

WHAT YOU NEED TO KNOW ABOUT EPA'S PROPOSED NEW INDUSTRIAL STORMWATER PERMIT

Most industrial facilities use general permits to cover their stormwater discharges. The terms of EPA's new Multi-Sector General Permit (MSGP), thus, are critically important in establishing the permitting burden facing industrial stormwater dischargers. Following are some important changes that EPA is considering, which are also summarized on pages 59, 675-6 of its *Federal Register* notice (see [78 Fed. Reg. 59,672, Sept. 27, 2013](#)).

AGC welcomes members' comments on any of the proposed changes. Please email Leah Pilconis, senior environmental advisor to AGC, at pilconisl@agc.org in advance of the Nov. 27, 2013, comment deadline.

Limitations on Pavement Washwaters

The proposed MSGP would clarify that pavement washwaters may not come into contact with hazardous cleaning products (bleach, hydrofluoric acid, sodium hydroxide, nonylphenyls) to be covered under the permit.

Narrowed Scope of "Allowable Non-stormwater Discharges"

In addition, EPA is proposing to clarify that discharges from the spray down of lumber and wood product areas are permitted so long as no chemical additives are used in the spray-down waters or applied to the wood. Similarly, [EPA's fact sheet](#) also discusses other non-stormwater discharges that may require a different permit (*i.e.*, prohibited non-stormwater discharges) and appears to be narrowing to scope of the MSGP 2013. You will notice on [fact sheet pages 6 and 7 \(and in the proposed permit itself\)](#) various discussions about limitations on facilities being able to rely upon the "NPDES Permit Shield" for various types of discharges not specifically enumerated in the MSGP 2013. That discussion likely is in response to recent court cases in which the court relied upon the permit shield doctrine to overturn citizen suits relating to alleged unauthorized discharges.

Discharges to CERCLA (Superfund) Sites

EPA's proposed MSGP would clarify that discharges to a Superfund (hazardous waste) site are not covered unless specifically authorized by the EPA regional office in which the site is located. Some aspects of this proposed mandate appear to raise some legal questions about EPA's legal authority (under the stormwater program) and a current discharger's responsibility for others' possible contamination.

NEPA Review

Previous versions of the MSGP required those facilities constructed after the promulgation of their industry's New Source Performance Standards (NSPS) to determine and document in their SWPPP either "No Significant Impact" under the National Environmental Policy Act (NEPA), or to complete an Environmental Impact Statement in accordance with an environmental review conducted by EPA. The MSGP proposes to get rid of the requirement for permittees to document compliance with NEPA either through a "FONSI" (finding of no significant impact) or

preparation of an Environmental Impact Statement. Instead, EPA intends to take care of NEPA compliance by itself when it finally issues the permit. Specifically, for the proposed 2013 MSGP, EPA plans to prepare an Environmental Assessment to analyze the potential environmental impacts of the permit. Therefore, under the proposed 2013 MSGP, industrial discharges subject to NSPS do not have to independently make such a determination.

Information Required for NOIs

The MSGP proposes to require more information in an applicant's "Notice of Intent" to be covered by the permit, which is submitted to EPA. Specifically, EPA now wants more information about the location of outfalls, the type of surface water into which the facility discharges and details about the stormwater pollution prevention plan (SWPPP).

Electronic Reporting Requirements

EPA is proposing to require significant quantities of site-specific data to be submitted electronically, including stormwater pollution prevention plans (SWPPPs) or SWPPP summaries. This appears to be consistent with its recent proposal to move toward electronic reporting in the NPDES program (*see prior Observer articles*). Electronic reporting increases the likelihood of enforcement, given the increased availability of data and ease of data analysis.

