

June 27, 2019

Ms. Heather Bartlett
Mr. Travis Porter
Washington State Department of Ecology
Water Quality Program
P.O. Box 47696
Olympia, WA 98504-7696

Re: Comments on Washington's Draft National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated with Industrial Activities

Dear Ms. Bartlett and Mr. Porter:

The purpose of this letter is to provide comments on Washington's draft National Pollutant Discharge Elimination System (NPDES) Industrial Stormwater General Permit (ISGP) released May 1, 2019.

The Port of Seattle (Port) supports the efforts to improve stormwater quality put forth in the draft ISGP. Managing stormwater discharges and protecting Washington's receiving waters is a critical goal for the Port. In today's competitive economic climate, the ISGP has a major economic impact on Washington ports, port customers and related businesses. These comments are submitted with the aim of achieving environmental protection and regulatory predictability while balancing the economic needs of local and regional businesses.

The Port appreciates that this draft maintains important water quality benchmarks and includes new language addressing:

- clarified multiple sampling events per day and per quarter
- added electronic Stormwater Pollution Prevention Plan option to improve public availability
- clarified the Conditional No Exposure Exemption

The Port does not support expansion of required permit coverage beyond the federal NPDES program when there are no compelling and science-supported reasons to do so. Ecology's proposed expansions include adding industries beyond those federally defined, requiring permit coverage for areas without industrial activity as defined per 40 CFR 122.26, and adding discharges to groundwater as covered activities. These changes could cause significant operational and economic impacts to local and regional businesses with no clear benefit or improvement to water quality. Further, many of these changes are beyond the scope of Ecology's delegated authority under the Clean Water Act. To the extent Ecology seeks to impose more stringent state requirements, Ecology should clarify that these requirements are pursuant to the State Water Pollution Control Act (RCW Chapter 90.48).

The Port's suggestions for improving the draft ISGP language fall into five categories as follows:

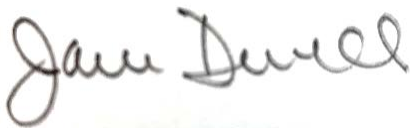
1. Explicitly announce when Ecology is expanding the ISGP's scope, and under what authority, to allow for a truly transparent public process
2. Use science to justify the expansion of the ISGP to new activities and provide a public process
3. Acknowledge those provisions of the ISGP that Ecology regards as enforceable under the Clean Water Act, and those Ecology has adopted under state authority alone
4. Eliminate or clarify definitions that inject uncertainty into the ISGP, in order for permittees to better understand and implement permit requirements
5. Provide additional time for level three corrective actions for complex facilities, consistent with what is typically necessary for facilities installing large treatment systems

The Port also proposes better communication between permittees and Ecology. As permit holders, we have direct experience implementing the ISGP and should have the opportunity to inform subsequent permit drafts. Better communication would also help ensure consistency between Ecology regions in their interpretation of the ISGP. Consistency is critical, particularly for permittees with operations in multiple Ecology regions. The Port supports and would be willing to help organize a permit workgroup for mutual benefit.

We believe the state can continue a strong, consistent, science-based stormwater regulatory framework to improve water quality without negatively impacting the state economy. We include Attachment A with this letter, which contains more detail. Thank you in advance for considering our comments.

If you have any questions concerning the contents of this letter or attachment, please contact me at (206) 787-4668.

Sincerely,



Jane Dewell
Stormwater Program Manager
Port of Seattle
Pier 69 – 2711 Alaskan Way
Seattle, WA 98121
Phone: (206) 787-4668
Email: dewell.j@portseattle.org

cc: Sandra Kilroy, Director, Maritime Environment and Sustainability – Port of Seattle
Elizabeth Black, Senior Port Legal Counsel – Port of Seattle

Attachment A: Port of Seattle’s Specific Comments on Washington’s Draft National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for Stormwater Discharges Associated with Industrial Activities

Comment 1 – Transition from SIC to NAICS Codes

Permit Reference: S.1, PERMIT COVERAGE, page 1

Comment:

The Port is supportive of the transition from SIC to NAICS codes presented in this section, however, it would be useful to include a comparison table between the two systems to facilitate the transition for existing and new permittees. The U.S. Environmental Protection Agency (EPA) Multi-Sector General Permit for industrial dischargers Appendix N contains a crosswalk between the two industrial classification systems consistent with the definition of industrial activity at 40 CFR 122.26, and is a good model.

