

Shane Latimer

See comments in attached document. Thank you.

Comments on Industrial Stormwater Draft General Permit - 2024

Shane Latimer, PhD
4405 SW Dosch Road
Portland, OR 97239
503-867-1780

We assume the permit document will realize the attention of a professional editor and outside stormwater professionals to address grammatical errors, inconsistencies, and structural issues throughout, which lead to vagueness and poor confidence in permit relevance and fairness.

Existing permit text is included for reference in italics, where applicable.

S1. A. Page 8.

*This statewide permit applies to **facilities** conducting **industrial activities** that directly or indirectly discharge **stormwater** to **surface water of the state**, water which includes but is not limited to roadside ditches and **storm sewer** systems.*

This sentence is poorly constructed and vague, and should be rewritten, as it is foundational to the rest of the permit.

“... surface water of the state” should be entirely in bold; “State” capitalized; “waters” plural, as in the definition and statute. Singular form may be used in context, i.e., a “surface water of the State.” Regardless, this should be consistent throughout.

“Discharge” is a term defined in Appendix 2 and should be in bold. The term “discharge” should be further defined (in Appendix 2) as explicitly not including sheet flow or any other non-conveyance-associated flow of stormwater that may reach waters of the State. Sheet flow should be defined and addressed in Appendix 2 for clarity, as it is a point of contention due to some limited, unsupported assertions by EPA Region X staff (not EPA Headquarters) and several EPA documents that also carry disclaimers stating that they do “... *not impose any new legally binding requirements on EPA, States, or the regulated community...*”

The terms “indirect discharge” and “indirectly discharged” need to be clearly defined in Appendix 2. If the intent is to cover industrial [indirect] discharges via ditches or MS4 systems to waters, then this should be written in plain language. It is currently too vague as to intent and underlying or supporting statute or regulation. For instance, non-point source, incidental or de minimis sheet flow or track out that may eventually make its way to a water of the State is not an NPDES discharge and should be regulated via other state or local regulations, not through this industrial permit, as there are currently no clear, objective, quantitative criteria to make such determinations. Moreover, the potential for such a non-point source discharge is not an objective criterion, nor is it based on best available science or current permitting frameworks. Indeed, EPA’s guidance (55 Fed. Reg 47990, Nov. 16, 1990) is that “individual facilities have the burden of determining whether a permit application should be submitted to address a point source discharge,” i.e., not the regulatory agency and only for point source discharges.

S1. A. Page 8.

Facilities conducting industrial activities listed in Table 1 or referenced in S1.A.3 shall apply for coverage under this permit or apply for a Conditional No Exposure exemption, if eligible (Condition

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S1.F). The Department of Ecology (Ecology) may also require permit coverage for any facility on a case-by-case basis in order to protect waters of the State (Condition S1.B).

The trigger for permit coverage should not be precipitation exposure to industrial materials, uses, or activities: It should be, per statute, triggered by discharge to waters of the State. If there is no point source discharge to a water, then permit coverage should not be required. The Conditional No Exposure exemption should instead be a Conditional No Discharge exemption, as discharge is defined in Appendix 2; “exposure” is not.

S1.A.1. Page 8-10

Ecology’s use of NAICS rather than the dated SIC system is appreciated.

S1.A.1. Page 10

*3. Any **inactive facility** where any industrial activity listed in Table 1 was previously conducted and where significant materials remain onsite and are exposed to stormwater shall obtain permit coverage.*

Presence of materials and stormwater exposure is not a trigger for NPDES program permit coverage: Discharge (point source) of stormwater is the trigger for permit coverage. By definition, discharge needs to be present to require NPDES permit coverage.

S1.B.1-3. Page 11

Significant Contributors of Pollutants

This section gives Ecology unbounded and unchecked discretion to determine that permit coverage is required for any site with no clearly defined criteria, supporting scientific documentation, or requirement for best available science. This discretion covers any occurrence of stormwater or non-stormwater in any form, regardless of whether a discharge occurs, which is outside the scope of the NPDES permit framework (e.g., Multi-Sector General Permit (MSGP)), the Clean Water Act, and Section S1.A. of this permit (Facilities Required to Seek Coverage Under This General Permit), which would seem to be controlling.

Section S1.B., essentially alleviates the need for any other state “NPDES” permit requirements, giving overriding discretion to Ecology to simply make a determination for every facility in the state, including those that are non-industrial, because S1.B. refers to “facilities” as defined in Appendix 2, the definition of which circularly refers back to Section 1, including S1.B.1., which does not itself include an industrial use limitation.

