



July 15, 2023

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RE: AWB Comments on Draft Industrial General Stormwater Permit

Thank you for the opportunity to provide comments to the draft 2025 Industrial General Stormwater Permit (IGSP or permit). The Association of Washington Business (AWB) is a statewide business advocacy organization representing over 7,000 large, medium, and small businesses across the state. The majority of our members are small businesses with under 50 employees.

AWB members have a strong interest in the IGSP, particularly as it impacts our members who are smaller businesses with limited resources. Over the past few permit iterations, we have been concerned with the rising compliance costs and complexity around the permit. When first implemented, the IGSP was a permit with focused, effective compliance requirements. However, as additional permit requirements have been added, costs and complexity to comply have increased without material benefits for the environment. The proposed draft 2025 ISGP further adds to the scope of the permit and the costs of compliance onto the business community. We have identified a number of concerns with the language in the draft permit, which we think need to be addressed before the 2025 ISGP is adopted.

The common thread for these comments is that the proposed new language in the draft 2025 ISGP is often ambiguous, provides limited environmental benefit, and imposes increased compliance costs.

We ask for the following changes, which will continue the environmental benefits of the ISGP without imposing undue burdens on small businesses to comply.

### **Permit Section S1.A., Section S5.A.2 & Section S6**

The draft 2025 ISGP language states that the permit applies to facilities that discharge stormwater “directly *or indirectly* to surface waters of the state, including but not limited to *roadside ditches* or storm sewer systems”. Draft ISGP, Section S1.A. (italics added). AWB submits that the addition of “indirectly” creates an ambiguity that will result in uncertainty and unnecessary costs.

The draft 2025 ISGP fails to define what constitutes an “indirect” stormwater discharge. First, in the context of the Clean Water Act, and many state programs promulgated pursuant to the federal CWA, the term “indirect” has a specific meaning. An “indirect discharger” is defined as an entity discharging to publicly owned treatment works (POTWs) (see, 40 C.F.R. 122.2).<sup>1</sup> The Washington

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<sup>1</sup> Notably, the federal National Pollutant Discharge Elimination System (NPDES) program does not include discharges from “indirect dischargers”, as that term is defined under the federal program, within the definition of discharge of a pollutant (40 C.F.R. 122.2) requiring an NPDES permit (40 C.F.R. 122.3(c)).

Department of Ecology (“Department”) has seemingly adopted this definition in its overall NPDES permitting strategy: an “indirect discharger” is defined as a “discharger of wastewater to the sanitary sewer which is not sanitary wastewater or is not equivalent to sanitary wastewater in character.” State of Washington Department of Ecology, Water Quality Program Permit Writer’s Manual, p. xvii (July, 2018). Second, the United States Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, (2020) (*Maui*), a case relied upon with respect to groundwater discharges in the draft ISGP, references “*indirect discharges* through groundwater” in discussing the reach of the NPDES permitting program. In light of these uses of the term “indirect”, an “indirect” stormwater discharge could be construed as either a discharge to a sanitary sewer or a discharge to groundwater that ultimately results in a discharge to surface waters.

Additionally, the draft permit’s applicability to stormwater discharges to “roadside ditches” further complicates the regulated community’s ability to interpret the meaning of an “indirect” discharge. In many if not all cases, discharges to roadside ditches are not subject to permitting under Washington’s NPDES program. The prohibition against discharges without a permit provides:

[n]o pollutants shall be discharged to *any surface water of the state* from a point source, except as authorized by an individual permit issued pursuant to this chapter [WAC 173-220] or as authorized by a general permit issued pursuant to chapter 173-226 WAC.

WAC 173-220-020 (italics added). The term “surface waters of the state” is defined as “all waters defined as ‘waters of the United States’ in 40 C.F.R. 122.2 that are within the boundaries of the state of Washington. This includes lakes, rivers, ponds, streams, inland waters, wetlands, ocean, bays, estuaries, sounds, and inlets.” WAC 173-220-030(26).<sup>2</sup> Importantly, the definition of “waters of the United States” set forth under the federal regulations specifically excludes “[d]itches (*including roadside ditches*) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.” 40 C.F.R. § 120.2(b)(3) (italics added). Hence, because the definition of “surface waters of the state” incorporates the federal exclusion of upland ditches (“including roadside ditches”) from the definition of waters for which a permit is required, the draft 2025 ISGP’s apparent inclusion of roadside ditches exceeds the scope of the Department’s authority as set forth in the applicable regulations.

