

Washington State Department of Ecology's Draft Industrial Stormwater General Permit

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The Department of Ecology's Industrial Stormwater General Permit ("ISGP" or "Permit") expires at the end of the year, and Ecology has requested public comment on a revised Permit. This paper addresses the key changes in the draft Permit and highlights compliance issues that all facilities should consider as we move into a new Permit.

With a few notable exceptions, Ecology is not proposing significant changes to the Permit. The basic benchmarks, stormwater pollution prevention plan (SWPPP), monitoring, reporting and corrective actions remain essentially the same.

The most significant addition to the permit will be narrative and numeric effluent limits for discharges to what are termed Puget Sound Sediment Cleanup Sites. Areas of particular interest for potential comments on the draft Permit include:

- Coverage for transportation facilities
- New 303(d) listings
- New limits for discharges to Puget Sound Sediment Cleanup Sites
- Engineering Report requirements
- Reporting requirements

I. Transportation Facilities

The draft ISGP retains the current Permit’s language in Special Condition S1 Table 1 as to coverage for transportation facilities as well as the definition of “industrial activities” in Appendix 2. The definition in the Permit of industrial activities is taken verbatim from EPA regulations. This is significant for transportation facilities as the federal definition is limited to “only those portions of the facility that are . . . involved in vehicle maintenance.”¹

In practice, Ecology has interpreted this provision to require coverage of entire transportation facilities if there are any vehicle maintenance activities conducted on site.² For example, in an Ecology guidance document issued in 2012, Ecology announced that it would require ISGP coverage for entire facilities when any portion of the facility was used for vehicle maintenance activity.³

The Pollution Control Hearings Board (the “Board”) in 2012 determined that Ecology had failed to provide public notice when it changed the 2012 permit to require coverage of vehicle maintenance activity,⁴ but upheld the modification as a reasonable assertion of state authority.⁵ The Board did not, however, address the reasonableness of requiring Permit coverage for entire facilities based on maintenance activity in a portion thereof.

Ecology has proposed a 10 mg/L NWTPh-Dx benchmark for Transportation facilities and Petroleum Bulk Stations and Terminals.⁶

¹ 40 CFR §122.26(b)(14)(vii).

² As of May 2012, Ecology subjects an entire Transportation facility to Permit coverage, even if the activity triggering coverage (e.g., mobile fueling) occurs only in a portion of the facility. See ISGP (May 16, 2012 modification); Washington Department of Ecology, Industrial Stormwater General Permit Frequently Asked Questions, Question 8. Before 2012, the Permit coverage trigger was a (stationary) Vehicle Maintenance Shop.

³ Washington State Department of Ecology, Industrial Stormwater General Permit Frequently Asked Questions, Question and Answer No. 9. A more recent version addresses this subject in Question 10, available at <http://www.ecy.wa.gov/programs/wq/stormwater/industrial/ISGP%20FAQ%202013.pdf>.

⁴ *BNSF Railway v. Ecology*, PCHB No. 12-062c, Order on Motions for Partial Summary Judgment (May 28, 2013) at 14.

⁵ *Id.* at 17–18.

⁶ Draft ISGP S5.B, Table 3.

II. Who Is Subject to New Numeric and Narrative Effluent Limits?

The Draft Permit contains new numeric and narrative effluent limits for facilities discharging to 303(d)-listed waterbodies and the so-called Puget Sound Sediment Cleanup Sites (the “Sediment Sites”) in Condition S6.⁷ A description of the specific requirements is provided in Section III below.

Dischargers may be surprised by these new limits. Ecology has not identified all the dischargers subject to S6 and does not regard Appendix 4 as a complete listing of facilities subject to Condition S6.⁸ In public workshops, Ecology has indicated that it does not intend to generate a final list of affected facilities before the Permit becomes effective.

For dischargers that do not appear in Appendix 4 but who believe they may discharge near or into a Sediment Site, Ecology has provided no maps or other information by which Permittees can determine if they lie within an affected drainage basin.⁹ The Sediment Sites are only roughly identified as Bellingham Bay, Budd Inlet (Inner), Commencement Bay (Inner), Commencement Bay (Outer), Dalco Passage and East Passage, Duwamish Waterway, Eagle Harbor, Elliot Bay, Everett/Port Gardner, Hood Canal (North), Liberty Bay, Port Angeles Harbor, Rosario Strait, Sinclair Inlet, and Thea Foss Waterway.¹⁰

Without maps or reference to specific impaired water grids, some ISGP permit holders will be left to guess at the boundaries of the Sediment Sites. For example, Ecology considers all dischargers to the “Duwamish Waterway” as subject to S6. But the Duwamish Waterway is a much larger area than the area designated for Superfund Cleanup as the Lower Duwamish.¹¹ In fact, the

⁷ Draft ISGP S6.C.

