

Puget Soundkeeper Alliance

Please see attached document for comments.

**Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper,
Waste Action Project, North Sound Waterkeeper/RE Sources,
Communities for a Healthy Bay, Sound Action, Orca Network, Friends of the San Juans,
Deschutes Estuary Restoration Team, Surfrider Foundation**

July 15, 2024

Lucienne Banning

Washington State Department of Ecology

PO Box 47696

Olympia, WA 98504-7696

RE: Comments on the Draft Industrial Stormwater General Permit

Dear Lucienne Banning:

These comments are submitted on behalf of Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper, Waste Action Project, North Sound Waterkeeper/RE Sources, Communities for a Healthy Bay, Sound Action, Orca Network, Friends of the San Juans, Deschutes Estuary Restoration Team, and Surfrider Foundation (hereinafter “Soundkeeper”). As you know, several of these organizations have been actively involved in the development, implementation, and enforcement of the Industrial Stormwater General Permit (“ISGP” or “permit”) since 2000 and have inspected and reviewed compliance issues in detail at dozens of permittee facilities in this period. Commenters consider regulation of industrial stormwater to be of great importance and public interest.

We appreciate the attention and work that Ecology has put into the ISGP over the years. That said, improvements are needed to bring this permit into compliance with the Clean Water Act.

Importantly, over our decades-long effort enforcing Ecology’s ISGP, we have grown increasingly concerned with declines in compliance which we believe result from an under-resourced inspection and regulatory program at Ecology. As one example, we have been fielding numerous calls from the public asking about a growing number of waivers and extensions and delays for any corrective actions triggered by exceedances. The ISGP is only worth the paper it’s printed on unless there’s appropriate enforcement, otherwise, Ecology cannot adequately protect water quality threatened by industrial pollution. We encourage Ecology to more fully invest in its enforcement and compliance staff, support modernization of permit management (including overhauls to the PARIS permitting database), and provide full transparency for the ISGP oversight program.

1. 6PPD-quinone

First and foremost, we appreciate the inclusion of 6PPD and 6PPD-quinone (together, below, “6PPD-q”) in this permit draft as an eventual sampling requirement. However, much more can be done to protect aquatic life, meet water quality standards, and manage this toxic pollution. Ecology must include more 6PPD-q control in the final permit.

Ecology states that 6PPD-q is “the chemical culprit causing acute Coho salmon death in small streams after rain events. 6PPD-q comes from 6PPD, a chemical preservative found in tires used to increase tire lifespan. Currently, 6PPD is used in all tires, is found in recycled tire products, and can contaminate stormwater anywhere tires are used.”¹

Given the breadth of 6PPD-q sources at ISGP-covered facilities, and the extreme toxicity of 6PPD-q, several improvements to this permit are required.

- **Sampling Timeline.** Ecology must start by moving up the timeline for reporting 6PPD-q discharge levels from 2028 to at the latest Dec. 31, 2025 (i.e., within one year of the permit taking effect). Anything less than this is unreasonable. Regarding one of the reasons Ecology gave for this delay – an unsubstantiated claim that there aren’t enough labs to run samples – is a red herring. If a thousand industrial sites across the state had samples to run, laboratories would jump at the chance to increase local capacity. The state’s proposed timeline bootstraps its own rationale; *but for* this delayed testing requirement, the state would indeed have sufficient lab capacity (even assuming it doesn’t today). Moreover, there is no public policy, scientific, or legal reason to delay the gathering of information, especially information that cuts to the heart of a pollution problem that has been studied for decades. Ecology has known for at least 4 years that 6PPD-q from tires has been causing salmon mortality, and inexplicably is giving the very sources of that pollution three more years before sampling is required. This is unconscionable.
- **Required Pollution Elimination.** Ecology must actually require permittees to eliminate 6PPD-q discharges. Industrial sites covered by the ISGP are designed for stormwater capture, conveyance, and treatment. Sources of pollutants are mapped, stormwater flows from risk areas are assessed, and management plans are built to address discharges in a way that fits the particular details of the site plan and site uses. There is no reason given by Ecology why ISGP-covered facilities do not have to actually control and eliminate 6PPD-q as these sites control and eliminate other known sources of pollution. Since 2022, Ecology has had a published BMP guide for addressing 6PPD-q; just a few weeks ago announced over \$300 million dollars for clean water funding and called out almost \$400,000 in grants to the City of Vancouver for investments to address 6PPD-q.² Tire pile and tire waste management is not a new concept. Pollution from vehicles, brakes, tires, and intra-site roadways are regular parts of stormwater management plans. As noted in the Fact Sheet, “Motorized equipment, cars, trucks, and heavy equipment are typically used at industrial sites. They represent a source of contamination by petroleum products and metals that are common to most facilities

¹ Department of Ecology, Focus on: Best Management Practices for 6PPD-q (January 2023)
<https://apps.ecology.wa.gov/publications/documents/2310001.pdf>.

² See https://fortress.wa.gov/ecy/ezshare/wq/Permits/Flare/2019SWMMWW/Content/Resources/DocsForDownload/2022_SWTreatmentOfTireContaminants-BMPEffectiveness.pdf and <https://ecology.wa.gov/about-us/who-we-are/news/2024-news-stories/june-28-clean-water-funding>.

with coverage under this permit.” In short, the agency knows what’s needed to address 6PPD-q, is actively working to fund projects to address 6PPD-q, has guidance on how to address 6PPD-q, has long told ISGP permittees how to address pollution from tires and vehicles generally, and yet still doesn’t require 6PPD-q control in this permit. The entire infrastructure of this permit aligns directly with 6PPD-q management, yet Ecology does not fully require control of this pollutant. The final permit must be amended to actually require elimination of 6PPD-q from ISGP-covered discharges, not just limit 6PPD-q efforts to some industries having a report-only requirement.