Suggested Revision:

Replace Table 1. with the table provided in Appendix N of the EPA Multi-Sector General Permit to be consistent with definition of industrial activities at 40 CFR 122.26.

Comment 2 – Transportation Sector Facility Area of Coverage

Permit Reference: S.1, Table 1 and Definition for Industrial Activity, pages 1-3

Industrial Activities	NAICS Groups
Transportation facilities which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations.	
<ul style="list-style-type: none"> • Railroad Transportation 	482xxx, 488210
<ul style="list-style-type: none"> • Transit and Ground Passenger Transportation 	485xxx, 488490, 487110
<ul style="list-style-type: none"> • Truck Transportation 	484xxx
<ul style="list-style-type: none"> • Postal Service 	491xxx
<ul style="list-style-type: none"> • Water Transportation 	483xxx, 487210, 4883xx, 532411
<ul style="list-style-type: none"> • Air Transportation 	481xxx, 487990
<ul style="list-style-type: none"> • Petroleum Bulk Stations and Terminals 	4247xx

Comment:

For the purposes of coverage under the NPDES permit program, 40 CFR 122.26(b)(14)(viii) defines industrial activity for transportation facilities as: “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” (emphasis added). Ecology should add language to this permit clarifying the extent of NPDES authority consistent with 40 CFR 122.26.

Suggested Revision:

Language or a footnote should be added to Table 1 clarifying that “only those portions of transportation sector facilities that are either involved in vehicle maintenance, equipment cleaning operations, or airport deicing operations are covered under this permit.” To the extent Ecology intends to regulate discharges of stormwater beyond what is regulated under the Clean Water Act, Ecology should clarify that it is doing so pursuant to the State Water Pollution Control Act.

Industrial Activities	NAICS Groups
<u>Those portions of transportation facilities which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations. Only those portions of transportation sector facilities that are either involved in vehicle maintenance, equipment cleaning operations, or airport deicing operations are covered under this permit.</u> <ul style="list-style-type: none"> • Railroad Transportation • Transit and Ground Passenger Transportation • Truck Transportation • Postal Service • Water Transportation • Air Transportation • Petroleum Bulk Stations and Terminals 	482xxx, 488210 485xxx, 488490, 487110 484xxx 491xxx 483xxx, 487210, 4883xx, 532411 481xxx, 487990 4247xx

Comment 3 – Addition of Forestry Machinery and Equipment Rental and Leasing and Marine Construction Sectors

Permit Reference: S.1, Table 1, pages 1-3

Comment:

Table 1 includes the addition of two new industrial sectors covered under this permit: Construction, Transportation, Mining, and Forestry Machinery and Equipment Rental and Leasing; and Marine Construction. The justification for including these two sectors is not clear in the permit or Fact Sheet. These sectors do not appear to meet the definition of industrial activities in 40 CFR 122.26. If Ecology has designated these sectors as “significant contributors” of pollutants, that should be

explained, along with confirmation of its authority to do so with EPA's approval under the Clean Water Act. There is no discussion in the draft ISGP, Fact Sheet or Small Business Economic Impact Analysis of how Ecology determined that these sectors should be covered under the ISGP. The Port and other affected industry entities were not notified of prior determinations or any formal process by Ecology to make this determination. Forestry Machinery and Equipment Rental and Leasing, and Marine Construction should be removed from the scope of the ISGP until a formal designation process has been completed by Ecology that includes scientific analysis and public input.

Suggested Revision:

Remove Forestry Machinery and Equipment Rental and Leasing, and Marine Construction and NAICS Codes 53241x and ECY003 from Table 1.

