



THE CUBICAL

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EPA's New Industrial Stormwater General Permit And How It Might Impact Your State's Program

by Stephen B. Ellingson, Ph.D., special guest author

On February 19, 2021, EPA issued a new multi-sector general permit (MSGP) for stormwater discharges associated with industrial activity. A copy of this general permit can be found [here](#). The new MSGP went into effect on March 1, 2021 and applies in areas of the country where EPA is the NPDES permitting authority and has made the MSGP available for coverage. These areas include Massachusetts, New Hampshire, New Mexico, most Indian country lands, Puerto Rico, the District of Columbia, and most territories and protectorates. For now, this also includes Idaho; however, authority for industrial stormwater will transfer from EPA to Idaho on July 1, 2021. Certain federal facilities and oil and gas operations are also covered by the new general permit. Operators with current permit coverage in these areas have until May 30, 2021 to submit a new Notice of Intent (NOI) to continue permit coverage.

Most states have authority to issue their own stormwater permits, including stormwater permits associated with industrial activity. However, about two-thirds of these state specific permits are identical or similar to EPA's MSGP. It is likely that states with authority to issue their own MSGPs will incorporate most of the new MSGP requirements (described below) as their respective MSGPs come up for renewal over the next several years. Therefore, this summary will provide a head start on understanding likely future compliance obligations under the next round of renewed MSGPs.

SIGNIFICANT CHANGES TO MSGP FOR 2021

After the 2015 MSGP was issued, environmental and industry groups challenged the permit. A settlement was reached in August 2016. This settlement required EPA to fund a study on possible improvements to the MSGP. The study was conducted jointly by the National Academies of Sciences (NAS) and the National Research Council (NRC) and the results were published in 2019. EPA used results from this 2019 study and other information to promulgate several new or modified permit requirements. These requirements are briefly described in the following sections.

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More About Special Guest Author, Stephen B. Ellingson, Ph.D.

Stephen B. Ellingson is a certified groundwater professional and principal with Vatten Associates in Marietta, GA. (Website: www.vattenassociates.com) Dr. Ellingson has acquired a broad range of practical, solution-oriented experience working in senior roles in consulting, industry, and government. His experience includes 15 years as the senior environmental director reporting to executive-level business managers at a large, multi-national manufacturing company. Dr. Ellingson is currently providing litigation support on several high-profile matters involving water quality issues, is coordinating a large Superfund project, and is enhancing the environmental management system of a large transportation company.



With Two Recent Announcements, SEC Emphasis on Climate and ESG Comes Into Sharper Focus

SEC's 2021 Examination Priorities Include Greater Focus on Climate and ESG Risks

SEC's Division of Enforcement Announces Creation of Climate and ESG Task Force

On March 3rd, SEC's Division of Examination announced its examination priorities for 2021. In its announcement, the Division noted that its priorities for this year reflect a greater focus on climate and environmental, social, and governance (ESG) risks. Among other things, the Division will focus on whether firms' business continuity plans appropriately account for "[t]he growing physical and other relevant risks associated with climate change."

This focus raises an important question for businesses impacted by the Division of Examination's announcement: Where can one find well-founded and scientifically defensible forecasts of the impacts of climate change? One potential group of sources is a business's property insurers and property insurance brokers. The potential for an increase in the frequency and intensity of natural catastrophes due to a changing climate is something that the insurance industry has been considering for some time now. And in fact, this may be an issue that property insurers might raise in engineering surveys of an insured's business operations. (Such surveys are usually an integral component of a business's property insurance program.) A business grappling with how to incorporate climate-related impacts into its business continuity plans should consider reaching out to its property insurers or property insurance brokers to ask about the sorts of information that may be available to assist the business in completing this task.

On March 4th - the day after the Division of Examination announced its examination priorities for 2021 - SEC's Division of Enforcement announced the creation of a Climate and ESG Task Force. This task force will consist of 22 members from SEC headquarters, regional offices, and various specialized units within the Division of Enforcement. The mission of the task force will be to develop initiatives to proactively identify ESG-related misconduct.

According to the announcement, the Climate and ESG Task Force will use sophisticated data analysis techniques "[t]o mine and assess information across [businesses], to identify potential violations." This statement bears a faint echo to what EPA has considered to be one of the primary benefits of its multimedia compliance inspections. This is that one can detect violations of environmental requirements by analyzing and comparing reports, records, and other data across different media, and then identifying gaps or inconsistencies within such data. While the data analysis techniques to be deployed by the Climate and ESG Task Force seem to focus more on external inconsistencies (i.e., comparing one business with another business) as opposed to internal inconsistencies (i.e., comparing different sources of data from the same facility), the basic idea is the same. Namely, inconsistencies in reports, records, and, data can lead to the identification of misconduct or noncompliance.



Swing Into Golf Season: The Rules of Golf and Environmentally Sensitive Areas

With the golf world having turned its eyes towards Augusta, Georgia last week for the first men's major tournament of 2021, I thought I would close out this month's edition of The Cubical with an article on the intersection of the Rules of Golf and environmental protection. Several years ago, I was watching a golf tournament on television and noticed something that I had never seen before - a hazard area marked by green stakes. I was familiar with red, yellow, and white stakes. However, I had never seen green stakes before.

As it turns out, the green stakes delineated an "environmentally sensitive area." The key difference between an environmentally sensitive area and other hazards marked out by red or yellow stakes is that no one is allowed to enter an environmentally sensitive area to look for a ball or to try to play a shot. A player whose ball comes to rest in such an area must take whatever penalty and relief is called for under the rules. The purpose for prohibiting such entry, of course, is to protect the environmentally sensitive area by not allowing any access, even (and perhaps especially) when a professional tour event is being played.

So, what exactly are "environmentally sensitive areas" and how are they handled under the Rules of Golf? For starters, the Rules of Golf underwent a significant overhaul in 2019. As a result, the concept of an "environmentally sensitive area" has been subsumed into a broader category of areas that are off limits. These areas are called "no play zones." Under the Rules, a "no play zone" is any part of the course where a player is not allowed to play his or her ball. Environmentally sensitive areas can be designated as no play zones by a committee with responsibility for a course or a competition. No play zones are usually designated as penalty areas, and are marked by yellow or red stakes with green tips. Penalty and relief correspond with those of "yellow" or "red" penalty areas. The key difference of course is that in most cases, no one can enter a no play zone to find, retrieve, or play the ball.

So, what happens if someone enters a no play zone in contravention of a prohibition on such entry? In terms of play, committees responsible for courses or competitions have latitude to establish penalties for such breaches of conduct, up to and including removal from the course or disqualification. Sometimes though, this is the least of a golfer's worries. If an environmentally sensitive area has been designated as a no play zone because of federal, state, or local regulations restricting access, a golfer who wanders into such an area to retrieve a ball may receive a warning or citation from a governmental environmental or law enforcement official.

Bottom line then is that when you're out for a round of golf, enjoy the scenery, have a good time, but don't wander into environmentally sensitive areas - not even to retrieve your ball. By avoiding these areas, you will not only protect the environment,

but you will also avoid incurring the wrath of a golf course superintendent or law enforcement official.

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