- **Small Business.** Ecology’s permit proposes to exempt “small businesses” from 6PPD-q reporting, and defines those as “any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees.” Ecology’s exemption is not based on any water quality impact and the assessment of impact on small businesses fails to properly exempt from consideration 6PPD-q testing which is vital for compliance with state and federal water quality standards. Moreover, fifty employees could mean up to 50 vehicles on a site, leading to 6PPD-q source management concerns from 50 sets of tires just for employee parking. There are also no constraints on this definition to protect against bad actors taking advantage of this exemption – for example if one site is managed collaboratively but is permitted with several technically separate legal entities. No business size data for transportation sector (or 6PPD-q-testing entities) was included in the impact assessment. Under the state rules, several options exist for mitigating impacts, including:
 - Establishing differing compliance or reporting requirements or timetables for small businesses.
 - Clarifying, consolidating, or simplifying the compliance and reporting requirements under the general permit for small businesses.
 - Establishing performance rather than design standards.
 - Exempting small businesses from parts of the general permit.

Here, Table 3, Parameter 1 industries weren’t even included in the small business impact review; 6PPD-q wasn’t discussed in the small business impact review; the impact review didn’t explain how (nor does the fact sheet) this sampling requirement is or is not AKART or does or does not inequitably burden small businesses. In fact, it appears that this report-only requirement for these facilities exempts an unknown number of entities from unknown costs of 6PPD-q sampling and ONLY exempts these 6PPD-q requirements (no other references are made to small businesses in the permit). There wasn’t an assessment of other mitigation options less than full exemption, despite many being available; in fact, exemption is not listed under Section 4.2.1 of its 2024 SBEIA – reduced sampling, streamlining, and allowance of alternative lab analysis methods are the only three elements discussed to “potentially reduce the cost of the permit.” Ecology should reexamine its impact analysis and consider, if called for, any of the other mitigation measures available – any of which result in *some* added information collection that can

be used toward stormwater management planning – instead of simply exempting 6PPD-q testing requirements from an unknowable number of sites.

We point to Ecology’s own conclusions here (found on page 32 of its 2024 SBEIA) noting that *“the size of the facilities’ impermeable surface, nature of the industrial activity, and installation and maintenance of best management practices determines the quantity and quality of the stormwater discharge. Given this, there is no reason to believe small businesses will have a small stormwater impact simply because they have fewer employees. Therefore, there is no basis that would allow Ecology to be more lenient on small businesses without an unreasonable risk of violating federal or state water quality laws and rules.”* Exempting 6PPD-q sampling here is not justified.

- **Benchmarks and Aquatic Life Criteria.** In February 2024, Ecology proposed a freshwater acute criterion for 6PPD-q in its draft Aquatic Life toxics criteria rulemaking. In support of that proposal, Ecology noted that its criterion will “be protective of coho salmon and other aquatic life.” There is nothing in state or federal law blocking Ecology from setting this criterion as a requirement of this permit before the EPA approves the agency’s submission, especially given the scientific basis presented by Ecology mere months ago about the acute toxicity here. Ecology should thereby include this criterion here; instead, the water permitting team seems to have disavowed awareness of the water quality standards team’s regulatory proposals (the permit fact sheet states that “no numeric surface water quality criteria exist for 6PPD-q, so it is infeasible to derive a water quality based numeric effluent limitation or benchmark at this time” - yet one has been proposed and the agency has finished its review of the criteria). There must be benchmarks for there to be consequences of exceeding them.
- **AKART and Salmon.** For a host of municipalities under the MS4 permits Ecology issued in 2019 – including at least Seattle for the discharges into Longfellow Creek, Ecology has received notifications that stormwater, with 6PPD-q, is leading to salmon mortality and water quality impairment. To our awareness, Ecology has not taken action on those notifications at all; yet, those discharges persist and impairments continue unabated. For this ISGP permit Ecology has not set benchmark levels for 6PPD-q (and must), nor has Ecology developed a plan for dealing with waterways it knows (through MS4 notifications, its own agency data, or public reports) to be impaired and affected by stormwater runoff with 6PPD-q. Ecology must address this gap in the final permit. One potential pathway could be the establishment of a new appendix or list of streams with coho or steelhead populations that details which waterways need enhanced BMP requirements to address 6PPD-q pollution (as indeed the permit does in S6 for impaired waters or discharges to sediment cleanup sites).

This approach was recently taken for the U.S. EPA-issued draft MS4 permit for Joint Base Lewis-McChord (#WAS026638).³ That permit requires up to 20 acres of retrofits

³ JBLM also requires that “samples for Total 6PPD-quinone must be analyzed using Draft EPA Method 1634, or other sufficiently sensitive approved analytical methods.”

(designed to address 6PPD-q) in two key stormwater-impacted, salmon-bearing sub-watersheds on the base. Similar situations exist throughout the watersheds affected by ISGP permittees – from Seattle’s Longfellow Creek and other creeks along the Green-Duwamish River system, to Carkeek Park, Kitsap, Budd Inlet, and beyond. This permit entirely fails to require AKART – or any treatment whatsoever – for 6PPD-q, and it must. Ecology should amend the final permit to require treatment of stormwater to address 6PPD-q for any discharges with 6PPD-q (sampled or modelled) into waterways where salmon may be present (or upstream of those waterways). Only this level of response to a pollutant loading is justified by science and the Clean Water Act. Biofiltration is AKART for 6PPD/Q and the draft permit fails to meet this legal standard.

Further, the fact sheet notes that the samples (which will begin in 2028) required for a subset of permittees (in Table 3, item 1) will “allow Ecology to characterize 6PPD-q in stormwater discharges from these sectors, assess the effectiveness of BMPs and other permit requirements to reduce 6PPD-q.” This is a dangerous proposition by the state. First, the permit requires no BMPs to address 6PPD-q, so there will be no ability to characterize or otherwise study effectiveness on any given site. Second, there are no permit requirements other than sampling “to reduce 6PPD-q.” Third, these samples won’t be taken for several years – within which an entire generation of coho, steelhead, and other salmonids will have been affected by 6PPD-q pollution.

There must be BMPs required for permittees to address 6PPD-q pollution; there must be sampling of 6PPD-q wherever (just like any other pollutant) there are potential on-site sources of the pollutant; and there must be benchmarks – and the consequences that flow from them – for this second-most-toxic-to-aquatic life chemical known to science.

