Federal StormWater Association

July 15, 2024

Lucienne Banning
Washington State Department of Ecology
PO Box 47696
Olympia, WA 98504-7696
Submitted electronically:
Lucienne.Banning@ecy.wa.gov

Re: Comments by the Federal StormWater Association on Draft Industrial Stormwater General Permit; Publication Number 24-10-024, May 2024.

Dear Ms. Banning:

The Federal StormWater Association (FSWA) submits the following comments on the Washington State Department of Ecology Draft Industrial Stormwater General Permit. The Department announced availability of the Draft Permit and Fact Sheet for Review and Comment on April 30, 2024.[1] The comment deadline was extended from June 28, 2024 to July 15, 2024.[2]

I. Interest

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA). FSWA has been engaged in stormwater regulatory and litigation matters across the country for nearly 20 years. Its members have been involved in similar stormwater regulatory matters since the beginning of the current stormwater regulatory program was adopted by Congress in 1987, related Phase I regulations by EPA in November 1990, and then the Phase II stormwater program expansion in 1999. FSWA members, for purposes of these comments, include, for example, Airports Council International - North America; American Petroleum Institute; Associated General Contractors of America; Association of American Railroads; Auto Industry Water Quality Coalition; Recycled Materials Association (formerly Institute of Scrap Recycling Industries); National Association of Home Builders; Pavement Coatings Technology Council; and Western States Petroleum Association.

II. Comments Summary

FSWA members own and operate facilities and conduct industrial activities covered by the proposed permit. The Draft Permit includes requirements that go beyond the State's authority to regulate stormwater discharges under CWA Section 402 and related National Pollutant Discharge Elimination Act (NPDES) stormwater permitting regulations by regulating discharges of stormwater to groundwater. The Clean Water Act's NPDES program is designed

[1] https://fortress.wa.gov/ecy/ezshare/wq/permits/ISGP_2024_StateRegisterNotice.pdf.
[2] *Id.*

to limit discharges of pollutants being discharged from point sources into waters of the United States. Discharges to groundwater are not regulated under CWA Section 402. See 33 U.S.C. 1342(a) and (b) (authorizing State implemtation of the program). While the Department has jurisdiction to regulate groundwater within the State, including incorporation of groundwater protection requirements through NPDES permits, the Department's presumptive application of groundwater requirements through the stormwater general permit is inappropriate and should be withdrawn.

FSWA also asserts that the State's expansion of the transportation and landfill sectors under the Draft Permit exceed its NPDES permitting authority. For example, with respect to airports, the proposal inappropriately expands the scope of industrial activities covered by the permit to include the entire airport. Consistent with federal stormwater regulations at 40 CFR 122.26(b)(14), the current permit is limited to fueling, vehicle maintenance, equipment cleaning, and deicing. Areas of the airport that do not have such activities are often covered by local jurisdictions through non-traditional MS4 permits or MS4 permit coverage for the city or county in which the airport is located. The proposed expansion conflicts with this well-established framework and fails to comply with the process set forth in the CWA at 402(p)(5)-(6) or 402(p)(2)(E) governing the identification and regulation of additional classes of stormwater discharges.

Similarly, the addition of PFAS sampling requirements for airports and landfills exceeds the Department's authority under the stormwater program as explained more fully below. Finally, the addition of 6PPD-quinone sampling raises concerns with reliance on draft Method 1634; a method not yet an approved pursuant to 40 CFR Part 136. For these reasons, the Department should withdraw these requirements as they exceed the State's CWA authority. Our detailed comments on the Department's proposed changes to the existing permit and recommendations are set forth below.

