review that challenged a prior renewal of the 1200-Z General Permit.

Significant Changes from the 2018 1200-Z General Permit

The new 1200-Z General Permit differs from the 2018 permit in a number of respects. Significant changes include the following:

- **Expanded scope of regulation of transportation sector stormwater discharges.** Consistent with federal CWA regulations, under both the 2018 1200-Z General Permit and 2021 1200-Z General Permit transportation sector's eligibility for coverage is generally based on the existence of certain auxiliary operations (i.e., vehicle maintenance shops, equipment cleaning operations, or airport deicing operations).ⁱⁱⁱ Additionally, under the 2018 permit, the scope of the transportation sector's regulated industrial stormwater is likewise limited to the scope of the federal CWA regulations, i.e., only stormwater discharges associated with those specific auxiliary operations are regulated.^{iv} The 2021 permit, however, attempts to regulate all transportation sector stormwater discharges—not just those associated with vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Consequently, for many transportation facilities covered under the 2018 1200-Z General Permit, the scope of their SWPCPs and delineation of corresponding regulated areas, will need to be expanded considerably under the new permit.^v

DEQ's authority to increase the scope of regulated transportation sector stormwater discharges is questionable. In response to comments questioning DEQ's authority to expand the scope, DEQ asserted that "the proposed final permit language is consistent with 340-045-0015(2) and 40 CFR 122.26 which are the rules that outline the requirements for who must obtain permit coverage." DEQ also reasoned that "Washington State Ecology's industrial stormwater general permit also regulates the entire footprint of industrial facilities." However, both the United States District Court for the Western District of Washington in *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, No. C17-5016 BHS, 2020 WL 6445825 (W.D. Wash. Nov. 3, 2020) and Washington Pollution Control Hearings Board in *Puget Soundkeeper Alliance v. Ecology*, P19-089c, at 18 (PCHB Mar. 23, 2021) recently rejected that position, ruling that in the context of transportation facilities, the scope of Washington's industrial stormwater general permit is limited to only the portions of the facility involved in the specified auxiliary operations (or which are otherwise identified under federal regulations as "associated with industrial activity"), not the entire transportation facility.

This change in the scope of the permit's reach will substantially expand the obligations of facilities within the transportation sector. Equally important, it may serve as a flawed template on the basis of which other states will seek to expand the reach of their ISGPs. Roughly 20% of ISGPs nationally are renewed each year, meaning that this risk is both real and not limited to the Pacific Northwest states where this has occurred recently.

- **Modified benchmarks.** The 2021 1200-Z General Permit contains modified statewide and sector-specific benchmarks.^{vi} In some instances, the benchmark concentrations increased, while in other instances they decreased. For example, statewide benchmark concentrations for copper decreased for all georegions except the Columbia River mainstream, eastern, and marine waters georegions (where instead the statewide copper benchmark concentrations increased), and sector E sector-specific aluminum benchmark concentrations for clay product manufacturers increased from 0.75 mg/L to 1.10 mg/L. Permittees will need to review these benchmarks to determine the extent to which these modifications affect their obligations relating to applicable benchmarks.
- **Reduced Category 5: Clean Water Act section 303(d) impairment monitoring.** Under the 2018 1200-Z General Permit, registrants that discharge to a [Category 5: 303\(d\)](#) waterbody must conduct impairment monitoring for all Category 5: 303(d) pollutants for which the receiving water is listed as impaired. The 2021 1200-Z General Permit limits the scope of pollutants that a permittee must monitor by requiring permittees to conduct impairment monitoring for copper, lead, zinc, pH, iron, E. coli, fecal coliform, or enterococcus only if the waterway is listed as impaired for one of those select pollutants. Permittees will no longer be required to monitor up to 38 listed impairment pollutants.^{vii}
- **New framework for Category 5: 303(d) list impairment exceedance response.** The 2021 1200-Z General Permit sets forth a new framework for responding to impairment monitoring exceedances. Under the 2018 permit, exceedances of any impairment reference concentration triggers Tier 1 corrective action, due within 60 days from receiving the monitoring results. Under the new permit, no impairment monitoring exceedances trigger the Tier 1 corrective action requirement. Instead, the permits sets forth the following impairment parameter-specific response scheme:
 - If impairment monitoring indicates two consecutive exceedances for copper, lead, zinc, or pH (outside range), or a single copper, lead, or zinc exceedance greater than two times the impairment concentration, then the permittee will become subject to numeric water quality-based effluent limits equal to the impairment monitoring concentrations. If this occurs the permit registrant may seek regulatory approval of a schedule up to two years to come into compliance.