- **Industry Requirements.** In Tables 3-5, several industrial groups are exempted from having to sample for 6PPD-q – including transportation, airport, marine construction, waste management and hazardous waste facilities – without any explanation. Some of these sites (e.g., hazardous waste sites) are literally used tire storage facilities; others literally burn used tires for fuel; some are airports that violently wear down heavy-duty tires hundreds of times a day; others literally take bulk used tires for disposal, storage, or repurposing; and all have parking lots, vehicle fleets, and, often, heavy truck traffic in and out of stormwater control areas. Without any explanation, Ecology exempts these areas from sampling requirements – a position that must be changed in the final permit. Pollution doesn’t stop being pollution because of the SIC code associated with an enterprise – and Ecology is bound to manage industrial stormwater pollution wherever it is found. All of these types of sites have tire and 6PPD-q pollution generating activities and all must be regulated by this permit.
- **General Prohibitions.** Ecology should add tires, plastic, and foam to the general prohibitions of S5.F, directing permittees to manage their sites to prevent discharges of these materials. In the event Ecology believes these materials fall within the already-listed “trash and floating debris” category, inclusion of further examples can only help compliance and Ecology should add these specifics as a “for example...” addition, or as

an “including...” list. It is our experience that sites are more likely to have tires lying around exposed to stormwater, leaning behind buildings or piled along waterfront edges – even if trash and debris is well contained. Clarification is important.⁴

Overall, Ecology must issue a final permit that tackles the 6PPD-q crisis directly, robustly, and in a timely manner, as required by law. Failing to require permittees to implement known BMPs to address a known water quality issue runs counter to stormwater management and the law.

2. Permit Coverage (Condition S1)

Within the permit coverage section, Ecology must make many changes and clarifications before issuing its final permit.

- **Significant Contributors of Pollutants.** According to the Fact Sheet and the plain language of the permit, “Condition S1.B of the draft permit retains the ability for Ecology to require permit coverage for certain facilities that would otherwise be exempt.” Within this condition, we recommend Ecology make two vital changes. First, this section should be renamed for clarity. While section titles do not ultimately inform the clear conditions spelled out in any given section, an amendment here is needed for clarity’s sake. Plainly, there are two other entire classes of sites that may not consider themselves “significant contributors” of pollutants. As any site may be determined by Ecology to need coverage under this permit, a needed clarification of this section title.

Second, the permit’s second potential avenue for needing coverage misstates federal law. The permit (S1.B.2) states that facilities might need coverage if they “May reasonably be expected to cause a violation of any water quality standard,” and in the fact sheet cites the “Federal Clean Water Act at Section 402(p)(2)(E) as giving “the state of Washington this authority.”⁵ That section of the CWA, however, actually says: “...A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. CWA 402(p)(2)(E) (emphasis added). Plainly, the federal authority must be included here, so that Ecology may require permit coverage where a discharge *contributes to* violations of water quality standards.

⁴ Additionally, “floating debris” should be broadened as well; with decades of cleanup experience in waterways, debris, trash, plastics, or other floating material sometimes floats, sometimes doesn’t. Debris and trash is debris in trash – regardless of the weather or waterway conditions that might affect whether any given piece of waste floats or not. Please clarify this permit to delete the word “floating”.

⁵ The same language is repeated in the definitions section: Significant Amount means an amount of a pollutant in a discharge that is amenable to available and reasonable methods of prevention, control, or treatment; or an amount of a pollutant that has a reasonable potential to cause a violation of surface or ground water quality standards or sediment management standards.” and “Significant Contributor of Pollutant(s) means a facility determined by Ecology to be a contributor of a significant amount(s) of a pollutant(s) to waters of the State.”

- **Activities and Codes.** First and foremost, as this permit is written, it might be read to indicate that facilities that fall under the Table 1-listed NAICS groups need coverage. The permit, however, clearly notes that “The North American Industry Classification System (NAICS) groups generally, but not always, associated with these activities are listed in Table 1.” Ecology should clarify that a facility’s industrial activities and stormwater discharges are what define the scope of coverage, not simply NAICS grouping. This might be accomplished by adding a footnote to the Table 1 NAICS column header that notes those groupings are provided only to help illustrate, but not limit, the Industrial activities listed in the first column.

Further, to prevent the accidental omission of facilities, please ensure that all SIC-coded facilities are captured by NAICS code and vice versa. We request that Ecology incorporates all SIC codes listed in the federal definition of stormwater associated with industrial activities within the permit.

- **Expanded Industrial Activities.** Given Ecology’s clear awareness of 6PPD-q dangers, and the Fact Sheet’s conclusion that “motorized equipment, cars, trucks, and heavy equipment are typically used at industrial sites ... [and] represent a source of contamination by petroleum products and metals that are common to most facilities with coverage under this permit,” we are concerned there are a host of facilities not included in Table 1’s list of activities covered by this permit. For example, parking lots, commercial sites with high levels of impervious surface coverage, warehouses (especially those with heavy industrial, commercial, and small-vehicle traffic, such as fulfillment centers), short and long-term vehicle and boat storage facilities, stadiums, or auto repair shops are not included in this permit. Ecology should consider adding these industries to this ISGP, at the very least if those facilities contribute stormwater to salmon-bearing watersheds.
- **Buildings and Administration.** Ecology includes several exemptions that we do not believe should be exempted, or at least should be clarified. Regarding office buildings and parking lots, the permit has several conflicting terms and conditions:
 - In S1.C.4, Ecology says it does not require “Office buildings and/or administrative parking lots” to obtain coverage.
 - In the definitions, Ecology includes defines “industrial activity” with a qualifier: “The term excludes areas located on a site separate from the facility’s industrial activities, such as office buildings and accompanying parking lots.”
 - In the Fact Sheet, Ecology states that Permit Coverage “does not include areas that are administrative and not comingled with industrial stormwater.”

First, as has been stated repeatedly, including by Ecology, the agency is entirely aware of the pollution generated by vehicles, tires, and traffic – including but certainly not limited to 6PPD-q. To entirely exempt buildings (which most likely includes parking garages within those office buildings) and parking lots simply because they may be

administrative ignores the very real water pollution generated at these sites by the permittees. Ecology must include all parking facilities within the permit scope.

Second, Ecology includes this facility exemption in a separate section (S1.C) that solely deals with facilities not covered by the permit – making it less than clear for the permittees whether office buildings or administrative parking lots at otherwise covered facilities need stormwater management or, as it is currently written, only facilities which are solely office buildings or administrative parking lots are exempt from coverage. Ecology must clarify this inconsistency.

