

June 28, 2019
DA 062819 001
Via Electronic Submittal

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REF: Ecology Request for Comments on Proposed Changes to WA 2020 Industrial Stormwater General Permit

Dear Mr. Porter:

The Boeing Company has a strong commitment to protecting the environment and minimizing the potential impact from operations on the environment. With regards to stormwater, Boeing has been an industry leader by pursuing proactive approaches that focus on a combination of measures, such as restoring ecological functions utilizing green infrastructure in an environmentally and economically sustainable manner, and in implementing state of the art BMPs, such as advanced stormwater treatment. Boeing therefore gives careful consideration to Ecology's stormwater regulations and policies.

The Department of Ecology (Ecology) has requested comment on its proposed changes to the Washington 2020 Industrial Stormwater General Permit (ISGP). Boeing appreciates Ecology's outreach to public stakeholders and listening sessions on the proposed changes to the ISGP.

Our technical comments on specific sections of the permit are provided in Attachment 1.

The following highlights some of the key concerns identified in the attachment:

- Special Condition S.1.B.1 – Significant Contributor of Pollutants
- Special Condition S.1.E.1 – Discharges to Ground Water
- Special Condition S3 – Specific SWPPP requirements
- Special Condition S6 – Compliance Schedules
- Special Condition S8 – Level 3 Treatment deadline



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Boeing appreciates Ecology's consideration of these comments.

Please address any questions regarding Boeing's comments to Lori Blair, at lori.n.blair@boeing.com, (425) 306-4661.

Sincerely,

A handwritten signature in black ink, appearing to read 'S Shestak', written over a horizontal line.

Steve Shestak
Director, Environment
Environment, Health and Safety

cc:

Susan Champlain
Manager, Government Operations

Enclosures

Attachment 1: June 28, 2019 Draft 2020 Industrial Stormwater General Permit Technical Comments

ATTACHMENT 1

The following are the Boeing comments to the Draft 2020 Industrial Stormwater General Permit (ISGP). Specific questions are in bold and any proposed changes identified by Boeing are indicated by underlined text in the following comments.

1. Special Conditions S1.A.1 – Facilities Required to Seek Coverage Under This General Permit

The Washington Department of Ecology (Ecology) administers the Federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program under authority delegated to the State of Washington. RCW 90.48.260. Under this delegated authority, Ecology must implement the NPDES program in conformance with the CWA and applicable implementing regulations.

The Draft 2020 ISGP includes proposed revisions to Special Condition S1.A.1 that modify Table 1 to substitute North American Industry Classification System (NAICS) codes for Standard Industrial Classification (SIC) codes in Table 1 and make corresponding changes through the Draft 2020 ISGP (e.g., S1.B.3, Table 3). Because the definition of “Industrial Activity” included in Appendix 2- Definitions incorporates by reference the content of Table 1, the proposed revision would also change the definition of “Industrial Activity.” This proposed revision would modify the definition of “Industrial Activity” such that it that is different than EPA’s definition of “Industrial Activity” in 40 C.F.R. § 122.26(b)(14), which continues to define “industrial activity” for purposes of the NPDES program based on SIC codes.

Moreover, the use of NAICS codes rather than SIC codes would introduce confusion because other parts of the ISGP reference EPA’s definition of “Industrial Activity” in 40 C.F.R. § 122.26(b)(14). For example, the ISGP’s definition of “Industrial Activity” in Appendix 2 states that “Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i)-(xi) in a different format”; this statement would not be correct if the 2020 ISGP were to use NAICS codes rather than SIC codes.

Accordingly, the final version of S1.A.1 and the definition of Industrial Activity in Appendix 2 should remain unchanged from the definition included in the current, 2015 ISGP, and any other references to SIC codes in the ISGP should also remain unchanged.

2. Special Conditions S1.B.1 - Significant Contributors of Pollutants

S1.B.1 in the Draft 2020 ISGP requires permit coverage even if the only significant contribution of pollutants is from stormwater to groundwater of the State. This is directly contrary to Section S1.A, which says that industrial facilities are only covered if they discharge to a “surface waterbody” or to a storm sewer system that drains to a “surface

waterbody.” Ecology was correct when it wrote Section S1.A and seeks to act contrary to law in the draft’s Section S1.B.1 (as well as S1.E.1, discussed below). Discharges to groundwater alone are not subject to regulation under the CWA. Recent case law from the Ninth Circuit provides for CWA jurisdiction over groundwater only under two very limiting circumstances that the draft permit fails to address. First, there must be a point source industrial discharge to groundwater. *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018). In the *Maui* case the County used an underground pipe to discharge treatment plant wastewater to groundwater. By contrast, this draft permit provides for CWA jurisdiction if stormwater reaches groundwater without any point source discharge. Second, the *Maui* case permitted the regulation of a point source discharge to groundwater but only where there was a specific factual finding of a direct hydrogeological connection to a surface waterbody. Ecology’s 2015 ISGP was previously consistent with the *Maui* case and remains so in the draft permit, to the extent Section S1.C.3 provides that facilities that only discharge stormwater to groundwater, with no discharge to surface waters, are not covered by the ISGP. By contrast, if approved as currently written, S1.B.1 of this draft permit would be internally inconsistent in asserting CWA jurisdiction over groundwater in the absence of a discharge to surface water. Ecology’s S1.A and S1.C.3 are the correct regulatory interpretations, as Ecology may only require coverage under the ISGP where there is a discharge of stormwater to a surface waterbody.