III. Detailed Comments

The Department requests comment on the following changes to the Industrial Stormwater General Permit:

- **A new definition for transportation facilities to make it clear that the permit applies to all areas of industrial activity, not just in areas where vehicle maintenance, equipment cleaning, and airport deicing occur.**

Municipal and industrial stormwater discharges are regulated under CWA Section 402(p) and the State of Washington Water Pollution Control Law, Chapter 90.48 Revised Code of Washington (RCW), where those discharges are "associated with industrial activity."[3] The Draft Permit attempts to expand the Department's ability to regulate

[3] See Section 402(p) implementing regulations at 40 CFR 122.26 Storm water discharges, applicable to State NPDES programs, subject to the requirements of 123.25.

transportation facilities, for example, in their entirety through a revised definition for "industrial activities" as that definition pertains to the transportation sectors identified in the Draft Permit. The draft revised definition abandons the approach in prior permits of defining coverage consistent with the federal regulations at 40 CFR 122.26(b)(14)(i-xi)[4] and sweeps too broadly to assert jurisdiction over entire transportation facilities, including areas where no industrial activities occur and that are within the purview of other regulatory authorities.

For example, 40 CFR 122.26(b)(14)(viii) defines permit coverage for the transportation facility classification to include facilities which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. The regulation further explains that only those portions of the facility that are either involved in vehicle maintenance, equipment cleaning operations, airport deicing operations, are associated with industrial activity. The proposed definition, to include the entire airport facility, for example, would sweep in areas of the airport where industrial activities are not conducted and are generally covered by non-traditional MS4 permit coverage or MS4 coverage for the county or city that covers the airport property. In this instance the Department is essentially attempting to double permit portions of these facilities and those permits likely have significant conflicts in how they address various regulated discharges, putting facility operators in an impossible compliance dilemma. The Department should reconsider the expanded definition of coverage for the transportation sector and return to the long-standing definition that tracks the federal regulations.

The Department also should reconsider the inclusion in the definition of "industrial activities" of inactive facilities, sites that by definition no longer conduct industrial activities.[5] Setting aside the question of whether it is legally appropriate to include facilities that no longer conduct industrial activity in the definition of "Industrial Activity", the Department has failed to consider the impracticality of compliance, including the additional costs, at sites that are typically no longer staffed and may not be located in close proximity to active facilities. Some or many of these sites may have filed notices to terminate permit coverage because they no longer have "stormwater associated with industrial activity" from any point sources at those sites. At a minimum, the Department must consider, and make accommodations for the compliance challenges that would come with requiring inactive facilities to obtain stormwater permit coverage.

The Department's attempt to regulate the entire transportation facility, including inactive sites goes too far and is not supported by the CWA. Congress did not provide NPDES regulators with unbridled authority. Rather, the CWA "authorizes the EPA to regulate, through the NPDES permitting system, *only* the discharge of pollutants." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added)." As the D.C. Circuit has explained,

[4] See definition of Industrial Activity, Draft Industrial Stormwater General Permit Redline Version at Appendix 2.
[5] See *Id*. defining Inactive Facility to mean " a Facility that no longer engages in business, production, providing services, or any auxiliary operation."

"[t]he statute is clear" and contains no language that "undercuts the plain meaning of the statutory text;" EPA may not "meddl[e] inside a facility" because it only has authority over the discharge of pollutants from a point source, and "Congress clearly intended to allow the permittee to choose its own control strategy." *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997). EPA "is powerless to impose conditions unrelated to the discharge itself." *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th Cir 2009) ("the Clean Water Act gives EPA jurisdiction to regulate… only *actual* discharges—not potential discharges, and certainly not point sources themselves.") (emphasis in original).

- **Clarifying the definition of "industrial activity" to ensure transportation facilities apply the permit, sampling, and best management practices (BMPs) facility-wide, including areas where material is handled and stored.**

As explained, the scope of CWA stormwater jurisdiction does not extend "facility-wide." If the Department seeks to expand the scope of the CWA stormwater requirements, it must follow the process set forth in Section 402(p)(5)-(6). Only certain enumerated stormwater point source discharges are regulated under the CWA and NPDES program and the Department's attempt to expand stormwater regulatory authority to address entire industrial sites, including areas where no industrial activity occurs must be consistent with the CWA. The Department's effort to apply the permit, sampling, and best management practices (BMPs) facility-wide, including areas where material is handled and stored, is impermissible regulatory overreach and should be withdrawn.

