



June 28, 2019

*Via Email (tpor461@ECY.WA.GOV)*

Mr. Travis Porter  
Department of Ecology  
PO Box 47696  
Olympia, WA 98504-7600

Re: Draft Industrial Stormwater General Permit

Dear Mr. Porter:

The undersigned associations appreciate the opportunity to comment on the Industrial Stormwater General Permit (Permit). The Permit is designed to protect water quality, a goal shared by our associations and members.

Our members are integral to Washington State's economy and global role in manufacturing, trade, shipping, energy, and logistics. They generate billions in annual wages for thousands of Washington employees. In addition, hundreds of our members hold the Permit and have now nearly two decades of experience with the Permit. The Permit revisions proposed below are based on that experience. Our members are also committed to achieving and maintaining the highest water quality possible through compliance with the Permit.

Our proposed Permit language in the comments below are intended to improve compliance with the Permit by bringing needed certainty and predictability to Permit compliance. Our focus is on clear definitions and delineations on what activities are covered under the Clean Water Act NPDES Permit and providing a predictable and reliable process for Permit implementation through proactive Ecology oversight and enforcement of the Permit.

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**Special Condition S1.A.1 Table 1 – Transportation Activities Requiring Permit Coverage**

(Add the following text to the list of transportation facilities in Table 1) Coverage is required for only those portions of the Transportation facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under 40 CFR 122.26(b)(14)(1)-(vii) or (ix)-(xi) as associated with industrial activity.

**Explanation:** The proposed revision clarifies that Washington State’s implementation of the Clean Water Act is consistent with EPA rules and policy and the practice of other states.

The Federal National Pollutant Discharge Elimination System (NPDES) requires NPDES permits for stormwater discharges that are “associated with industrial activity,” discharges from separate storm sewer systems, or discharges EPA or an authorized State determine contribute to a violation of water quality standards or are a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2)(B), (E).

For transportation facilities, EPA defines as “associated with industrial activity” discharges associated with vehicle maintenance, equipment cleaning, and airport deicing. Facilities with these activities require the Permit. However, EPA limited the scope of the required NPDES coverage to the portions of the facility engaged in those three activities:

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. *Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;*

40 C.F.R. § 122.26(b)(14)(viii) (emphasis added). Consistent with EPA policy, states implementing the NPDES program do not require an NPDES Permit for stormwater discharges at transportation facilities except where the discharges are from vehicle maintenance, equipment cleaning operations, or airport deicing.

The proposed language makes the Permit consistent with the practice of EPA and other U.S. states.

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#### **Special Condition S1.A.1 Table 1 – Marine Construction Activities Requiring Permit Coverage**

Remove text including “Marine Construction” and “ECY003” from activities requiring coverage under the Permit.

**Explanation:** The ISGP, as a NPDES permit, can only cover discharges associated with industrial activities as defined in 40 C.F.R. § 122.26(b)(14).

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#### **Special Condition S1.B (new section 4) – Significant Contributors of Pollutants**

4. A determination by Ecology that a facility is a **significant contributor of pollutants** shall be made by administrative order setting forth the basis for the determination and deadlines to obtain coverage under this permit.

**Explanation:** The Permit should include a clear process for a significant contributor of pollutants determination including adequate notice of and right to review before the Pollution Control Hearings Board the determination before it is binding on a facility.

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### **Special Condition S1.B.1 and S1.C.3 – Significant Contributors of Pollutants**

Remove text “including groundwater.” (S1.B.1), and Section S1.C.3 in its entirety.

**Explanation:** Discharges to groundwater are generally not subject to regulation under the Clean Water Act although recent case law has expanded jurisdiction of the Clean Water Act to cases where a groundwater discharge results in the discharge of pollutants to surface water. Discharges to groundwater that are not significant contributors of pollutants to Waters of the United States should not be covered under the delegated federal Permit.

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### **Special Condition S1.E.1 – Discharges to Ground**

Retain text in current Permit: For sites that discharge to both surface water and ground water, the terms and conditions of this permit shall apply to all ground water discharges. However, Permittees are not required to sample on-site discharges to ground (e.g., infiltration), unless specifically required by Ecology. (Condition G12).