Comment 4 – Requiring ISGP Coverage for Discharges to Groundwater that Ecology Considers to be a Significant Contributor of Pollutants

**Permit Reference: S1.C.3, Facilities Not Required to Obtain Coverage, page 3
S1.B.1, Significant Contributor of Pollutants, page 3**

S1.C.3: Industrial facilities that discharge stormwater only to groundwater (e.g., on-site infiltration) with no discharge to surface waters of the State under any condition, provided the facility doesn't meet the requirements of S1.B.1.

S1.B: Ecology may require a facility to obtain coverage under this permit if Ecology determines the facility:

1. Is a significant contributor of pollutants to waters of the State, including groundwater.

Comment:

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters¹. The EPA recently issued an interpretive statement concluding that releases of pollutants to groundwater are categorically excluded from the CWA's permitting requirements because Congress explicitly left regulation of discharges to groundwater under other state and EPA statutes. Based on the EPA's analysis and careful consideration of public input, EPA concluded that releases of pollutants to groundwater are excluded from the CWA's permitting requirements, regardless of whether that groundwater is hydrologically connected to a surface water². Discharges to groundwater in Washington are regulated through the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As such, the CWA NPDES permit program does not apply to discharges to groundwater.

¹ <https://www.epa.gov/laws-regulations/summary-clean-water-act>

² <https://www.epa.gov/npdes/releases-point-source-groundwater>

In addition, it is unclear how Ecology would determine whether a facility is a significant contributor of pollutants to groundwater. Fact Sheet (page 25) briefly summarizes what Ecology would consider when determining whether a facility is a *significant contributor of pollutants* to groundwater but does not identify or define a specific process that would be followed, including how a facility would appeal a *significant contributor of pollutants* determination by Ecology.

Suggested Revision:

The language in S1.C.3 referring to significant contributor of pollutants under S1.B.1 and the language referring to groundwater under S1.B.1 should be removed from the final version of the ISGP.

S1.C.3: Industrial facilities that discharge stormwater only to groundwater (e.g., on-site infiltration) with no discharge to surface waters of the State under any condition, ~~provided the facility doesn't meet the requirements of S1.B.1.~~

S1.B: Ecology may require a facility to obtain coverage under this permit if Ecology determines the facility:

1. Is a significant contributor of pollutants to waters of the State, ~~including groundwater.~~

Comment 5 – Requiring ISGP Coverage for Discharge Points to Groundwater

Permit Reference: S1.E.1, Discharges to Ground, page 5

S1.E Discharges to Ground

1. For sites with a discharge point to groundwater, the terms and conditions of this permit shall apply.

Comment:

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters³. EPA recently issued an interpretive statement concluding that releases of pollutants to groundwater are categorically excluded from the CWA's permitting requirements because Congress explicitly left regulation of discharges to groundwater under other state and EPA statutes. Based on the EPA's analysis and careful consideration of public input, EPA concluded that releases of pollutants to groundwater are excluded from the CWA's permitting requirements, regardless of whether that groundwater is hydrologically connected to a surface water⁴. Discharges to groundwater in Washington are regulated through the SDWA, RCRA, and CERCLA. As such, the CWA NPDES permit program does not apply to discharges to groundwater, and specifically to releases of a pollutant from a discharge point or point source to groundwater. Ecology should consider developing a sister program

³ <https://www.epa.gov/laws-regulations/summary-clean-water-act>

⁴ <https://www.epa.gov/npdes/releases-point-source-groundwater>

to the Underground Injection Control (UIC) Program under the authority of the SDWA to address point source discharges to groundwater that could impact drinking water sources.

Suggested Revision:

The language in S1.E.1 should be deleted in the final version of the ISGP.

S1.E Discharges to Ground

~~1. For sites with a discharge point to groundwater, the terms and conditions of this permit shall apply.~~

2.—1. Facilities with a discharge point to groundwater through an underground injection control well shall comply with any applicable requirements of the Underground Injection Control (UIC) regulations, Chapter 173-218 WAC.