Endangered Species Requirements

The proposed MSGP would change the procedures that operators are required follow in order to certify their compliance with the Endangered Species Act. The applicant would be allowed to do one of the following: (1) show that there are no threatened and endangered (T&E) species or critical habitat in the discharge area; (2) rely upon a nearby discharger's certification under the new MSGP; (3) show that the discharge is not likely to adversely affect T&E species or critical habitat; (4) rely on a completed consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS); or (5) rely upon a ESA section 10 permit specific to the discharge. Compliance with some of these options may prove to be burdensome. Of course, the ESA requirements only apply when EPA is the permit issuer; these requirements do not apply when a state issues the permit. [It is interesting to note that page 9 of [EPA's fact sheet](#) explains that the new mandates to demonstrate ESA compliance are an intentional effort to "front-load" ESA procedures in order to relieve the review process for the FWS.]

Inspections

The comprehensive site inspection procedures and routine facility inspection procedures in the 2008 MSGP were essentially the same but with different documentation requirements. The proposed MSGP would combine these two inspection requirements into a single inspection mandate to eliminate redundancies.

Corrective Actions

Although the 2008 MSGP required corrective actions, the proposed permit would clarify which conditions require a SWPPP review, modify the deadlines to further define expectations for what actions must be taken by the deadlines, and rewrite and clarify the reporting requirements for reporting following corrective actions.

SWPPP Documentation and Effluent Limits

As noted in the electronic reporting section above, EPA's proposed permit would mandate greater access to SWPPPs for inspector and public consumption/review. At the same time, EPA proposed to require more detailed descriptions throughout the SWPPP and prohibiting "generic" SWPPPs. Some SWPPP best management practice mandates (particularly related to erosion and impervious surfaces) raise questions about EPA's legal authority (like flow), whether related pollutants are "associated with industrial activity" or are directly related to such discharges. See [EPA's fact sheet](#) at pages 21, 25 and 27.

To reduce permittee burden, EPA would allow certain SWPPP mandates and related documentation requirements regarding particular effluent limits to be satisfied by merely copying EPA's requirements verbatim into the SWPPP, without providing additional information. Such instances are marked with an asterisk (*) in the [fact sheet](#) (e.g., "Drain fluids from equipment and vehicles that will be decommissioned.").

In terms of meeting Water Quality Based Effluent Limits, EPA makes a very valuable statement on page 29 of its [fact sheet](#): "Control the discharge as necessary to meet applicable water quality standards in the receiving waterbody." Environmental groups have favored meeting WQS at the point of discharge, not ultimately in the receiving waterbody. **However**, after this initial statement, the remainder of the fact sheet simply references the more generic statement that discharges "must meet applicable water quality standards." **This will be a key issue.**

EPA expands anti-degradation mandates, not only for new dischargers (see [fact sheet](#) at pages 9 and 10), but also for existing discharges with "increased" discharges ([fact sheet](#) at page 31). Footnote 1 helps explain what is an "increased" discharge for stormwater purposes (which are highly variable to begin with); however, note that EPA's reference to Part 7.4 should be Part 7.7.

SWPPP Availability

To provide greater access to the SWPPP, the proposed MSGP requires that permittees either provide a weblink or URL for the SWPPP on the NOI form, or provide selected information from the SWPPP on the NOI form.

More on Effluent Limit / Clarifications

Several of the effluent limits in Part 2 of the proposed MSGP include a greater level of specificity to make the requirements more clearly articulated, transparent and enforceable. The effluent for which EPA has made clarifications include requirements for minimizing exposure, good housekeeping, maintenance, spill prevention and response procedures, and employee training.

Benchmark Values

For the proposed permit, EPA has included additional non-hardness dependent metals benchmarks for facilities that discharge into saline waters. Benchmark values in the 2008 MSGP for these metals were based on acute or chronic aquatic life freshwater criteria. These additional saline benchmark values are based on available acute ambient water quality criteria for arsenic, cadmium, copper, cyanide, lead, mercury, nickel, selenium, silver and zinc. The [fact sheet](#) on pages 50-55 discusses EPA's prior promise to review benchmark data before extending benchmarks (questionable analysis) and request for comment on a new "risk-based" monitoring protocol.