CWA Section 301, contains a general prohibition of pollutant discharges, however, CWA Section 402 provides an exception to that prohibition, by allowing certain pollutant discharges to be authorized by an NPDES permit, provided that the discharges meet appropriate "effluent limitations" contained in the permit. 33 U.S.C. § 1342(a). In 1987, Congress added CWA Section 402(p), which established a phased approach to regulating certain point source stormwater discharges, as needed. To implement CWA Section 402(p)'s Phase I stormwater program, EPA promulgated new regulations that defined the term "associated with industrial activity" to identify 11 categories of industrial operations that must obtain NPDES stormwater permits. 55 Fed. Reg. 47,998 (Nov. 16, 1990). The industrial stormwater program regulates only those discharges specifically enumerated as associated with industrial activity, and other non-industrial stormwater discharges that commingle with regulated industrial stormwater discharges. One category that EPA defined as "industrial stormwater" were discharges from transportation activities that have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. 40 CFR § 122.26(b)(14)(viii).

EPA then expanded its NPDES stormwater program through the Phase II expansion process set forth in CWA Sections 402(p)(5)-(6). That was the process set forth by Congress and EPA followed that process, even though it recognized it would not be a quick fix because

it required a report to Congress and subsequent lengthy rulemaking process. The Department cannot expand the scope of its CWA stormwater program without adhering to the specific processes for designating new classes or categories of sources for NPDES stormwater permitting set forth in the CWA.

CWA Section 402(p)(1) is a broad exemption from NPDES permitting for all stormwater discharges except those identified in Section 402(p)(2). As set forth above, the CWA sets forth specific processes for designating new classes or categories of sources for NPDES permitting. However, the regulatory authority may designate for permitting an individual site ("a discharge") that contributes to a violation of a water quality standard or is a significant pollutant discharger on a site-specific basis, with some limitations that ensure the disignated site is discharging a pollutant from a point source to a navigable water. Section 402(p)(2)(E) clearly is limited to "a discharge…as the case may be…" and is clearly understood to be a case-by-case determination that a site is discharging significant pollutants or is violating water quality standards, even though not otherwise regulated by the other sections in CWA Section 402(p)(2). However, such case-by-case determinations are not appropriate in the context of a general permit.

- **Adding PFAS sampling requirements for airports and landfills, since these operations are more likely to have PFAS contamination.**

Aqueous Fire Fighting Foam (AFFF) usage at commercial airports has been mandated by the Federal Aviation Administration (FAA) and is related to public safety and firefighting preparedness. Nothing associated with AFFF is related to vehicle maintenance, fueling, or deicing. The activities are typically conducted in designated areas with secondary containment and are not "associated with industrial activity" and remain outside of the industrial general stormwater permitting program. At the same time, many airports are investigating possible PFAS contamination in Washington, so additional stormwater permit mandates will not provide any useful information.

- **Adding 6PPD-quinone (from tire wear) sampling for larger transportation facilities, where we expect increased tire wear particles and likelihood for 6PPD pollution, starting in year three of the permit.**

FSWA is concerned with the Department's proposed 6PPD-Q sampling at larger transportation facilities and its reliance on draft Method 1634, which is not yet an approved method under 40 CFR Part 136. According to EPA, the method is for use "only by analysts experienced with Liquid Chromatography with Tandem Mass Spectrometry (C/MS/MS) instruments or under the close supervision of such qualified persons."[6] Furthermore, the

[6] See U.S. Environmental Protection Agency Office of Water (4303T) Office of Science and Technology Engineering and Analysis Division, EPA 821-D-24-001, DRAFT Method 1634 Determination of 6PPD-Quinone in Aqueous Matrices Using Liquid Chromatography with Tandem Mass Spectrometry (LC/MS/MS), 1.3. (December 2023).

method provides wide discretion in the laboratory to adjust the model to "improve performance."[7] This raises concerns with the ability to find qualified laboratories and analysts, consistency across laboratories and reliability of the results, in addition to the cost associated with specialized sampling.