⁸ Referring to the additional sampling requirements and effluent limits, Ecology provides: “Facilities subject to these limits include, but may not be limited to, facilities listed in Appendix 4.” S6.C.1.a. (emphasis added).

⁹ By contrast, Ecology typically identifies impaired waterbodies by grid cells and refines that identification further by a Sediment Remedial Investigation process.

¹⁰ Draft ISGP Fact Sheet at 21, n.4.

¹¹ The Lower Duwamish waterway is 5 miles long, but it includes a combined sewer service area of nearly 32 square miles. Ecology, Lower Duwamish Waterway Source Control Strategy (Draft Final) (Rev. Dec. 2011) at 1.

Upper Duwamish and Green River watersheds drain 480 square miles into the Lower Duwamish.¹² This ambiguity will almost certainly play out in citizen enforcement of the Clean Water Act in Washington.

Ecology's lack of specificity is also troubling given that Ecology has at times previously rejected a link between stormwater and sediment contamination. For example, in 2001 Ecology concluded that industrial stormwater dischargers to Inner Bellingham Bay were not significant contributors to contaminated sediment.¹³ Yet without any reference to such prior determinations, Appendix 4 lists several permittees as "[a]ssociated with" a bioassay sediment listing in Inner Bellingham Bay. These permittees are treated under the draft ISGP as contributors to sediment contamination, the source and cause of which has not been identified, without any specific information demonstrating a causal link, and without any discussion of the discrepancy with Ecology's prior determinations.

III. Monitoring Requirements and Effluent Limits Related to Impaired Waterbodies and Puget Sound Cleanup Sites

a. Source Control BMPs

Permittees discharging to Sediment Sites are required to remove and collect solids from inlets, catch basins, sumps, conveyances lines, and

The "Source Area" for the Lower Duwamish includes the entire industrial area south of Seattle, and large sections of West Seattle, Rainier Valley, and Beacon Hill.

http://www.ecy.wa.gov/programs/tcp/sites_brochure/lower_duwamish/LDW%20SC%20Strategy_Draft-Final_Dec2012.pdf at 4 (Figures 1, 2).

¹² EPA, Appendix B: Environmental Justice Analysis for the Lower Duwamish Waterway Superfund Cleanup (Feb. 2013) at 8. *See also*

http://your.kingcounty.gov/dnrp/library/wastewater/LDW/1105_LowDuSourceCntrlBroFINAL.pdf

¹³ "This evaluation found no specific ongoing discharge sources for mercury, phenol, 4-methylphenol, wood debris, or other sediment contaminants." Ecology, Inner Bellingham Bay Contaminated Sediments Total Maximum Daily Load, Submittal Report, Pub. No. 99-58-WQ (Sept. 2001) at 23 (emphasis added). Ecology determined that stormwater point sources were not contributing to sediment quality impairments in Inner Bellingham Bay. *Id.* at 2 ("Wasteload Allocations are applied to the stormwater sources in Inner Bellingham Bay. No ongoing sources have been documented as currently contributing to the sediment quality impairments in Inner Bellingham Bay."). *See also* Ecology, Inner Bellingham Bay Contaminated Sediments TMDL Detailed Implementation Plan, Pub. No. 03-10-057 (June 2003) at 2 ("The only [NPDES] permit that had a potential to recontaminate an affected site was the Georgia Pacific West permit.")

oil/water separators at least once before October 1, 2017.¹⁴ Facilities also have to characterize the solids for disposal. In addition, facilities have to report sample results from storm drain system solids. The sampling parameters include several PCB aroclors,¹⁵ PAHs, various metals, and NWTPH-Dx.¹⁶

b. Numeric Effluent Limits

The Draft Permit contains new numeric and narrative effluent limits for facilities discharging to 303(d)-listed waterbodies and Sediment Sites.¹⁷ For facilities discharging to 303(d)-listed waterbodies, S6 imposes sampling and effluent limits corresponding to the parameter for which the waterbody is listed. Condition S6 also requires sampling for TSS if the Permittee discharges either to a Sediment Site or to a waterbody 303(d)-listed for a sediment quality parameter.¹⁸

c. Expanded Limits on New Dischargers

Under S6.B, the current Permit prohibits new discharges to 303(d)-listed waterbodies unless the discharger can show the pollutant for which the waterbody is listed is either not present or not likely to cause or contribute to a violation of water quality standards.