- In the event of two consecutive exceedances of impairment monitoring for iron or E. coli, then the permittee will become subject to narrative water quality-based effluent limits.
- Exceedances of impairment monitoring for fecal coliform or enterococcus do not trigger any required corrective action response.

As with the expansion of regulation of the transportation sector, the passive conversion of impairment monitoring concentrations into enforceable WQBELs is an innovation of questionable legal standing. WQBELs must be based on a reasonable potential analysis and must be developed in a manner consistent with specific regulations. To date, benchmarks values, which are basically what the permit's impairment monitoring concentrations are, have not met these strict standards. Dischargers in Oregon and in other states that may be tempted to adopt the new Oregon paradigm may be imposing enforceable WQBELs without observing those requirements.

- **Mass reduction measure certification.** The 2021 1200-Z General Permit contains a new requirement that mass reduction waivers (which are available to permit registrants that implement mass reduction measures that divert a portion of the discharge from reaching surface waters through infiltration devices) be supported by Oregon registered professional engineer (PE) or Oregon certified engineering geologist (CEG) certified mass reduction measures. For previously granted waivers, the permit registrant must obtain and submit a PE- or CEG-stamped certification by December 31, 2021 confirming that the permit registrant's mass reduction measures are "operating as intended."^{viii} For new waivers, a PE or CEG must design and stamp the portion of the SWPCP covering the mass reduction measures supporting the waiver.^{ix}
- **Heightened monitoring waiver prerequisite.** The new permit will require five, instead of four, consecutive samples below benchmarks based on geometric mean evaluation or due to background natural conditions before a permit registrant may qualify for a parameter-specific monitoring waiver.^x
- **Electronic reporting and increased visibility.** Under the current system, stormwater records submitted to DEQ are available to the public only via public records requests. As a practical matter, this means that these records do not become public for weeks, or even months, after a permittee submits them to DEQ. The new 1200-Z General Permit requires electronic reporting via DEQ's new Environmental Data Management System called "Your DEQ Online." In turn, data and reports posted to Your DEQ Online will now be readily accessible by the public when a permittee submits them. This data includes "the location of facilities with permit coverage, the stormwater discharge locations, monitoring results, and the stormwater pollution control plans implemented at all sites with permit coverage."^{xi}

Implementation

The new 2021 1200-Z General Permit may be vulnerable to legal challenges on account of the expanded fence-line-to-fence line scope for transportation sector facilities or passive adoption of impairment criteria as WQBELs without following the rigorous WQBELs-development process.

Absent a successful legal challenge, or injunction in the interim, facilities currently covered by the 2018 1200-Z General Permit will need to submit an updated SWPCP that conforms to the new permit requirements by August 31, 2021. Facilities (especially those outside the transportation sector) can minimize liability exposure and risk by becoming familiar with and preparing for the new requirements well in advance of the 2021 1200-Z General Permit's July 1, 2021 effective date.

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ⁱ Oregon Revised Statutes 468B.005(10) defines "waters of the state" as "includ[ing] lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction."

ⁱⁱ In this context, "transportation sector" excludes transportation related facilities operating under 4221 (farm product warehousing and storage), 4222 (refrigerated warehousing and storage), and 4225 (general warehousing and storage) primary Standard Industrial Classification (SIC) codes. For those SIC codes, CWA regulations cover stormwater discharges from all portions of the facility (except any isolated non-industrial areas, such as office buildings and accompanying employee parking lots) pursuant to 40 C.F.R. 122.26(14)(xi).

ⁱⁱⁱ The exception is in the case of 4221 (farm product warehousing and storage), 4222 (refrigerated warehousing and storage), and 4225 (general warehousing and storage) SICs, in which cases coverage applies to all facilities with those primary SICs regardless of whether or not these auxiliary operations are also present.

^{iv} As noted above, federal CWA regulations treat 4221-4225 SIC code facilities differently and regulate stormwater discharges from the entire industrial facility (excluding isolated office buildings and employee parking lots).

^v 2021 1200-Z at Table 1.

^{vi} *Id.* at Sch. B.2 and Sch. E.

^{vii} *Id.* at Sch. B.3, B.4, B.5 and Appendix A.

^{viii} *Id.* at Sch. A.6.

^{ix} *Id.* at Sch. A.11.k.3.

^x *Id.* at Sch. B.9.

^{xi} 2021 1200-Z Staff Report available at https://www.oregon.gov/deq/EQCdocs/032521_ItemC_StaffReport.pdf.