



Jessica Spiegel
Regional Director

August 8, 2019

Greg Gould
Industrial Section
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504

Subject: Proposed U.S. Oil and Refining NPDES Permit WA0001783

Dear Mr. Gould:

The Western States Petroleum Association (WSPA) appreciates this opportunity to provide the Department of Ecology comments on the proposed U.S. Oil and Refining NPDES permit. WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states, including Washington.

Ecology's permit draft raises several regulatory policy issues that are relevant to the U.S. Oil permit, but which might be common to the other WSPA-member permits as they are renewed in coming years.

Comment #1

On May 10, 2019 the Environmental Protection Agency approved, after reconsideration, most of the Washington Department of Ecology's human health-based water quality criteria submitted by the state in August 2016 (letter from EPA Region X Administrator Hladick to Department of Ecology Director Bellon). The EPA judged the States' submittal to be protective of designated uses, based on sound science, and consistent with the Clean Water Act. This determination is largely a reversal of a November 2016 EPA partial disapproval decision on these same Washington water quality criteria. As a next step, on July 10, 2019 EPA announced a series of public hearings to receive comments on the proposed withdrawal of the federally-promulgated human health-based water quality criteria the EPA had imposed on Washington. The Washington Department of Ecology has communicated its resistance to these EPA actions.

Litigation on coming administrative decisions is expected and it may be several years before there is a confident outcome on the final Washington HHWQS. In this same timeframe, Ecology's Industrial Section will be renewing NPDES permits for WSPA facilities.

As a matter of fairness and good public policy, NPDES permit limitations (and other terms and conditions) should be based on applicable and promulgated water quality standards. Should Washington's water quality standards be revised to ultimately be less stringent than those which were in effect when the U.S. Oil permit is actually issued, there are provisions in federal NPDES regulations at 40 CFR 122.62(a) *Causes for Modification* which establish viable reasons for potentially less stringent effluent limitations (regulation section provided below). It is sufficient for the Industrial Section to acknowledge this possibility at this time. Should this situation develop during the term of an NPDES permit or at permit renewal, the affected WSPA member

will initiate a discussion with the Department of Ecology to consider the obligation to amend the permit.

40 CFR 122.62

(a) *Causes for modification.* The following are causes for modification but not revocation and reissuance of permits except when the permittee requests or agrees.

(1) *Alterations.*

(2) *Information.*

(3) *New regulations.* The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

(i) For promulgation of amended standards or regulations, when:

(A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards, or the Secondary Treatment Regulations under part 133; and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with §124.5 within ninety (90) days after FEDERAL REGISTER notice of the action on which the request is based.

(4)-(18)

Comment #2

In the current generation of NPDES permits the Industrial Section chose to regulate stormwater discharges from WSPA facilities through modified elements of Ecology's Industrial Stormwater General NPDES permit. This was appropriate as it imposed regulatory oversight consistent with the Department of Ecology's chosen approach for all industrial facilities.

With the SeaPort Sound Terminal (Targa Sound Terminal) permit (WA 0003204, issued in July 2018) and now with the proposed U.S. Oil and Refining permit, the Industrial Section is choosing to implement a hybrid permitting model which is not consistent with Department of Ecology permits and policy. Significantly, this is a permitting approach which will create cost exposure and regulatory risk for U.S. Oil and Refining, and ostensibly for other WSPA facilities as their permits are renewed. For the following reasons, WSPA requests that the Industrial Section maintain consistency with the Industrial Stormwater General NPDES permitting model.

- Although not explained in the U.S. Oil permit Fact Sheet, the Industrial Section is choosing to apply a state Court of Appeals decision requiring a reasonable potential determination if stormwater effluent data is available, and then establishing water quality-based effluent limits if reasonable potential is determined.¹ But this permitting approach has rarely been followed across the population of stormwater permittees (and there are in excess of 1,500 state-wide).² It is a permitting approach that may be unique to Industrial Section regulated facilities. This permitting choice must be considered premature until such time that Ecology's Water Quality Program acknowledges and begins implementation of the court decision in all individual and general NPDES permits.
- The Industrial Sections abandonment of the ISWGP regulatory presumptions is simply unfair and unreasonable, and in the U.S. Oil proposed permit exposes the company to significant legal and financial vulnerability that other ISWG permittees do not experience. Two examples support this point. First, the Industrial Section ignores the ISWGP presumption of the presence of AKART.³ If the Industrial Section is uncertain about AKART, a special study can be directed and adequate time allowed to implement any needed BMPs. Second, the reasonable potential analysis relies on very limited discharge and receiving water data and statistical analysis. Ecology's uncertainty with receiving water metals data is such that a fresh study to characterize priority pollutant metals is being imposed across the industry. Together, these two determinations eliminate the opportunity for a WAC 173-201A-400 mixing zone and this means numeric WAC 173-201A water quality criteria must be met at point of discharge. Water quality-based effluent limits imposing this requirement will be difficult to continuously achieve in a precipitation-driven system. Violations of effluent limitations subject a permittee to government and citizen enforcement.
- Establishing effluent limits ("interim" or "final"; technology- or water quality-based) that might subsequently be adjusted to be less stringent as new information is developed, could well create an "anti-backsliding" issue (see 40 CFR 122.62(l) *Reissued Permits*). Two factors that might support less stringent future effluent limits would be the revision of WAC 173-201A water quality criteria, or more complete effluent and receiving water characterization data that supports a different reasonable potential analysis.

¹ *Puget Soundkeeper Alliance v. State of Washington and State of Washington Pollution Control Hearings Board* (No. 48267-3-II, February 22, 2017).

² We note that Ecology general stormwater permits (including the ISWGP, the Municipal Phase I and Phase II permits, the Municipal WDOT Permit) take no account of the Court of Appeals ruling even though discharge data is being produced and these permits have been renewed subsequent to the Court of Appeals decision. As a specific example, ISWG permittees have been monitoring stormwater pollutants for 10+ years and many, many benchmark value exceedances have been reported. Yet Ecology regional offices do not force reasonable potential analyses and then follow with the development of water quality-based effluent limits. Ecology's current actions to renew the ISWGP included no new provisions to implement the Court of Appeals decision.

³ The regulatory determination of AKART presence is presumed in the ISWGP if the performance and reporting requirements in that permit are adhered to. It is not dependent on consistent achievement of Benchmark Values.

Greg Gould ltr
Aug. 8, 2019
Page 4

Irrespective, Ecology does not need to create this predicament in the U.S. Oil or other WSPA company permits. A logical permitting progression would be 1) recommit to the ISWGP model, 2) implement BMPs from the *Stormwater Management Manual for Western Washington* to fully demonstrate AKART; 3) complete the receiving water priority pollutant metals study. Should Ecology commit to the Court of Appeals directive across the individual and general NPDES permit population, future Industrial Section permitting actions can occur in a consistent and equitable manner.

Thank you for your consideration of WSPA's comments. We welcome any questions or comments you might have. Please contact the project manager, Tery Lizarraga at (510) 3640-7875 or by email at TLizarraga@wspa.org.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J Spiegel', written in a cursive style.

Jessica Spiegel
Director