**Explanation:** Ecology is improperly proposing in the draft revisions to condition S1.E.1 to expand coverage of the Permit to all groundwater discharges regardless of any connection to surface water quality and without any express provisions in the Permit on how a Permittee should comply with all Permit conditions with respect to a groundwater discharge. Condition S3.B.5 requires that the SWPPP sampling plan identify all discrete groundwater discharges and requires monitoring at all discharge points. The Permit does not describe where discrete groundwater discharges should be monitored. The Permit further lacks any benchmarks for groundwater discharges and thus no indication on what basis and how a Permittee should respond to groundwater discharge monitoring data.

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### **Special Condition S3.A (new subsection 6) SWPPP Review and Approval**

#### 6. SWPPP Review and Approval

If the Permittee files its SWPPP with Ecology, including any submission under Special Condition S3.A.3, the SWPPP shall be deemed to fully comply with the requirements of Special Condition S3 at the time of submission unless Ecology notifies the Permittee of any deficiencies. The Permittee shall within 30 days re-submit the SWPPP to address any deficiencies identified by Ecology.

**Explanation:** Many Permittees already retain “qualified personnel” to prepare facility SWPPPs. SWPPPs are required to be available at the time of Ecology inspections. Many facilities are nonetheless subject to third-party notices of intent to sue and legal actions under the citizen suit provisions of the Clean Water Act alleging violations of each mandatory requirement in Condition S3. The proposed language would provide an option for Ecology review of SWPPPs and opportunity to identify any deficiencies in the document. This would provide more assurance of compliance with the Permit and avoid after the fact allegations that a SWPPP is not in compliance with the Permit.

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#### **Special Condition S3.A.2 (new subsection e) – Stormwater Management Manuals**

e. Documentation in a SWPPP that the BMPs selected are ***demonstrably equivalent*** shall be deemed to be deemed to fully comply with Special Condition S3.A.3.d at the time of SWPPP submission unless Ecology notifies the Permittee of any deficiencies and provides the technical basis for a BMP that Ecology is requesting including (1) the method and basis for choosing the stormwater BMP; (2) the pollutant removal performance expected from the practice requested by Ecology; (3) the technical basis supporting the performance claims for the practice requested; (4) an assessment of how the requested practice complies with water quality standards; and (5) an assessment of how the requested practice will satisfy both applicable federal technology-based treatment requirements and state requirements to use all known, available, and reasonable methods of prevention, control, and treatment.

**Explanation:** Ecology recently revised the stormwater management manuals with minimal public involvement, no response to comments, and no right to review. The Permit incorporates many of the BMPs from the manuals as mandatory Permit requirements unless the Permittee has documented that alternative BMPs are demonstrably equivalent. The proposed condition simply requires Ecology to document why a BMP in the manual is preferable to a demonstrably equivalent BMP. This information should be readily available to Ecology and will provide appropriate and necessary information for a Permittee to review and understand the basis for proper BMP selection.

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#### **Special Condition S4.B.1.b – First Fall Storm Event**

Replace text “on or after September 1<sup>st</sup>” with “on or after October 1<sup>st</sup>” (Retain text in current Permit).

**Explanation:** The proposed language retains the requirements in the current Permit for a first fall event sampling event after October 1<sup>st</sup> each year. The current Permit is consistent with long-term meteorological data on the gradual break-down of the seasonal Pacific high pressure and the on-set of rains in the Pacific Northwest. Moving this date back to September 1<sup>st</sup> adds no useful long-term data on the performance of stormwater management under the Permit and unreasonably adds expense and burden to facilities to plan for additional stormwater sampling in the third quarter.

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### **Special Condition S4.B.2 (new subsection e) Sampling Locations**

e. The Permittee's designation of sample locations, including any determination that discharge points are substantially identical and any changes or updates to sample locations per S4.B.2.d, shall constitute compliance with the Permit. If Ecology notifies the Permittee that changes or updates to sample locations are required, the Permittee has 30 days from the date of notice to update its designation and SWPPP.

**Explanation:** Permittees make good faith efforts to comply with the Permit in the designation of sampling locations and notify Ecology of the specific sampling points designated in the SWPPP sampling plan. There should be a presumption of Permit compliance unless Ecology during a facility inspection or otherwise determines that alternative sampling points are required. In that event, Permittees should have 30-days to respond to update the sampling plan and outfall designation or provide documentation and justification as to why the Ecology suggestion is not substantially identical.