A partial solution would be to include “and” rather than “or” for B.1-3 but this level of discretion remains overarching with no bounds, checks, or supporting best available science.

States have the authority to implement requirements that are more restrictive or stringent than those included in the federal NPDES program. However, this is generally associated with states addressing NPDES water quality standards in terms of (a) designated uses, (b) numeric and/or narrative water quality criteria, and (c) antidegradation policy associated with point source discharge, as defined by the NPDES program and state statute. Moreover, each of these has a process that must be followed and that usually requires quantitative analyses and technical

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support using best available science. We are aware of no provision under the industrial NPDES program, or NPDES in general, which allows for wholesale addition or modification of requirements beyond those found in the MSGP or ancillary NPDES program documents, especially without scientific or high-level regulatory support, including that of EPA Headquarters.

It would seem that if the state wants to add this sort of non-NPDES permit coverage to statute it should do so outside the NPDES program via legislative action. Perhaps then, proper review, consideration, and best available science could be used to develop objective criteria by which to regulate not-point source discharges or “exposures.”

Regarding groundwater: Following the County of Maui v. Hawai‘i Wildlife Fund (Maui) U.S. Supreme Court decision, there has been greater attention given to the potential effects of wastewater on groundwater. It should be noted, however, that Maui was particular to point source discharges (via injection) to groundwater. Point source stormwater discharges to groundwater should be objectively assessed to determine potential effects and permit coverage issued accordingly. For instance, the presence of shallow pools or puddles on soil surfaces (some completely or nearly impervious) has been construed by Ecology as having potential effects to groundwater that should be covered by NPDES permits. Indeed, some companies have been required by Ecology to, for instance, spray acids onto such pools to neutralize high pH liquids, fearing that they might somehow detrimentally affect groundwater. These actions are apparently required with no underlying professional (e.g., via a panel of licensed geological professionals) or peer-reviewed scientific support. Perhaps Ecology could empanel a team of licensed professionals to review *ad hoc* policies and requirements prior to implementing them in the field. See comment on S1.E, below.

S1.B.2. The phrase “reasonably be expected” should be defined as determined by a professional geologist or hydrogeologist licensed in the state of Washington.

S1.C.1. NPDES rules are based on discharge, not exposure. Thus, this exemption should be based on discharge (per NPDES), not exposure.

S1.C.3. Refers back to S1.B.1. with no requirement for professional (licensed) review or scientific support.

S1.E. Discharges to Ground (Page 14)

Ecology should clarify the term “discharge point to groundwater” as being a defined point source discharge rather than any source of water, such as standing surface water.

Furthermore, we suggest Ecology adopt the draft and eventual final EPA guidance for determining such discharge, the current version being “Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater.” Furthermore, final determinations should be based on conclusions made by qualified professionals, i.e., geologists or hydrogeologists licensed in Washington.

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Appendix 2 Page 83

Definition of “Industrial Activities” – This is not a definition of industrial activities. It is a list of industrial uses followed by a list of industrial activities. Industrial activities should be listed first followed by examples of uses that may include those industrial activities, or simply refer to the previously cited NAICS.

What is an industrial “plant yard”? Please update this language (the entire paragraph) to reflect something more general/modern as this is a holdover term from the rule when the Clean Water Act (CWA) was meant to really just address major dischargers (de minimis and non-point source discharges are not part of the CWA, as stated in the Federal Register).

Perhaps cite the previously included NAICS table and forgo the examples.

Immediately following this definition, the definition of Land Application Site should be separated from the preceding paragraph (typo).

Appendix 2 Page 86

Reasonable Potential means the likely probability for pollutants in the discharge to cause or contribute to a water quality violation in the receiving waterbody, or loss of sensitive and/or important habitat.

This definition should include, refer to, or cite objective criteria for determining “reasonable potential” and require concurrence by a professional engineer or applicable licensed professional.

Moreover, the definition is significantly broad as to likely require more expertise than may be readily available via Ecology staff and, thus, should be supported by suitable criteria via a workbook or other reference validated by licensed professionals.

Appendix 2 Page 88

Stormwater means that portion of precipitation that does not naturally percolate into the ground or evaporate, but flows via overland flow, interflow, pipes, and other features of a stormwater drainage system into a defined surface waterbody, or a constructed infiltration facility.

This definition properly defines stormwater up to “... evaporate” but seems to go astray, thereafter, particularly in the context of NPDES permitting. For instance, “overland flow” or sheet flow may be composed of stormwater but is not a discharge of stormwater and is thus not stormwater in the context of NPDES. We suggest clearly defining stormwater in the context of NPDES permitting, per the CWA definition.