Since the 6PPD-Q sampling requirement is not triggered until a full three years into the permit cycle, FSWA strongly encourages the Department to forego the requirement and reconsider for the next permit renewal cycle. At that time, it is more likely Method 1634 may be an approved method and sampling results would be more meaningful. We recognize the potential threats that 6PPD-Q have been asserted to present to fish in certain receiving streams, but more research is needed before such mandates can be inserted in the State's industrial general permit. Once again, perhaps individual permits may be appropriate for certain types of sites on certain water bodies, but not a state-wide mandate.

- **Adding flexibility to allow facilities to apply for a waiver to adjust where they sample their stormwater discharge. This is intended to help with safety and logistical issues of sampling wharves and piers at marine cargo handling facilities.**

FSWA supports the added flexibility for the waiver to adjust where stormwater discharges are sampled. However, we question the need to invite public comment as waivers are site-specific and driven out of specific change in circumstances and need. These are issues generally addressed through the expertise of the state regulators and the site operators. Adding a public comment process will add delay and invite political motivations to the process.

- **Increase inspection oversight by removing the automatic approval for areas not exposed to rain, also called Conditional 'No Exposure' exemptions.**

FSWA questions whether the Department has adequate staff and resources to approve every no exposure request. For the history of the general NPDES program, requests for exemption from permit coverage for areas not exposed to rain has been through self- certification. In other words, the applicant must certify, under threat of prosecution, that statements asserting no exposure are true and accurate. The purpose of no exposure is to allow sites with no risk to avoid the permit program and incentivize others to achieve that status and promote pollution prevention. Installing a lengthy and delayed process eviscerates the incentive and amounts to over regulation of low- risk facilities. Regulators are free to visit and inspect no exposure sites, but the draft "approval" process add unnecessary bureaucracy to the process and will discourage sites from investing to achieve no exposure pollution prevention status because they will not be assured that an individual regulator will approve.

[7] Id. at 1.4.

IV. Additional Comments:

- **Special Condition S1 Permit Coverage A. Facilities Required to Seek Coverage Under This General Permit**

The Draft Permit states that the 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. However, the authority the Department is acting under RCW 90.48.020 (limits discharges to surface waters) and RCW 90.48.080 (limits discharges to groundwater) does not include roadside ditches. RCW 90.48.020 states "wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include 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 State of Washington has not made any formal determination that all roadside ditches are considered "waters of the state." Whether a roadside ditch can be considered a water of the state and regulated as such would require a site-specific analysis that must be done case-by-case. The Department's attempt to regulate all roadside ditches as if they are waters of the state is overbroad and not supported in law.

- **S3. Stormwater Pollution Prevention Plan (SWPPP)**
  4. Other Pollution Control Plans

The Draft Permit provides for the incorporation by reference plans prepared for other purposes and under other regulatory programs. For example, many facilities are required to develop Spill Prevention, Control, and Countermeasure (SPCC) plans prepared under regulations implementing Section 311 of the CWA. SPCC plans ensure discharges of oil are prevented from reaching navigable waters and include prevention measures that are functionally equivalent to certain SWPPP requirements. FSWA supports the ability to cross reference legally enforceable requirements of other regulatory programs in the SWPPP as a means of avoiding duplicative measures under different permitting programs with the same purpose. However, FSWA strongly disagrees with the Department's proposal that the requirements of other regulatory programs should be incorporated into the SWPPP as enforceable requirements of the Industrial Stormwater General Permit. The Draft approach would potentially subject permittees to enforcement actions or citizen suits under two different permits for the same violation. In addition, the Department does not have the authority under Section 402 to enforce the terms and conditions of a permit issued by another agency department under a completely different CWA program. By attempting to improperly assume an enforcement role for permits that the Department did not issue places permittees in a position of serving two masters, the agency that issued and legally enforces the permit and the Department that assumed for itself an enforcement role via issuance of a stormwater permit. The proposal overreaches the Department's authority and exposes

permittees to risk of double jeopardy. The Draft should be revised to provide for cross reference to other regulatory programs that serve the same purpose to prevent discharges of pollutants through point sources to navigable waters to avoid duplicative regulation. Those programs should not be incorporated into the Industrial Stormwater General Permit as enforceable requirements.

