



Construction Stormwater Draft Permit Comments Received During 2020 Public Comment Period

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Norman Peck

A Construction Stormwater Permit should be required for construction work involving excavation, grading or soil movement at any site that is contaminated with hazardous substances as defined in MTCA (at or above MTCA cleanup standard levels).

At any site contaminated with a hazardous substance at above MTCA cleanup standards where construction work or cleanup work occurs without a formal MTCA Order or Consent Decree, contaminants at the site should be identified to Ecology, and monitoring for those contaminants in stormwater should be required. In the alternative, a separate General or Site Specific Construction Stormwater Permit should be required at contaminated sites.

Discharge monitoring of stormwater that discharges to groundwater should be monitored at contaminated sites.

SMITH & LOWNEY, P.L.L.C.

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August 14, 2020

Noel Tamboer
Washington Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

Re: Puget Soundkeeper Alliance's comments on draft Construction Stormwater General Permit

Dear Noel Tamboer:

These comments on the Department of Ecology's 2020 draft Construction Stormwater General Permit ("CSGP") are submitted on behalf of Puget Soundkeeper Alliance (Soundkeeper). Soundkeeper is a water quality focused grassroots community organization founded in 1984. Soundkeeper's mission is to protect and preserve the waters of Puget Sound. Representing over 3,000 members, supporters, volunteers and activists, Soundkeeper works to meaningfully decrease pollutants reaching the Sound by actively monitoring Puget Sound water quality, enforcing clean water laws, improving policies and regulations, preventing pollution and cleaning up waterways. Soundkeeper is profoundly concerned with the health of the Puget Sound and surrounding waterways.

The CSGP is an important general permit intended to ensure that construction sites across the state implement essential controls on stormwater runoff to protect water quality from potentially serious impacts. Soundkeeper commends Ecology for its efforts to timely reissue the CSGP, and for attempts to ensure that the water quality protection and AKART statutory mandates are implemented. Soundkeeper generally supports Ecology's determination to reissue the CSGP with only minor changes. Soundkeeper urges Ecology to clarify and strengthen portions of the permit as discussed in these comments.

Comment 1

Condition S2.A.1.c. asserts that "[t]he operator must submit the NOI at least 60 days before discharging stormwater from construction activities" Soundkeeper contends that a period of at least sixty days from application to discharge is essential to allow those concerned about the potential impacts of a proposed construction activity to evaluate those impacts and construction plans, and to either object to Ecology or file an appeal of permit coverage with the Pollution Control Hearings Board before construction discharges commence. However, Soundkeeper is concerned and somewhat confused by the timeline for permit coverage, which seems *not* to ensure that the NOI is submitted at least 60 days before discharge. S2.A.1.c., in its clause specifying the time of commencement of permit coverage, states that "coverage under the general permit will automatically commence on the 31st day following receipt by Ecology of a

completed NOI.” Condition S2.B. specifies that the NOI must be submitted before the start of the public notice period. The public notice period can be completed in approximately 38 days (2 publications in 8 days followed by a 30-day public comment period. Under this regime it seems that the 31-day timeline for automatic effectiveness of the permit may be completed before the 30-day comment period, nevermind 60 days after submission of the NOI. Is this correct? If so, why does the permit not ensure that public notice processes and the intended 60 days pass before CSGP coverage is automatically granted? If not, can you explain the steps and timing of the application process and how it assures that there will be no discharge until 60 days after NOI submission, and clarify S2.A.1.c.?

Comment 2

Condition S3.A. states that “[d]ischarges must not cause or contribute to a violation of [applicable water quality standards]. Discharges not in compliance with these standards are not authorized.” On page 29, the draft fact sheet clarifies that “[t]his section requires that discharges associated with construction activity are subject to all applicable state water quality and sediment management standards. Discharges that are not in compliance with these standards are not authorized by the permit and are subject to enforcement action.” Thus it seems that Ecology sensibly intends that discharges causing or contributing to violation of water quality standards in receiving waters should be subject to enforcement for permit violation, consistent with the design and intention of the NPDES permit program and its statutory mandates. Soundkeeper is concerned, however, that the language of S3.A., quoted above, could be found inadequate to allow enforcement, particularly in a citizen suit in federal district court, of the intended prohibitory permit condition due to its curious and uncertain phrasing. Specifically, Soundkeeper requests that the permit language be changed to state “[d]ischarges not in compliance with these standards *violate this condition of the permit*”, rather than “are not authorized.” *Non-authorization* by a permit may not be the same as *violation* of a permit.

This suggested language change would also bring Condition S.3.A. into harmony with Condition G1:

All discharges and activities authorized by this general permit must be consistent with the terms and conditions of this general permit. *Any discharge of any pollutant more frequent than or at a level in excess of that identified and authorized by the general permit must constitute a violation of the terms and conditions of this permit.* (italics added).