Comment 6 – Consistent Attainment Annual Sample

Permit Reference: S4.B.7, Sampling Requirement, page 19

7. The Permittee can reduce monitoring to once a year for a period of three years (12 quarters) based on consistent attainment of benchmark values when: ...

c. The annual sample must be taken during the 4th quarter. A facility may average the annual sample with any other samples taken over the course of the 4th quarter.

d. A Permittee whose annual sample exceeds the benchmark during consistent attainment is no longer allowed to claim consistent attainment. The Permittee must begin sampling in accordance with S4.B.

Comment:

Ecology should clarify that the consistent attainment annual sample does not include the first fall sample to remove any confusion about sampling requirements for those who have achieved consistent attainment.

Suggested Revision:

c. The annual sample must be taken during the 4th quarter. A facility may average the annual sample with any other samples taken over the course of the 4th quarter. The annual sample does not include sampling the first fall storm event.

Comment 7 – First Fall Storm Event Sampling and Discharge Monitoring Report (DMR)

**Permit Reference: S4.B.1.a and S4.B.1.b, Sampling Requirements, pages 17
S5.A.3, Benchmarks and Sampling Requirements, page 20**

Comment:

In draft 2020 ISGP listening sessions, Ecology proposed to require a separate DMR for the “first fall storm event” and to move the timing from October 1st to on or after September 1st, so that Ecology can improve its data collection. The change in timing of the “first fall storm event” to potentially encompass two sampling quarters creates significant difficulties for Permittees to collect samples representative of quarterly discharges from a facility, and limits Permittees ability to average samples based on timing of the “first fall storm event” and representative benchmark samples. The benefits of such a change are not clear and do not outweigh the complications. Ecology’s 2009 ISGP Fact Sheet included references to the 6415 Data Analysis Report, which “describes the data for most parameters as exhibiting a distinctly right-skewed distribution, due to the presence of numerous outliers in the upper end of the data range. This distribution is commonly observed in water quality data that are collected during stormwater sampling, due to the influence of sporadic, ‘first flush’ events that are associated with high pollutant concentrations. After the ‘first flush,’ discharges typically have lower pollutant concentrations.” Hence, the “first fall storm event” is not representative of quarterly facility stormwater discharges.

The Port suggests that the “first fall storm event” be a stand-alone report-only sample event and not part of benchmark sampling.

Suggested Revision:

B. Sampling Requirements

1. Quarterly Benchmark and First Fall Storm Event Sample Timing and Frequency

a. The Permittee shall sample the *discharge* from each designated location at least once per quarter for comparison to benchmarks as described in Part S5.A.3:

1st Quarter = January, February, and March

2nd Quarter = April, May, and June

3rd Quarter = July, August, and September

4th Quarter = October, November, and December

b. In addition to the benchmark sampling required at S4.B.1.a, Permittees shall sample the *stormwater discharge* from the *first fall storm event* each year. “First fall storm event” means the first time on or after September 1st of each year that precipitation occurs and results in a *stormwater discharge* from a *facility*. Results of the *first fall storm event* sampling shall be reported on a separate DMR for report-only purposes. Only if the Permittee is not able to collect a benchmark sample during the quarter in which the *first fall storm event* sample is collected, then the *first fall storm event* sample analysis result will then also be used for the benchmark sample DMR for that quarter.

Similar changes should be made in Part S5.A.3 to make clear that first fall storm event sample analysis results will be report-only and not used as part of quarterly benchmark DMR submittals unless a Permittee has no other samples in that quarter.

Comment 8 – Timely Response to Engineering Reports and Extension Requests

Permit Reference: S8.C.4, Level 2 Corrective Actions – Structural Source Control BMPs; S8.D.3, and S8.D.5, Level 3 Corrective Actions – Treatment BMPs, pages 35-36

Comment:

In addition to providing insufficient time to adequately implement corrective actions, the timing and duration of extension request and engineering report submittal and approval conflicts with the preferred construction period for stormwater treatment projects. Facility managers cannot approach management for design funding/approval until they are certain the extension has been declined by Ecology, and an organization cannot responsibly proceed with design/construction of a complex treatment system until they have certainty that Ecology has approved the design approach.