- **E. Discharges to Ground**

The Department expands the stormwater permit to include discharges to ground and groundwater. Washington's groundwater quality standards are implemented through regulatory mechanisms, including incorporation into NPDES permits.[8] However, implementation guidance waives the groundwater discharge requirements at WAC 173-200 (implementing chapter 90.48) for any activity regulated by a general permit which includes groundwater protection provisions.[9] Yet, the Draft Permit overrides the statutory waiver by creating a presumption that a facility subject to PFAS sampling per condition S5B is not eligible for the waiver. The Department's determination lacks a scientific basis and should be withdrawn. As stated earlier, PFAS contamination is primarily associated with use of AFFF at airports and occurs within specific areas on a facility.

Groundwater and stormwater discharges that are not associated with these delineated areas present very low risk of PFAS contamination to ground water. The Department's requirement that any facility subject to PFAS sampling must also develop a hydrologic study and monitoring plan consistent with RCW 90.48 is arbitrary and fails to make the required finding that the facility has the potential to contaminate groundwater.[10]

The Draft Permit also eliminates the waiver from groundwater requirements where the Department deems a discharge point a functional equivalent to a point source discharge to surface waters. The Department fails to provide any information on how a functional equivalent analysis would be conducted and U.S. EPA has yet to release administrative guidance interpreting the Supreme Court decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund.* As the Supreme Court recognized, many factors may be relevant to determining whether a discharge is the functional equivalent of a direct discharge to navigable waters. FSWA is concerned that without clear guidance and criteria as to how functional equivalent determinations will be made, there is a high risk that decisions will be arbitrarily made and inconsistently applied. FSWA strongly recommends the Department should withdraw the provision until such time as the process and criteria are developed through proper administrative procedures to include public comment.

- **Additional Sampling Requirements for Specific Industrial Groups**

[8] Implementation Guidance for the Ground Water Quality Standards, Watershed Management Section (2005) at 1.3.1.2.
[9] *Id.* at 1.3.1.3.
[10] *See* Implementation Guidance at 1.3.1.1.

The Draft Permit requires that analytical methods used to meet sampling requirements must conform to the latest test procedures at 40 CFR Part 136 and prepared by an accredited lab.[11] However, new sampling requirements for the transportation sector, specifically PFAS and 6PPD-quinone, rely on Method 1633 (PFAS) and 1634 (6PPD-quinone) that are not yet approved under Part 136, making these requirements inconsistent with the analytical sampling requirements stipulated in the permit. FSWA requests the Department clarify expectations regarding this inconsistency. In addition, we are concerned with reliability of the data generated, even though "report only" sampling requirements from methods not yet approved. The purpose of report only sampling is to generate data to inform future regulatory actions, meaning the data must be both reliable and meaningful. The Department should avoid imposing expensive sampling requirements on permittees until such time as the analytical methods employed are approved and can be confidently relied on for making regulatory decisions.

- **Table 3: Additional Benchmarks and Sampling Requirements Applicable to Specific Industries**

Table 3, 5. Air Transportation Facilities contains benchmark and sampling requirements for airports, including monitoring for ammonia, BOD5, COD, Nitrate, Petroleum Hydrocarbons. These requirements only apply to airports that use 100,000 gallons of deicing fluid/year. Footnote "b" to the chart including this clarification is mislabeled and should be "c". This is likely a typographical error.

Conclusion

FSWA appreciates this opportunity to provide comments on Washington's Draft Industrial Stormwater General Permit. If you have any questions or would like to engage with FSWA further on this issue, please contact me directly at jeffrey.longsworth@earthandwatergroup.com or (301) 807-9685.

Respectfully,

Jeffrey S. Longsworth
FSWA Coordinator and Counsel

[11] Draft Industrial Stormwater GP, C. Analytical Procedures for Sampling Requirements, at 37.