Accordingly, the final version of S1.B.1 should read:

“Is a significant contributor of pollutants to surface waters of the State, ~~including groundwater~~; or ”

3. Special Condition S1.E.1 - Discharges to Ground

The current version of S1.E.1 in the 2015 ISGP contains the correct statement of the law and the revision in the Draft 2020 ISGP would violate the law. Current S1.E.1 provides that a facility with a discharge to both surface water and groundwater is required to comply with all conditions of the ISGP. The draft seeks to remove any surface water connection and apply the CWA’s stormwater permitting requirements to any facility that discharges to groundwater only. As discussed regarding Section S1.B1 above, CWA jurisdiction does not exist over discharges to groundwater only, and the only recent exception carved out by the Ninth Circuit would require a point source discharge to groundwater, such as an underground pipe, and specific proof of a direct hydrogeological connection to a surface waterbody. Moreover, upcoming Supreme Court review of the *Maui* principles is likely to pose legal problems for this ISGP above and beyond the very clear ones that definitively exist already, harming Washington State stormwater regulation in the process.

Accordingly, the final version of S1.E.1 should read the same as the 2015 ISGP:

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).

4. Special Condition S1.F.2 – Conditional “No Exposure” Exemption

Ecology’s proposed change provides helpful detail on the background of a Conditional “No Exposure” exemption (CNE). S1.F.2 specifies that a site must answer “NO” to eleven questions in order to obtain a CNE. However, the permit references a May 2018 Ecology “Focus On: Conditional No Exposure” publication (publication number 13-10-021) for the eleven questions. Specific requirements for compliance, in this case a determination for a conditional no exposure exemption, should be included in the permit.

Accordingly, the final version of S1.F.2 should read:

To determine if you qualify for a CNE, all of the following eleven questions must be answered “NO” and certified that none of the following materials or activities are, or will be in foreseeable future, exposed to precipitation:

1. Is anyone using, storing or cleaning industrial machinery or equipment in an area that is exposed to stormwater, or are there areas where residuals from using, storing or cleaning industrial machinery or equipment remain are exposed to stormwater.
2. Are there materials or residuals on the ground or in stormwater inlets from spills/leaks?
3. Are materials or products from past industrial activity exposed to precipitation?
4. Is material handling equipment used/stored (except adequately maintained vehicles)?
5. Are materials or products exposed to precipitation during loading/unloading or transporting activities?
6. Are materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to stormwater does not result in the discharge of pollutants)?
7. Are materials contained in open, deteriorated or leaking storage drums, barrels, tanks and similar containers?
8. Are materials or products handled/stored on roads or railways owned or maintained by the discharger?
9. Is waste material exposed to precipitation (except waste in covered, non-leaking containers, e.g., dumpsters)?
10. Does the application or disposal of process wastewater occur (unless otherwise permitted)?
11. Is there particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the stormwater outflow?

5. Special Condition S3.B – Specific SWPPP Requirements

5.1 Site map requirements. S3.B.1 specifies new requirements for the Stormwater Pollution Prevention Plan (SWPPP) site map including:

- Size of property in acres
- Direction of stormwater flow by use of arrows
- Locations of all structural control measures
- Locations of all stormwater conveyances, including ditches, pipes, swales, etc.
- Location of stormwater inlets
- Combined sewers or MS4s and where stormwater discharges to them
- Locations and sources of run-on to your sites from adjacent properties that may contain pollutants

S3.B.4.b.ii requires that the Permittee shall include in the SWPPP a detailed description of BMPS, including structural controls at the site. Translating the current textual description of all structural controls, such as (if applicable at a site): graded, bermed or curbed areas to direct stormwater flow, identification of all cleaning operations that are indoor, under cover or in bermed areas, and/or all washwater drains that direct washwater to further treatment or storage and not to stormwater, to the associated maps will take a considerable amount of time.

In addition, not all structural controls are fixed. Dumpsters/large waste containers are typically under hard cover, also known dog houses. These types of mobile structures are often moved in order to support the facility needs.

Accordingly, Boeing requests that the Site Map condition S3.B.1.e, Locations of all structural control measures, be removed, since structural controls are already described in the SWPPP and that not all structural controls are fixed features at the site.

As an additional issue, a new site map requirement is the location of all stormwater inlets. The Draft 2020 ISGP does not define “inlets.” This does not appear to refer to run-on since that is a different specific site map requirement. If Ecology intends “inlets” to mean catch basins, this may require that a significant amount of data to be mapped and documented.

Accordingly, Boeing requests a definition of “stormwater inlet.”

5.2 SWPPP update requirement. S3.A.3.c specifies that if a Permittee covered under the 2015 ISGP needs to update their SWPPP to be consistent with the 2020 ISGP, the update shall be completed by January 30, 2020.