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### **Special Condition S8.D.5 Deadline for Level 3 Corrective Actions**

Modify test to reflect: ".....no later than September 30<sup>th</sup> the following year 270 days from the date Ecology approves the engineering report for facilities that are less than 10 acres and two years from the date Ecology approves the engineering report for facilities that are greater than 10 acres."

**Discussion:** The Permit requires a facility subject to a Level 3 Corrective Action to submit an engineering report to Ecology by May 15 and to install the proposed treatment by September 30 of the following year. However, particularly for large or complex facilities, Ecology's approval of engineering reports is frequently not completed in time to allow the Permit holder to complete installation of treatment by September 30.

The proposed language replaces the September 30 deadline with a two hundred seventy-day period for sites that are less than 10 acres and two years for facilities that are greater than 10 acres. These deadlines present a reasonable and a minimal amount of time necessary for facilities to engage in necessary engineering and construction to install a treatment system. In many cases even these amounts of time will be inadequate. However, eliminating the September 30 deadline clarifies that a Permit holder is not liable in the event that Ecology is unable to render a determination to approve or disapprove an engineering report.

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### **Special Condition S10 (New Sections D and E). Compliance with Standards**

Add new Sections S10.D and S10.E, as follows:

A. The required response to such discharges is defined in section S10.D and E below.

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D. A Permittee remains in compliance with S10.A despite any discharges prohibited by S10.A when the Permittee notifies Ecology in writing within 30 days of becoming aware, based on credible site-specific information that a discharge from the facility is causing or contributing to a known or likely violation of Water Quality Standards in the receiving water. Written notification provided under this subsection shall, at a minimum, identify the source of the site-specific information, describe the nature and extent of the known or likely violation in the receiving water, and explain the reasons why the discharge is believed to be causing or contributing to the problem. For ongoing or continuing violations, a single written notification to Ecology will fulfill this requirement.

E. In the event that Ecology determines, based on a notification provided under S10.D or through any other means, that a discharge by the Permittee is causing or contributing to a violation of Water Quality Standards in a receiving water, Ecology will notify the Permittee in writing that corrective action in accordance with S8 is required, unless:

1. Ecology also determines that the violation of Water Quality Standards is already being addressed by a Total Maximum Daily Load (TMDL) or other enforceable water quality cleanup plan; or
2. Ecology concludes the Permittee's contribution to the violation will be eliminated through implementation of other permit requirements.

**Discussion:** Based upon language in the Phase I Municipal Permit, the proposed language provides a pathway for promptly identifying and addressing potential violations of water quality standards through the adaptive management process already built into the Permit.

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## Appendix 2 - Definitions

*Modify "Discharger" by adding a definition for "Operator" as follows:*

*Discharger means ~~the operator of the industrial facility covered by this General Permit, an owner or operator of any facility or activity subject to regulation under Chapter 90.48 RCW or the Federal Clean Water Act.~~*

Operator – any entity with a stormwater discharge associated with industrial activity that meets either of the following two criteria:

1. The entity has operational control over industrial activities, including the ability to make modifications to those activities; or
2. The entity has day-to-day operational control of activities at a facility necessary to ensure compliance with the permit (e.g., the entity is authorized to direct workers at a facility to carry out activities required by the permit).

Mr. Travis Porter

June 26, 2019

Page 7

**Discussion:** The Permit currently uses the term Discharger to describe the operator subject to coverage under the Permit. For example, the Permit uses the term to distinguish the (existing) discharger and a proposed new discharger in explaining Permit Coverage transfers (Condition S2.D.1). The Permit uses the term to describe the geographic location of the operator's facility for purposes of identifying receiving water-specific conditions (Condition S6.B; G4; G5). Third, the Permit uses the term Discharger to identify the entity authorized to appeal Permit terms or modify Permit coverage (Condition G22, G23).

The proposed definition of discharger is based on that adopted by California in its General Permit for Storm Water Discharges Associated with Industrial Activities. The proposed definition of Operator is adopted from Appendix A of EPA's Multi-Sector General Permit (MSGP). Adopting these definitions will clarify that the entity identified in these Permit conditions is the facility's operator and clarify the standard for identifying a facility operator.

Thank you for your consideration of our comments on the draft Permit.