As proposed, Ecology will expand this prohibition to waterbodies with TMDLs (Category 4A), waterbodies that are sediment impaired (Category 4B), and the so-called Sediment Sites. This change creates several obstacles for new Washington businesses or dischargers, including:

¹⁴ Draft ISGP, S6.C.2.a. The draft Permit refers to these solids as “sediment,” a term more often used to refer to particulate matter in an aquatic zone or water column. WAC 173-204-200(26).

¹⁵ The specified PCB test method is not EPA-approved.

¹⁶ Draft ISGP, S6.C.2.b., c. The Permit is designed to facilitate source tracing. Facilities subject to numeric effluent limits must sample the parameters at every point of discharge; in other words, the facilities cannot rely on substantially identical outfalls to reduce sampling requirements. S4.B.2.c. Finally, Ecology intends to use data to justify future Permit revisions: Ecology’s data “will inform the next (2020) version of the ISGP.” Draft ISGP Fact Sheet at 26.

¹⁷ Draft ISGP S6.C.

¹⁸ Draft ISGP S6.C.1.b; Table 6 footnote f. incorrectly references S6.C.1.c, which does not exist. The intended reference is probably to S6.C.2.

- Ecology has provided no method for determining if a facility discharges to a Sediment Site. As noted in Section II above, the geographic scope of each Sediment Site is ambiguous.
- A bioassay listing does not identify the chemical cause of the toxicity in sediments. Hence, even when a discharger can determine that their discharge is to a water grid listed for bioassay, it is unclear how dischargers can disprove responsibility for the toxicity reflected in the bioassay.

IV. Condensed Level 3 Engineering Report and Online Reporting.

Ecology has proposed a condensed Level 3 Engineering Report, consisting of eight items to replace the requirements of Chapter 173-240 WAC. A Professional Engineer (PE) stamp is still required for the engineering report.¹⁹

Ecology will require all Discharge Monitoring Reports to be filed electronically starting in 2015. Facilities not currently using Ecology's web-based system PARIS (Permit and Reporting Information System) will have an early introduction to that system, as Ecology is also requiring permit re-application requests to be submitted electronically.

V. Sample Averaging

Ecology proposes to require averaging of samples collected in a single 24 hour period.²⁰ This average, described as a "daily average", can then be averaged against other samples taken during the quarter.

VI. Facility Definition

Ecology revised the definition of "Facility" to remove any requirement that it constitute an NPDES "point source".²¹ The revised definition is circular, describing a "Facility" as an "establishment" that is subject to

¹⁹ S8.D.

²⁰ Draft ISGP S5.A.3; S5.B.2; S9.D.

²¹ Appendix 2.

regulation under S1 of the permit. Special condition S1, in turn, indicates that the Permit applies to “Facilities” engaged in certain industrial activities.

VII. Ecology Enforcement and ISGP Compliance

Though not Permit revisions, Ecology’s Workshops and ISGP Fact Sheet provide several interesting statistics. Ecology’s Fact Sheet states Ecology’s Permit enforcement efforts have improved DMR submission rates from 40% of Permittees in 2010 to around 90% in 2014.²² Ecology did not, however, provide data on whether the Permit is reducing metals in stormwater.

Also, the Fact Sheet indicates Ecology inspectors continue to rely heavily on “informal” enforcement. Ecology claims it took 3,278 “informal” enforcement actions (likely referring to letters, phone calls, and conversations). By contrast, Ecology issued 35 civil penalties, 29 administrative orders, 8 notices of violation, and 178 notices of correction between January 2010 and March 2014.

Finally, Ecology indicates there are 1,158 facilities covered by the ISGP.²³ Of these, most are grouped in what Ecology considers the southwest portion of the state (535), followed by the northwest (520) and the central (70). There are only 29 permitted facilities in the eastern portion of the state.

²² ISGP Fact Sheet at 5.

²³ *Id.*