For highly complex and large production sites, the site map can consist of between 50 – 100 sheets of maps. Not every site has access to a geographic information system (GIS) to generate/maintain multiple maps from a single source of data.

Due to the additional level of detail required to be placed on site maps, Boeing requests sufficient time to update the site maps to ensure they are complete and accurate.

Accordingly, Boeing requests that S3.A.3.c be revised to:

If a Permittee covered under the 2015 ISGP needs to update their SWPPP to be consistent with the 2020 ISGP, the update shall be completed by ~~January~~ **April** 30, 2020.

6. Special Condition S6.C. Should Allow For Compliance Schedules and Phased Implementation.

Condition S6.C sets forth sampling and effluent limits for discharges to 303(d) waters and Puget Sound Sediment Cleanup Sites. When adopting the 2015 ISGP, Ecology removed the 2010 ISGP language that authorized Ecology to issue compliance schedules, without explanation.

The 2010 ISGP had a six-month default compliance schedule that required compliance no earlier than July 1 of the first year of the permit, with new effluent limits established under Special Condition S6 for discharges to impaired water bodies under section 303(d) of the CWA. In Special Condition S6.C.1.c, a facility could apply to Ecology for a longer compliance schedule. Under Special Condition S6.C.1.c, Ecology was obligated to grant or deny the request by April 1, 2010.

The PCHB affirmed this approach in the 2010 permit appeal and specifically authorized the use of compliance schedules in the ISGP consistent with an earlier ruling on the Boatyard General Permit. See *Copper Development Ass'n v. Department of Ecology*, PCHB 09-135, at 52 (2011).

In addition, WAC 173-226-180, allows for compliance schedules to be a condition or schedule in a General Permit.

Ecology has indicated that it will communicate new numeric effluent limits to applicable Permittees, to be listed in Appendix 4 (Existing Dischargers to Impaired Water Bodies), by early December, 2019. Under the Draft 2020 ISGP requirements, numeric effluent limits are enforceable starting January 1, 2020. Facilities new to Appendix 4 or listed for a new parameter on Appendix 4 should have a reasonable period of time to monitor their

stormwater, to determine the need for a compliance schedule and to implement new BMPs required for discharges to listed water bodies.

Boeing requests that the 2010 ISGP compliance schedule language be incorporated into the 2020 ISGP.

Accordingly, the final version of S6.C should include the following:

S6.C.1 By July 1, 2020, Permittees discharging to a 303(d)-listed waterbody (Category 5) that was not 303(d)-listed at the time of 2015 permit coverage and that does not have an EPA-approved total maximum daily load (TMDL), either directly or indirectly through a stormwater drainage system, shall comply with the applicable sampling requirements and numeric effluent limits in Table 6, unless a compliance schedule is requested and granted in accordance with S6.C.1.c&d.

Add the following text from the Final 2010 ISGP, dates changed to correspond to the 2020 ISGP permit time frame:

S6.C.1.c Permittees may request a compliance schedule for relief from the July 1, 2020 deadline to comply with the applicable effluent limit in Condition S6.C. Permittees shall submit requests for compliance schedules in writing to Ecology no later than January 31, 2020 and shall include the company name, facility location, industrial stormwater permit number, and the reason for requesting a compliance schedule.

S6.C.1.d Ecology will consider all compliance schedule requests submitted by January 31, 2020. If Ecology determines that a Permittee is unable to comply with the applicable effluent limits by July 1, 2020, Ecology will establish a compliance schedule to require compliance as soon as possible and no later than twenty-four months, or two complete wet seasons, after the effective date of this permit. Ecology will send its decision regarding the request for compliance schedule to the Permittee no sooner than April 1, 2020.

S6.C.1.e For purposes of this condition, “wet season” means Sept 1st through June 30th.

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

The ISGP 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. However, particularly for large or complex facilities, Ecology’s approval of engineering reports is frequently not completed in time to allow the Permittee to complete installation of treatment by September 30.

Boeing proposes that the September 30 deadline be replaced with a timeline that is based upon Ecology’s approval of the engineering report as well as the complexity of the proposed system.

Specifically, Boeing proposes that for sites 10 acres or less, the level 3 deadline would be two hundred seventy-days from Ecology's approval of the engineering report and for sites that are greater than 10 acres, the level 3 deadline would be two years from Ecology's approval of the engineering report. These deadlines represent a reasonable and a minimal amount of time necessary for facilities to engage in necessary engineering and construction to install a treatment system. In some cases even these amounts of time will be inadequate. However, this approach encourages sites and Ecology to interact early and often during the development of the engineering report and provides a clear pathway for compliance as quickly as possible.

Accordingly, the final version of S8.D.5 Level 3 Deadline should read:

The Permittee shall sign/certify and fully implement the revised SWPPP according to Permit Condition D3 and the applicable Stormwater Management manual as soon as possible but no later than ~~September 30th the following year~~ 270 days from the date Ecology approves the engineering report for facilities that are 10 acres or less and two years from the date Ecology approves the engineering report for facilities that are greater than 10 acres.