Third, Ecology doesn't define "office building" or "administrative" or "parking lot". Many if not most ISGP-covered facilities have parking spaces for workers, have office buildings (which may be anything from shipping containers to multi-level towers), and carry out some administrative work. The way this is written, a parking spot might be considered part of a stormwater permit scope of coverage if an industrial worker parks there one day, but not covered by the permit if a clerical or administrative worker gets to the parking spot first the next day. It is a bit detached from conditions on the ground to think that ISGP industrial sites will have neat, no-pollution-generating, parking lots and offices that have no connections whatsoever to a site's stormwater system and which are entirely kept separated from anything industrial. Ecology should clarify that all of a site's stormwater must all be managed by a permittee if industrial activities are present, regardless of whether that stormwater comes from the roof of an office structure, the tires of an administrative employee's car, or any other part of the industrial site.

Fourth, Ecology needs to align these references with one another. Does the agency mean accompanying parking lots or administrative parking lots? Areas that are administrative or only administrative parking lots? Permittees need certainty here and clarification is a must. These areas generate pollution, including 6PPD-q, and Ecology should simplify this permit and ensure on any site that has industrial activity, all areas on the site are covered by this permit, without exemptions.

- **Groundwater monitoring (S1.E).** The draft permit does not require permittees "to sample on-site discharges to ground (e.g., infiltration)" except for three narrow exceptions. See S1.E. This is not effective discharge monitoring and thus inconsistent with recent case law. In *Wash. State Dairy Fed. et al. v. Dept. of Ecology et al.* the Washington Court of Appeals noted that NPDES permits with insufficient groundwater monitoring requirements "contain inherent contradictions that would render them unenforceable." 18 Wash.App.2d 259, 299 (2021).

The court explains "[u]nder the Clean Water Act, every NPDES permittee is required to 'monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit.' *Nat. Res. Def. Council v. County of Los Angeles* (NRDC), 725 F.3d 1194, 1207 (9th Cir. 2013) (citing 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1)). 'That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.' *Id.*

Washington regulations state that monitoring ‘may’ be required of ‘[a]ny discharge authorized by a general permit.’ WAC 173-226-090(1)(a). Monitoring is limited to methods that may ‘be reasonably required by the department, including the installation, use, and maintenance of monitoring equipment or methods.’ *Id.* The court points out that the “*use of the word ‘may’ in the state regulations* pertaining to monitoring suggests that monitoring discharges is not strictly required to comply with the WCPA. See WAC 173-226-090(1)(a). However, the CWA provides that a state may not adopt a standard of performance less stringent than that required under the CWA. 33 U.S.C. § 1370.” *Id. at* FN 13.

In order for the final permit to comply with the law, Ecology must require permittees to sample on-site discharges to the ground.

- **Site-Wide Permitting Scope.** Ecology’s Fact Sheet notes that “The draft ISGP includes a modification for the transportation category, and now includes all material handling areas;” a decision made in part because “Ecology has determined that these areas are significant contributors of pollutants due to the increased tire wear and material exposed to stormwater which cause solids, zinc, and other pollution to leave the facility.” We appreciate and support Ecology’s determination that all areas of transportation facilities, including but not limited to material handling areas, are significant contributors of pollutants to waters of the State, which include, but are not limited to, all waters of the United States in Washington State. We also appreciate that the draft “permit limits the discharge of pollutants to surface waters under the authority of the Federal Water Pollution Control Act (U.S.C.S. 1251),” i.e., the NPDES permit program, which EPA has delegated responsibility to administer to the state of Washington on the basis of Chapter 90.48 RCW.⁶ This is all consistent with Ecology’s basis for regulating the entire footprint of all transportation facilities that have vehicle maintenance, equipment cleaning, or airport deicing areas, under the 2010, 2015, and 2020 iterations of the ISGP, which Ecology set forth in a sworn declaration and briefing filed in federal court, and the PCHB, and confirmed by EPA in its review of the 2020 ISGP:
 - “Ecology’s decision to expand the scope of ISGP coverage at water transportation facilities was based on the fact that stormwater discharges from these facilities contain pollutants at levels that contribute to violations of Washington’s water quality standards. Ecology believes industrial activity occurs on the wharf section of the Port’s West Sitcum Terminal, and the Port’s National Pollutant Discharge Elimination System Permit therefore requires stormwater management on the wharf section of the Terminal. Ecology exercised its residual Clean Water Act authority under 33 U.S.C. § 1342(p)(2)(E) when it elected to extend the scope of ISGP coverage at transportation facilities that are required to obtain an NPDES

⁶ See the Fact Sheet, Page 4. Note also 40 CFR § 123.25, which states: “Requirements for permitting. (a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions **to impose more stringent requirements.**” (emphasis added).

permit under the Clean Water Act.” Ecology’s Amicus Brief at 2 filed August 16, 2019 in *Soundkeeper v. APM Terminals*, No. 3:17-cv-05016-BHS (W.D.Wash), ECF No. 269.

- “Ecology’s Decision to Expand the Scope of ISGP Coverage at Transportation Facilities Was an Exercise of Ecology’s Clean Water Act Authority to Require NPDES Permit Coverage for Discharges That Contribute to Violations of Water Quality Standards or Are Significant Contributors of Pollutants.” *Id.* at 5.
- “[T]he Fact Sheet Ecology developed during the 2009 reissuance of the ISGP demonstrates that industrial stormwater discharges from water transportation facilities like the West Sitcum Terminal, are a significant source of pollution that contributes to violations of Washington’s water quality standards.

The Fact Sheet for the 2009 ISGP includes a characterization of stormwater discharged by the industrial groups required to obtain an NPDES permit for stormwater discharges, including water transportation facilities, which are identified as SIC Code 44xx. Killelea Decl. ¶ 5, Ex. B at 097. The median concentration of copper in stormwater discharges from water transportation facilities was 36.3 micrograms per liter ($\mu\text{g/L}$). *Id.* Ex. B at 097, Table 37. That concentration is well above Washington’s acute marine water quality standard for copper, which is 4.8 $\mu\text{g/L}$. WAC 173-201A-240(5), Table 240. The copper in stormwater discharges from water transportation facilities not only greatly exceeds Washington’s acute water quality standard for copper, but also greatly exceeds the 14 $\mu\text{g/L}$ copper benchmark Ecology established in the ISGP in order to protect water quality. Killelea Decl. Ex. A at 025, Table 2.3.