Finally, it is unclear whether the draft general permit’s statement of applicability to “indirect” discharges is meant to convey a spatial component – that a point source be some measure of distance away from a “surface water of the state” prior to the effluent entering such a water. For example, a facility may discharge to a series of upland ephemeral drainage ditches which eventually flow to a surface water of the state. In arid parts of the state, stormwater effluent from the facility flowing in these ditches may never actually reach “surface waters of the state.” The draft 2025

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<sup>2</sup> Similarly, RCW 90.48.020 defines “waters of the state” as “lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.” The broader term “waters of the state” is defined as “all waters defined as ‘surface waters of the state’ and all waters defined as ‘waters of the state’ in RCW 90.48.020.” WAC 173-226-030(27).

ISGP would require the facility to obtain coverage despite the lack of discharge to, and impact on, any water of the state.<sup>3</sup>

AWB requests that the language in the draft ISGP that states that “roadside ditches” are waters of the state be deleted and that language on “indirect discharges” be revised to clarify the extent to which such discharges would be subject to the permit.

### **Permit, Section S1.E.**

The language in the draft permit provides that its conditions apply to “sites with a discharge point to groundwater.” While the term “discharge point” is defined, in pertinent part, as “the location where a discharge enters the ground on-site,” this definition is too broad to provide any meaningful guidance to the regulated community. This is especially true given that the draft permit expands this applicability beyond discharges via a “discharge point” to any discharge involving “infiltration.” Because the draft permit language is vague as to what constitutes a “discharge to groundwater,” the regulated community is faced with significant uncertainty.

The draft 2025 ISGP provides limited clarity regarding what constitutes a “discharge point.” Permit coverage appears to extend to discharges to groundwater under circumstances set forth in *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. \_\_\_ (2020)). See, e.g., General Permit, Sections S1.E.1. The discharge at issue in the *Maui* case involved treated water pumped into the ground through *disposal wells*. In other words, discharge was via a discrete conveyance to groundwater – a mechanism that a regulated entity would likely consider to be a “discharge point” to groundwater. Similarly, the draft permit includes a provision for “facilities with a discharge point to groundwater through an Underground Injection Control *well*”. Draft ISGP, Section S1.E.2. (italics added).<sup>4</sup> In turn, the UIC program applies to the injection of wastes via a “UIC well” which is defined as (1) a bored, drilled or driven shaft, or dug hole whose depth is greater than the largest surface dimension; (2) an improved sinkhole; or (3) a subsurface fluid distribution system. WAC 173-218-030. Again, these types of structures would typically be considered by the regulated community as “discharge points” and would be consistent with the permit’s intent to regulate a “discharge point” to groundwater.

However, the draft permit also contemplates coverage for “facilities *discharging to ground* (e.g., *infiltration*, Class V UIC wells, etc.)” and requires these discharges to comply with Special Condition S3.A.2. Draft ISGP, Section S1.E.3. (italics added). This condition does not limit the

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<sup>3</sup> The draft permit also imposes additional requirements on facilities that discharge “directly or *indirectly through a stormwater drainage system*” to impaired waters. See, General Permit, Section S5.A.2 & Section S6 (italics added). The draft permit could be construed as imposing these additional requirements on facilities regardless of the distance between the point source and the impaired water and regardless of whether stormwater would actually reach and/or have any impact on the impaired water. Commenters suggest that the applicability of the “indirect” discharge to impaired waters requirements be limited in scope.

<sup>4</sup> The permit provides that such discharges are subject to regulation under the State’s Underground Injection Control (UIC) requirements. However, it is unclear whether the General Permit’s applicability extends to discharges that are also covered under the UIC program; that is, is an entity required to obtain both a UIC permit and coverage under the General Permit (or individual permit, as the case may be).

ISGP's applicability to discharges from a "discharge point" and, instead, expands applicability to a broad category of discharges described as "infiltration."<sup>5</sup>

In many cases, facilities employ stormwater retention or detention basins in efforts to reduce impacts to stormwater. Under the current iteration of the draft permit, it is unclear whether such structures are subject to the ISGP even though they do not fit within the ordinary meaning of the term "discharge point" (or "point source"). The draft permit provides, subject to certain caveats, that facilities discharging stormwater "only to groundwater" are not required to obtain coverage. Draft ISGP, Section S1.C.3. However, the draft permit then states that the conditions of the permit apply to facilities "with a discharge point to groundwater". Draft ISGP, Section S1.E.3. AWB requests that the Department clarify in the final ISGP that infiltration of stormwater is not subject to ISGP requirements unless the stormwater infiltration to groundwater is determined to be the "functional equivalent" of a discharge to a water of the state.

### **Permit, Section S3.B.4.b.i.3**

The ISGP generally requires permittees to develop and implement a Stormwater Pollution Prevention Plan (SWPPP) outlining certain Best Management Practices (BMPs). Among the BMPs listed in the permit is the addition of the requirement to include a maintenance log in the SWPPP resulting from the inspection of "all equipment and vehicles... for leaking fluids such as oil, antifreeze, etc." Draft ISGP, Section S3.B.4.b.i.3.c. This relatively short addition to the draft permit would impose a significant burden on the regulated community.