For example, the draft permit provides Ecology 60 days to approve/decline a level 2 extension request, and then, if declined, provides only 45 days for the Permittee to implement the level 2 corrective action. Similarly, with the level 3 extension letter, Ecology has 60 days to approve/decline and then, if declined, provides only 75 days for the Permittee to design and construct a complete treatment system.

Ideally, the submittal/approval process would happen earlier in the year so that design can be completed in winter/spring, and construction start no later than June 1st. This would require shifting the ISGP reporting year by one quarter: from October 1 to September 30. If this is not possible, extension requests and engineering reports should be reviewed and approved/declined by Ecology in no more than 30 days to maximize Permittees design and construction window and provide certainty to the process. These submittals/approvals should be automatically approved after 30 days, similar to the Notice of Intent process.

Suggested Revision:

Level Two Corrective Actions – Structural Source Control BMPs

S8.C.4.c:

To request a time extension or waiver, a Permittee shall submit a detailed explanation of why it is making the request (technical basis), and a Modification of Coverage form to Ecology in accordance with Condition S2.B, by May 15th prior to Level 2 Deadline. Ecology will approve or deny the request within ~~60~~ 30 days of receipt of a complete Modification of Coverage request. After 30 days, the request will be automatically approved if no response is received by the Permittee.

Level Three Corrective Actions – Treatment BMPs

S8.D.3.b

The engineering report shall be submitted no later than the May 15th prior to the Level 3 deadline, unless an alternate due date is specified in an order. Ecology will approve or deny the engineering report within 30 days of receipt of the engineering report. After 30 days, the engineering report will be automatically approved if no response is received by the Permittee.

S8.D.5.c

To request a time extension or waiver, a Permittee shall submit a detailed explanation of why it is making the request (technical basis), and a Modification of Coverage form to Ecology in accordance with Condition S2.B, by May 15th prior to Level 2 Deadline. Ecology will approve or deny the request within ~~60~~ 30 days of receipt of a complete Modification of Coverage request. After 30 days, the request will be automatically approved if no response is received by the Permittee.

Comment 9 – Timeline for Level 3 Corrective Actions

Permit Reference: S8.D.5, Level 3 Corrective Actions – Treatment BMPs, page 36

5. Level 3 Deadline: The Permittee shall sign/certify and fully implement the revised SWPPP [Stormwater Pollution Prevention Plan] according to Permit Condition S3 and the applicable Stormwater Management Manual as soon as possible, but no later than September 30th of the following year.

Comment:

The timeline for implementing level 3 corrective actions provided in the ISGP does not allow for the time needed for approval of the engineering report; collecting necessary design data; and completing design, procurement, and construction. Additionally, like many large organizations, the Port has a lengthy and complex capital program budgeting and approval process, and detailed procurement procedures that often require more than one year to obtain project approvals, secure funding, and procure a contractor. Large, complex facilities require more time to implement level 3 corrective actions than is outlined in the ISGP.

Suggested Revision:

5. Level 3 Deadline: The Permittee shall sign/certify and fully implement the revised SWPPP according to Permit Condition S3 and the applicable Stormwater Management Manual as soon as possible, and according to the following schedule.
- a. For facilities treating 10 acres or less, no later than September 30th of the following year.
 - b. For facilities treating more than 10 acres or incurring a design and construction cost greater than \$1,000,000, no later than September 30th two years after triggering the level 3 requirement. For these facilities, the permittee shall institute an aggressive, enhanced

BMP program to minimize impacts to water quality until such time as the treatment system is operational.

- c. For both S8.D.5.a and b, if the engineering report is not approved by Ecology on or before June 1 prior to the Level 3 deadline, then the Level 3 deadline shall be automatically extended to four months from the date the Engineering Report is approved by Ecology.