The median concentration of zinc in stormwater discharges from water transportation facilities was 244 $\mu\text{g/L}$. Killelea Decl. ¶ 5, Ex. B at 097, Table 37. Again, that concentration is well above Washington’s acute marine water quality standard for zinc, which is 90 $\mu\text{g/L}$. WAC 173-201A-240(5), Table 240. The zinc in stormwater discharges from water transportation facilities also greatly exceeds the 117 $\mu\text{g/L}$ zinc benchmark Ecology established in the ISGP to protect water quality. Killelea Decl. Ex. A at 025, Table 2. The high levels of copper and zinc in stormwater discharges from water transportation facilities represents a significant source of pollutants that contribute to a violation of Washington’s water quality standards for copper and zinc, and Ecology relied on this fact to expand the scope of permit coverage at transportation facilities. Killelea Decl. ¶ 5. Following Ecology’s decision to expand the scope of permit coverage at transportation facilities, a significant number of water transportation facilities began to monitor stormwater discharges from marine cargo handling and storage

areas. Killelea Decl. ¶ 6. The results of this monitoring demonstrate that stormwater discharges from marine cargo handling and storage areas at Port facilities frequently exceed the copper and zinc benchmarks in the ISGP. *Id.* This monitoring data confirms that stormwater discharges from marine cargo handling and storage areas at water transportation facilities continue to represent a significant source of pollutants that contribute to violations of Washington’s water quality standards for copper and zinc. *Id.*” *Id.* at 6–7.

- “Stormwater discharges from marine cargo handling and storage areas at water transportation facilities are a significant source of pollutants that contribute to violations of Washington’s water quality standards for copper and zinc, and Ecology properly used its residual Clean Water Act authority to require ISGP coverage for these areas.” *Id.* at 8.
- “Ecology expanded the scope of ISGP coverage at water transportation facilities to all areas of industrial activity because stormwater discharges from areas of industrial activity at water transportation facilities are significant sources of pollution that contribute to violations of Washington’s water quality standards. Industrial activity occurs on the wharf section of the Port’s West Sitcum Terminal and the Port’s NPDES Permit therefore requires stormwater management on the wharf section of the Terminal. Ecology exercised its residual Clean Water Act authority to expand the scope of ISGP coverage at transportation facilities.” *Id.* at 9.
- “As Ecology explained in its Amicus Brief, Dkt. #269, Ecology expanded the scope of ISGP coverage to all areas of industrial activity at transportation facilities, including the wharf section of the Port’s terminal, and exercised residual state authority under 33 U.S.C. § 1342(p)(2)(E) to do so. Ecology’s explanation was neither untruthful nor a post hoc rationalization, and Ecology stands by the explanation provided in its Amicus Brief. In fact, documents submitted by the Port and SSA with their responses to Ecology’s Amicus Brief supports Ecology’s explanation that it expanded the scope of ISGP coverage at transportation facilities because stormwater discharges from areas other than vehicle maintenance areas are a significant source of pollutants that contribute to water quality violations.

For example, SSA cites January 7, 2011 deposition testimony from Mr. Killelea that confirms Ecology’s omission of the “only those portions” language from the 2010 ISGP was intended to expand the scope of ISGP coverage at transportation facilities. Dkt. #276, at 3 n.9. In addition, Mr. Killelea’s November 6, 2014 email to Director Bellon explained that the decision to expand the scope of ISGP coverage

at transportation facilities was based on the Water Quality Program's concern about the significant sources of pollution from areas other than maintenance areas. Dkt. #280-20, at 3 of 18 (limiting ISGP coverage to only those portions of a transportation facility involved in vehicle maintenance "had the practical effect of excluding most material handling, storage, loading/unloading areas from the ISGP's sampling and BMP requirements; even though stormwater from these areas is highly contaminated with zinc, copper, sediment, petroleum, etc."). See also Dkt. #278 (Ex. F at 16:17–21) (January 7, 2011 deposition testimony by Ecology employee Wilmot Moore that observations by Ecology's field staff indicated activities other than vehicle maintenance "had significant stormwater impacts.")." Ecology's Reply in Support of Its Amicus Brief at 3 filed September 6, 2019 in *Soundkeeper v. APM Terminals*, No. 3:17-cv-05016-BHS (W.D.Wash), ECF No. 290.

- "[T]he wharf section at the Port [of Tacoma]'s terminal is covered by the ISGP because Ecology exercised its residual state authority under 33 U.S.C. § 1342(p)(2)(E) to expand the scope of ISGP coverage at transportation facilities." *Id.* at 5.
- "Ecology's decision to expand the scope of ISGP coverage at transportation facilities was an exercise of Ecology's Clean Water Act authority to require an NPDES permit for stormwater discharges that either contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States." Ecology's Response to Mot. For Summary Judgment filed in PCHB, at 14-15 (Oct. 23, 2020).
- "Ecology properly made a determination to expand coverage at transportation facilities under the 2020 ISGP pursuant to 40 C.F.R. § 122.26(a)(9)(i)(D)." *Id.* at 23.
- "[I]t appears that Ecology is using its 'residual designation' authority under 40 CFR 122.26(a)(1)(v), 40 CFR 122.26(a)(9)(i)(D), and corresponding state law authorities to require NPDES coverage for these stormwater discharges." Letter, EPA Region 10 Administrator Chris Hladick, (August 27, 2019).
- "The Ports asked Ecology to state that the extension of ISGP coverage to the wharfs was done as a matter of state law rather than the Clean Water Act. Ecology denied this request based on our determination that stormwater discharges from transportation facilities are significant contributors of pollutants at concentrations that may reasonably be expected to cause a violation of water quality standards. I discussed this determination with Ms. Bartlett, who signed the 2020 ISGP, and she concurred with the determination." Declaration of Vince McGowan, ¶ 5 (Oct. 23, 2020).