As currently written, the draft permit would require a maintenance log for any and all maintenance on equipment and/or vehicles undertaken at the facility if that equipment or vehicle "could fail and result in contamination of stormwater." For many members of the regulated community, especially large sites or facilities, this could include hundreds or thousands of pieces of equipment such as tanks, mobile equipment, vehicles and manufacturing equipment. Requiring maintenance logs for "all" pieces of equipment or vehicles that "could" contribute to "contamination of stormwater" would impose a significant burden on the regulated community and is not needed. The ISGP already requires a permittee to maintain a log of spills that provides a basis for development maintenance plans appropriate to that facility's equipment and vehicles. AWB requests that this requirement be deleted.

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<sup>5</sup> Washington's permitting program requires a permit for discharges from a "point source." WAC 173-220-020. "Point source" is defined as

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

*Id.* Presumably, the permit's inclusion of the term "infiltration" is intended to be limited to infiltration structures that meet the definition of "point source". The commenters request clarification of the applicability of "infiltration."

### **Permit, Section G3**

The draft permit reserves the right of entry and inspection to an authorized representative of the Department “including an authorized contractor acting as a representative of the Administrator”. General Permit, Section G3. AWB supports this provision in general but request that the Department provide notice of the contractor’s identity.

Several members of the regulated community have had unfortunate experiences with “imposters” claiming to appear on behalf of the Department and seeking access to the facility for unknown reasons. To reduce the possibility of individuals attempting to gain illicit entry to facilities under the guise of a fictitious contractor relationship with the Department, AWB requests that, if a contractor is utilized by the Department, notice of the contractor’s identity be provided by the Department either prior to or at the time of entry.

While the provision requiring presentation of credentials certainly provides assurances to the regulated entity that an individual works for the Department, contractors typically do not hold those types of official credentials. In many instances, contractors merely hold work badges or other work-related identification that fails to provide any information regarding the relationship between the contractor and the Department. Notification from the Department to the facility would provide assurances that an individual (the contractor) is present for legitimate purposes and at the behest of the agency. Notification would also ensure that a legitimate contractor is not mistakenly turned away at the gate.

### **Permit, Section S3.B.4.b.i.4.b.**

The draft permit requires that containment area drainage valves, if present, remain closed until the permittee can verify “that *no contamination* is present prior to opening the discharge valve.” Permit, Section S3.B.4.b.i.4.b. (italics added). This presents an unreachable bar for any permittee utilizing secondary containment and commenters request clarification as to the intent of this requirement.

Neither the draft permit nor the regulations define the term “contamination.” Given the absolute prohibition on the discharge of “contamination” from containment structures, the regulated community is placed at significant risk of running afoul of this permit condition and under WAC 173-226-080(d). By way of contrast, the draft permit’s definition of “pollution” better defines what is unacceptable.

“Pollution” means contamination or other alteration of the physical, chemical, or biological properties of waters of the State; including change in temperature, taste, color, turbidity, or odor of the waters; or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the State *as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare...*

Draft ISGP, Appendix 2 – Definitions (*italics added*). In other words, there must be some adverse impact from “contamination” that “will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare” in order for the contamination to be considered pollution.<sup>6</sup>

Conversely, use of the term “contamination”, by itself, strips the prerequisite that the substance “create a nuisance” or be “harmful, detrimental or injurious to the public health, safety or welfare”. In effect, the proposed language prohibits the drainage of containment areas of any substance, even stormwater. AWB does not believe that this is the intent of the draft provision and suggest that the provision be revised to allow for inspection of retained water to ensure its discharge will not result in harmful, detrimental or injurious impacts to receiving waters.

### **Permit, Section S3.B.4.b.i.5.**

The draft permit requires permittees to provide training to not only its employees but also contractors or vendors “who have duties in areas of industrial activities subject to [the] permit.” General Permit, Section S3.B.4.b.i.5. While AWB supports training with respect to the permittee’s employees, AWB has significant concerns relating to the broad training requirements applicable to contractors and/or vendors.

At many facilities, the entire site would be subject to the permit, and any contractor or vendor working at the facility would be subject to the training requirement even though the activity may have no impact on stormwater. If the threshold for training is any contractor or vendor undertaking an activity in “areas of industrial activities”, then training would be required for any contractor present at the facility, regardless of whether the contractor or vendor’s activity would have any impact on stormwater. For example, an electrical contractor performing routine maintenance on equipment with no fluids or a landscaping company mowing the grass around the facility would require training even though their activities have no potential to impact stormwater. While facility personnel would be more likely to engage in various activities as part of their duties at the site, some of which could impact stormwater, contractor or vendor personnel are typically engaged in a limited capacity to undertake a specific task. Many of these specific tasks have no impact on stormwater.