- *See also* Travis Porter Decl. in PCHB, Oct 23, 2020, ¶16 (“Discharges from Port of Tacoma facilities into Commencement Bay and from Port of Seattle facilities into the Duwamish Waterway are of particular concern to Ecology because both of these waterbodies are Puget Sound Sediment Cleanup Sites. . . . Ecology has determined that these sites are at higher risk of recontamination from stormwater discharges and require additional monitoring by ISGP permittees that discharge into these waterbodies. In addition many segments of the waterbodies surrounding Port of Tacoma and Seattle facilities are listed as impaired for a variety of pollutants on Ecology’s Clean Water Act section 303(d) list of impaired waterbodies. This means the waterbodies are already failing to meet Washington’s water quality standards.”).

Both state and federal appellate courts have ruled in favor of Ecology’s site-wide approach. In March 2024, the Washington State Court of Appeals affirmed that Ecology’s interpretation of facility coverage is in line with the 2020 permit language and the purpose of the CWA and the state’s WPCA. Transportation facilities are responsible for the full extent of their industrial footprint and the entirety of their stormwater discharges. On June 10, 2024, the federal Ninth Circuit Court of Appeals ruled that certain facilities are responsible for controlling all stormwater pollution generated everywhere across their state-permitted facilities, including areas like docks and wharves built over waterways.

Importantly, we note that backsliding on NPDES permit conditions that guard against precisely these types of threats to water quality is strictly prohibited (See 33 U.S.C. 1342(o)). Please confirm that no such backsliding is contemplated.

- **Conditional No Exposures.** We support Ecology’s change that now requires applications for Conditional No Exposures (CNE) to receive affirmative approval before going into effect. However, Ecology should also explicitly require an Ecology inspection to confirm that CNE criteria are met before approving a CNE. Ecology agreed to propose such language in its settlement agreement with Soundkeeper, which Ecology executed on August 4, 2022.

Please also include the requirement that all permittees granted a CNE must upload notice once their CNE expires to PARIS. This will help Ecology better track all CNE exemption expiration dates and makes it more likely that facilities previously granted a CNE exemption submit a new application form every five years. Further, Ecology must continue to inspect facilities with approved CNEs during the term of exemption.

3. SWPPP improvements (S3)

For the SWPPPs required under this permit, the following changes must be made:

- There is a mistake in S3.A.2.c. regarding section reference. “Revisions to the manuals in S3.A.3. a & b, or other stormwater management guidance documents...” The “3” should be a “2”.
- Please require all permittees to update SWPPPs considering all we’ve learned about 6PPD-q since it was discovered in 2020 (i.e. sources, mitigation, etc.) as well as PFAS.
- S3.B.o requires that site maps identify locations of fueling and vehicle maintenance areas, and areas where equipment cleaning is conducted. This should include both short and long-term vehicle storage as well.
- Please include surfaces made of toxic precursors, like recycled 6PPD-containing tires in the S3.B.2.vii list of roofs or other surfaces composed of materials that may be mobilized by stormwater.
- For dumpster good housekeeping (S3.B.4.i.2.d) Ecology should require an annual review of all dumpsters to ensure they do not have rust holes and leaks, and that the lids all work properly. Please require that this is certified in an annual report and uploaded to PARIS. Ecology should also add a general good housekeeping requirement that facilities do not store tires outside, alongside, near or against dumpsters; this is usually a temporary storage location used before tires get picked up for disposal, but it creates a direct pathway for pollution generation.
- Ecology should require that permittees print electronic DMRs and attach them to the SWPPP to increase transparency.
- Ecology must include a training requirement for BMP monitoring and inspections within the employee training requirement (S3.B.4.b.i.5.). Please also include a requirement that employees ensure BMPs are in place prior to a rain event. Ecology should also require Water Quality Standards training focused on turbidity, pH, oil sheen, copper, and zinc. Please provide a justification for only training industrial employees. The requirement should include training for everyone.
- Finally, Ecology should add “any unregulated” to the illicit discharges section (S3.B.4.i.7). This addition clearly includes discharges that might be going through a permittee’s conveyance but may originate from another site.

4. Sampling requirements (S4)

We urge Ecology to ensure that the permit includes monitoring requirements with tangible remedial actions. Ecology cannot rely solely on the SWPPP and visual assessment.

S4.B.2.b refers to the *Maui* case when discussing sampling discharges to the ground, but Ecology does not refer to *Maui* for the same thing in S1.E.1. Please revisit this reference and make the sections consistent.

Regarding unsafe conditions, Ecology notes on page 49 of the Fact Sheet that “the access issues will have to be resolved and staff will have to plan accordingly so that samples can be obtained.” Please ensure this clarification is within the permit and the “unsafe conditions” exemption is used for truly temporary situations. Ecology should require that permittees fully document the location(s) it claims is unsafe for sampling. Ecology must verify these claims and require that the next best location is used. Ecology sampling guidance illustrates how to collect sheet flow, which seems like it would resolve all unsafe sampling claims related to sampling under a wharf/scupper hole. Permittees can collect the sample from the surface before it goes into the scupper.

Please explain why the sampling point waiver (S4.B.2.e) is necessary. There is already (1) accommodation for safety; (2) an exception from the requirement to monitor all points of discharge for substantially identical outfalls; and (3) an individual permit option. There are too many processes for waivers based on vague and subjective criteria (e.g. the permittee “believes” it’s “infeasible”; what is a “technical basis” in this context?). This undermines the public and EPA’s ability to ensure that the general permit, as a whole, meets the CWA requirements. It also adds administrative burden – Ecology is inviting permittees to submit site-specific waiver requests about monitoring locations, whereas Ecology is also concerned about the administrative burden of the ISGP waiver requests it already has to address. As drafted, the sampling point waiver request process applies if the permittee believes the sampling location requirements are not feasible. Please clarify what “feasible” means and Ecology’s case-by-case authorization process. Ecology should also clarify when the sampling point waiver terminates.

We recommend that if a permittee can reduce monitoring to once a year for three years based on consistent attainment of benchmark values, it must still sample during the first fall storm event (S4.B.7.c). Please clarify whether that is what Ecology intends and if not, describe why.

We suggest Ecology update the permit to include the following:

- Required copper monitoring for more facilities;
- Require five samples during the wet season (September – March) with one of those sampled from the first fall storm event discharge.
- The permit should clarify that the monthly visual monitoring for oil sheen must be reported on the quarterly DMRs;
- A provision that requires formal notification of the frequency and magnitude of stormwater by-pass (overflow) events as well as a requirement that facilities sample the by-pass, measure the duration of the by-pass, and the volume of untreated water discharge. With this information, Ecology can take the appropriate actions to prevent the recurrence of these events. By-pass sampling results should be reported in the quarterly DMR.

5. Corrective Action Improvements (S8)

It appears that there is a reference mistake in S8.B.2. “Summarize the Level 1 Corrective Actions in the Annual Report (Condition S9.B). The Annual Report is found in S9.C.

- **Level I Corrective Action.** Ecology should revise the permit to require permittees to upload a Level I Corrective Action certification into PARIS by the end of each quarter or alternatively, when the DMR for that quarter is due.
- **Level II Corrective Action.** Ecology should revise the permit to include review and approval process for a permittee’s proposed Level II Corrective Action. Also, we are very concerned that the draft permit has removed Ecology’s duty to respond to a request for a time extension or waiver. If Ecology fails to respond to the request would the permittee have a shield for unaddressed Level II issues? Please clarify and ensure that Ecology’s lack of response does not shield a permittee from unaddressed Level II issues. Next, the draft proposes to move the deadline for permittee’s Level II Corrective Action waiver or time extension from May 15 to August 31, the implementation deadline. We are concerned this change will likely result in delayed implementation of Level II improvements. With Level II requests due May 15, Ecology and the public can review and consider these requests before the implementation deadline, and permittees would have a chance to attempt to meet the deadline if their waiver request is denied before the deadline. The new schedule is likely to result in permittees ignoring the Level II requirements until immediately before the implementation deadline. Permittees that do so may submit last-minute waiver requests instead of duly implementing improvements on time. With an earlier deadline for waiver requests, permittees who ignore or defer Level II improvements until the last minute may be rewarded, and Ecology and the public may be left with inadequate time to evaluate waiver requests.

As written, the draft permit does not make it clear that facilities which fail to adequately implement the approved corrective action are not allowed the permit exemption advancing corrective action during the year following the trigger. Please modify the permit language accordingly.

Relatedly, Ecology should include the following underscored language in condition S8.C.4.e:

- “For the implementation year (the year following the calendar year the Permittee triggered a Level 2 corrective action), benchmark exceedances (for the same parameter) do not count towards additional Level 2 or 3 Corrective Actions.”

Ecology agreed to include this language in the draft permit in its settlement agreement with Soundkeeper which Ecology executed on August 4, 2022.

Finally, please change the due date for Level II Corrective Action to June 30th instead of August 31st of the following year. A full eight-month timeframe is excessively generous. Moving the due date back to June 30th leaves two full quarters to assess the effectiveness of the selected BMPs.

- **Level III Corrective Action.** We are concerned with S8.D.3.b and the unnecessary length of time a permittee has to submit the engineering report. As written, a permittee could have well over a year before having to submit a report. That is unreasonably long. Please change this to “within 6 months of triggering the Level III.”

We also urge Ecology not to extend the Level III Corrective Action deadline (S8.B.D.5). The draft permit proposes extending the Level III Corrective Action deadline from 9 months to one year and 9 months. The rationale behind this aspect of the draft permit is presumably that Ecology agreed to propose such language in its *draft* permit in a settlement agreement with the Ports of Seattle and Tacoma (and their Northwest Seaport Alliance), SSA Marine, and BNSF Railway. Notably, that agreement does not commit Ecology to include the language in the final permit, nor does it supply any reasoned basis for weakening core permit requirements. Given that the draft language would provide a pre-approved time extension to all facilities, whether they request one or not, we have several concerns. How many extension requests does Ecology receive for Level III Corrective Actions? How does Ecology determine whether it approves a request? What data or other information have the Ports of Seattle and Tacoma, Northwest Seaport Alliance, SSA Marine, and BNSF Railway provided to Ecology related to this draft permit condition? What information have other permittees provided related to this permit condition? This proposal only increases the risk that a Level III compliance schedule extends past the term of the permit, making tracking and administration far more difficult. Moreover, all continuing violations are not held against the permittee.

There are several other problems with the draft S8.B.D.5. language. For example, the Level III implementation timeline is a compliance schedule subject to the limitations and requirements of WAC 173-226-180. The draft permit Level III timeline does not comply with these requirements. First, as evidenced by the record of many permittees previous successful completion of Level III improvements by the old deadline, September 30 of the first year after the triggering benchmark exceedances, extending the deadline by an entire year for all permittees does not “reflect the shortest reasonable period of time necessary to achieve compliance” with the water quality based effluent limitations and AKART effluent limitations represented by the benchmarks. WAC 173-226-180(2). As proposed, the Level III timeline fails to set forth “interim requirements and the dates for their achievement” that are not more than a year apart. WAC 173-226-180(3). There is impermissibly more than one year between the engineering report due date and the implementation deadline in the proposed timeline. Third, the proposed timeline does not require a permittee’s written notice of compliance within fourteen days of the interim and final requirements. WAC 173-226-180(4). The draft also impermissibly ignores essentially all of WAC 173-201A-510(4)’s requirements for compliance schedules, including that compliance schedules be issued only on a case-by-case basis and not for new dischargers, the requirement for formally establishing interim effluent limits, and the requirement that “[p]rior to establishing a schedule of compliance, the department shall require the discharger to evaluate the possibility of achieving water quality standards via nonconstruction changes.”

Furthermore, the draft S8.B.D.5 language would violate the Clean Water Act's anti-backsliding provision. 33 U.S.C. § 1342(o). Does Ecology contend that the anti-backsliding provision is somehow inapplicable? If so, please explain. Likewise, if Ecology contends that an exception to the anti-backsliding provision applies, please explain.

The draft language extending the Level III Corrective Action deadline by a year is also incompatible with the S8.D.5.e language Ecology agreed to include in the draft in its 2022 settlement agreement with Soundkeeper:

- "For the implementation year (the year following the calendar year the Permittee triggered a Level 3 corrective action), benchmark exceedances (for the same parameter) do not count towards additional Level 2 or 3 Corrective Actions."