Further, staffing by contractors or vendors is more likely to change on a day-to-day basis, depending on employee availability. Under the draft permit, the permittee would be required to provide training for any individual brought on-site by the contractor or vendor even though the permittee has no control over the contractor or vendor’s personnel matters. Further, the permittee would be required to review the personnel list on a daily basis to ensure that contractor personnel have received the appropriate training. This places a significant burden on the permittee with minimal or no benefit to the environment.

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<sup>6</sup> Ensuring that no “pollution” is present is as equally difficult to practically implement as ensuring that “no contamination” is present. The likelihood of creating a nuisance or whether something is considered detrimental to welfare is not a straightforward judgment call.

In lieu of requiring training for contractors or vendors who “have duties in areas of industrial activities subject to [the] permit”, commenters suggest a more appropriate (and reasonable) threshold for training would be for those who “have duties that could impact stormwater discharges subject to this permit.”

#### **Permit, Section S3.B.4.b.i.5.c.**

The draft permit requires that all employees be trained within 30 days of hire, regardless of whether the position is full-time, part-time or on a seasonal basis. Draft ISGP, Section S3.B.4.b.i.5.c. AWB supports the training requirement in general but submits that the 30-day timeframe for training new hires is unduly burdensome on the regulated community, especially in the case of smaller facilities with limited resources.

Many industrial facilities subject to the ISGP have limited resources to devote to stormwater training *each time* an individual is hired. In cases where facilities do not have an individual qualified to provide stormwater training, the facility must outsource the training at significant expense (the cost of stormwater training can be several hundred dollars each time) and subject to the availability of the training program. Training is often held annually at the same time each year to align with other training needs and minimize the amount of time individuals are taken away from their job duties. Requiring facilities to conduct training every time an individual is hired would impose significant costs on smaller regulated facilities (and may result in fewer hiring opportunities). Commenters request removal of the 30-day requirement to conduct formal, documented training. In the alternative, commenters suggest that the training plan include a procedure for providing on-the-job, or similar, training to new hires within 60 days -- with formal, documented training required within one year. This approach would provide a more meaningful and individualized focus on the employee’s job duties, including how those duties may influence stormwater management at the site. This strategy addresses the concerns of the Department for timely training because the regulated community is already incentivized to provide the necessary training to ensure new employees can perform their job duties safely and in compliance with legal obligations.

#### **Permit, Section S4.B.1.e.**

The draft permit generally requires that samples be obtained within the first 12 hours of stormwater discharge events, but it does not require samples to be collected outside of “regular business hours”. General Permit, Section S4.B.1.C. Commenters seek clarification of the sampling requirement as it relates to sampling during “regular business hours.”

The term “regular business hours” is defined by the permit as

those time frames when the facility is engaged in its primary production process, but does not include additional shifts or weekends when partial staffing is at the site primarily for maintenance and incidental production activities. Regular business hours do not include periods of time that the facility is inactive and unstaffed.

Draft ISGP, Appendix 2 – Definitions. Under this definition, “regular business hours” clearly includes times when the facility is operating with a full staff (that is, when the personnel include not only operational personnel but also managerial and administrative personnel). What is less clear is whether “regular business hours” include time frames when only operational personnel are present.

Stormwater sampling at facilities is typically conducted by personnel specifically trained to obtain accurate stormwater samples. This training includes the proper time to obtain samples, the proper techniques for obtaining samples, and the proper preservation and handling of samples. This training is required to ensure a representative sample is collected. Many facilities, especially smaller ones, subject to the general permit have limited resources to dedicate to training personnel on proper stormwater sampling techniques and often have a single employee trained in proper sampling. Typically, this employee is a person whose job responsibilities are, or include, environmental compliance (for example, an environmental engineer, operations supervisor or maintenance lead). Such personnel may not be on-site at all times that a facility is “engaged in its primary production process,” especially in the case of facilities operating two or three shifts a day (or a facility operating seven days a week). Where this is the case, AWB seeks clarification that samples need only be obtained when the trained person is typically on-site.<sup>7</sup>

The state business community appreciates the Department’s consideration of the comments. Managing the costs and compliance of the IGSP is important for those businesses subject to the permit. AWB and our members take seriously our obligation to comply with laws that protect the environment. However, we are concerned that elements of the draft 2025 ISGP further increase the costs on permit holders and create more uncertainty for permittees, without any corresponding benefit to the environment. Implementing our requested changes and providing clarify where requested would greatly assist the business community and ensure that the expenses that we bear for regulatory compliance result in benefits to the environment.

Thank you,

A handwritten signature in blue ink that reads "Peter Godlewski". The signature is written in a cursive, flowing style.

Peter Godlewski  
Government Affairs Director Energy, Environment, and Water  
Association of Washington Business

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<sup>7</sup> Commenters also seek clarification that the term “regular business hours” does not include seasonal or periodic market-driven expansions in operating hours.