The language Ecology agreed to plainly contemplates that Level III Corrective Actions will be implemented within the next calendar year—not two years. Ecology should abide its statutory and regulatory requirements and its settlement agreement with Soundkeeper by declining to extend the current Level III deadline and by making it clear that permittees that do not implement Corrective Actions are held to account for benchmark exceedances during the year they should have been installing BMPs.

Again, we are very concerned that the draft permit has removed Ecology's duty to respond to a request for a time extension or waiver. If Ecology fails to respond to the request would the Permittee have a shield for unaddressed Level III issues? Please clarify and ensure that Ecology's lack of response does not shield a permittee from unaddressed Level III issues.

Please update the draft permit to require that permittees upload a certification to PARIS when the Level III Corrective Action is completed. Following installation of the treatment BMP, discharge monitoring should be increased to monthly through at least the remainder of the implementation year.

The permit must address the issue of facilities remaining at Level III Corrective Action status for decades. The permit must include when a facility no longer qualifies for coverage under the terms and conditions of a general permit due to excessive noncompliance. Alternatively, a system could be put in place where benchmarks are automatically converted to effluent limitations. This would provide a strong incentive for facilities to seriously meet benchmarks. Effluent limitation is not a new concept. It has already been incorporated in the ISGP for non-hazardous waste landfill, and facilities discharging into TMDL waterbodies or into waterbodies listed for sediment contamination.

6. Annual Report Improvements (S9.C.)

We suggest that Ecology move the due date for the annual report up to February 14th -- the same date as the entire year's monitoring data is due to Ecology. The annual report should be

uploaded to PARIS at the same time as the fourth quarter DMR. Not doing so allows a facility to procrastinate. The closer a facility waits to the current deadline the more likely it will find itself in a Level III Corrective Action with no time to develop the required engineering documentation for the treatment BMPs. This would almost certainly result in the facility submitting an NOI for a Level III Corrective Action Time Extension Request and increase the likelihood of Ecology approving it. Moving the due date up provides the facility with sufficient additional time to submit all the required supporting documentation and Ecology more time to review it. This simple change would increase the likelihood of treatment BMPs being implemented in a timely fashion.

The Annual Report must require the inclusion of chemical concentration for each benchmark exceedance, by quarter. This would assist the facility in better understanding its corrective action status. If the facility is at a Level II or III Corrective Action, it will better understand the overall magnitude of the challenge it is facing. This change would also provide all relevant monitoring information to Ecology and the public in one document.

7. Discharges to impaired waters (S6)

Regarding Table 6, Ecology should include salmon-impaired waters. If there is an impairment, Ecology should require 6PPD-q sampling. Please also include temperature in Table 6.

Regarding Table 8, add Tire and Road Wear Particles to the list of solids.

8. Public access and transparency

Transparency and ongoing public engagement are crucial for effective management of stormwater systems and achieving clean waterways. The more information Ecology and the public have access to the better. To create more transparency and make compliance verification easier, Ecology should require each facility to upload a certified copy of the Operation & Maintenance Manual into PARIS by its due date, as well as certifications for completion of all Corrective Actions (Levels I, II, and III); approved time extensions granted through administrative orders should also be uploaded to PARIS.

Currently, the process for approving waivers and time extensions for Corrective Actions lacks transparency. These are important permit decisions. Ecology should define and/or provide guidance for the required “detailed explanation” or “technical basis” (see e.g. S4.B.2.e.ii., S6.C.2.d.ii. S8.C.4.c., S8.D.5.c.) as to why Corrective Actions are not feasible or not necessary. The evaluation criteria should be clearly specified in the permit or accessible resource. Additionally, the new permit should require the facility to upload a certification into PARIS when the time extension has expired.

All Ecology administrative orders approving Corrective Action time extensions and waivers must be published on Ecology’s webpage. These public documents modifying permit coverage should be easily accessible to the public. Ecology should also modernize its modification process (S2.B).

Please include a digital notice for application for coverage modification and the public notice requirements in WAC 173-226-130(5).

9. Definitions and terms

- **Significant Process Change.** According to the permit, Significant Process Change means any modification of the facility that would result in any ... [a]dd additional impervious surface or acreage such that stormwater discharge would be increased by 25% or more. Please explain how Ecology determined 25% as the threshold percentage. This percentage seems arbitrary. A 5-acre facility that increases impervious surfaces by only 20% would be 1 acre, which is a considerable surface area for stormwater related impacts. Please compare and contrast these thresholds to smaller AKART thresholds developed under MS4 permits.
- **Superfund.** Please clarify if “Duwamish Waterway” Superfund Site definition includes Harbor Island and Lower Duwamish Waterway and any adjacent upland or early action sites related to these Superfund sites.
- **Triggers.** The definition of "trigger" states, “[f]or purposes of this permit, a Level II or III Corrective Action is triggered on the last day of the calendar year in which the benchmark was exceeded, resulting in corrective action requirements and deadlines.” This provision of the definition is unnecessary and might be read to mean that dischargers that exceed a benchmark in quarter one and quarter two should just ignore the pollution problem until January of the following year, rather than addressing the problem promptly by exploring and installing a Level II Corrective Action right away. This seems to conflict with the corrective action conditions, which require full implementation “as soon as possible.”

If the new "trigger" language is read to postpone the corrective action requirement, it will delay compliance by several months. This is particularly problematic for Level II Corrective Actions because structural BMPs can often be installed during the summer dry season of the year in which the Level II-triggering exceedances occurred, avoiding another first flush and wet season of pollution. Any delay in installing Level III Corrective actions is problematic too, of course. Dischargers should not be encouraged to put off Level III planning and implementation that could be done in the fourth quarter. Ecology should strike this portion of the new definition, which backtracks from the corrective action requirements of the current ISGP.

- **Who’s Responsible?** The permit's use of the terms “discharger,” “operator,” and “permittee” are inconsistent and confusing. “Discharger” and “Operator” are both defined; “Permittee” is used extensively but not defined.

10. Conclusion

Thank you for your work on the ISGP and consideration of these comments. Please direct response to comments to Emily Gonzalez, Director of Law & Policy, Puget Soundkeeper Alliance, at emily@pugetsoundkeeper.org.

Sincerely,

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