Comment 3

Condition S3.C. asserts Ecology’s presumption that “a Permittee complies with water quality standards unless discharge monitoring data or other site-specific information demonstrates that a discharge causes or contributes to a violation of water quality standards, when the Permittee complies with [all permit conditions and implements required BMPs.]” Soundkeeper does not understand the basis, intent, or function of this asserted presumption, and requests that it be deleted from the permit.

The draft fact sheet (at p. 13) asserts that Ecology’s “presumptive approach” is consistent with 40 CFR 122.44(k)(3) which allows permits to rely on BMPs to control pollutants when it is infeasible to derive appropriate numeric effluent limits.” Soundkeeper does not see how this regulatory provision justifies the “presumptive approach.” Water quality standards objectively describe the chemical, biological, and physical qualities of receiving waters necessary to meet statutory goals of water quality. Compliance with these standards, comprising narrative and numeric criteria and anti-degradation protections, can only be measured or determined by objective means related to the actual quality of the water. Therefore federal regulations require water quality-based effluent limitations in NPDES permits to be numeric (i.e., objective) unless it is infeasible (i.e., not possible or practicable because of scientific uncertainty) to do so. In such case, 40 CFR 122.44(k)(3) allows the use of narrative best management practice requirements in lieu of numeric effluent limitations. This concession does not support or warrant a presumption that compliance with such narrative limitations ensures or equates to non-violation of objective water quality standards. The mandate to avoid discharges that objectively violate water quality standards should not be conflated with the entirely distinct mandate to implement AKART.

Indeed, WAC 173-201A-510(3)(b) specifies a regime for implementing water quality-based effluent limitations for stormwater discharges that is inconsistent with Ecology’s asserted “presumptive approach”:

Best management practices shall be applied so that when all appropriate combinations of individual best management practices are utilized, violation of water quality criteria shall be prevented. **If a discharger is applying all best management practices appropriate or required by [Ecology] and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, selected or approved by the department, to achieve compliance with water quality criteria. Best management practices established in permits, orders, rules, or directives of the department shall be reviewed and modified, as appropriate, so as to achieve compliance with water quality criteria.**

In other words, implementation of BMPs is to be reviewed against objective performance (i.e., quality of discharge) to see whether additional or improved BMPs are needed to objectively comply with water quality criteria. Implementation of BMPs required by Ecology is *not* entitled to a presumption of compliance with water quality standards.

Aside from its lack of factual basis and regulatory support, Soundkeeper does not understand the purpose or intended function of the S3.C. statement of presumption. Please explain.

Comment 4

Conditions S4.B.2. and S4.B.4.g.iv. purport to require improvement, maintenance, or repair of BMPs where “necessary” “to improve the quality of stormwater discharges.” This is vague, unworkable, and unenforceable. What does it mean that a BMP change is “necessary ... to improve the quality of stormwater discharges”? Is the requirement triggered only if a

benchmark value is exceeded? Is the requirement triggered if the BMP change would result in a small marginal improvement in discharge quality? Is a BMP change required if it would substantially improve discharge quality but the suspect construction activity is nearly complete?

Comment 5

Condition S4.C. and Table 3 specify monitoring requirements and exempt sites that disturb less than 1 acre from weekly sampling requirements. Soundkeeper objects to this exemption as substantially weakening the permit's water quality protections from discharges from these sites. The weekly turbidity/transparency monitoring requirement couples with the benchmarks and adaptive management requirements to form a crucial part of the CSGP's ability to ensure that construction stormwater discharges are properly managed to avoid water quality harm. What portion of permitted sites overall are less than one acre and so exempt from sampling under this provision? On what basis does Ecology presume that discharges from these smaller construction sites are either unlikely to exceed turbidity benchmarks or adversely affect water quality? Does Ecology for some reason believe that BMPs implemented at smaller sites do not need to be held to objective measures of effectiveness based on discharge quality? The permit already allows sites less than 5 acres to substitute inexpensive and simple transparency tube monitoring for turbidity sample analysis. This is an easy, cheap, and quick monitoring method – is it considered too burdensome for less than 1 acre sites in comparison to potential environmental protection afforded by monitoring? On what basis?

Comment 6

Condition S4.C.5.b.iii. refers to “background turbidity” without providing any definition or guidance on how or where to measure or determine “background turbidity.” Such guidance seems essential, and Ecology should provide instruction and, at least, a definition of “background turbidity.” The language used in Condition S8.C.2. may be adequate for this purpose if incorporated for S4.C.b.iii.

Comment 7

Soundkeeper is pleased that the required SWPPP includes requirements for covering, containing, and protecting from vandalism “all chemicals, liquid products, petroleum products, and other materials that have the potential to pose a threat to human health or the environment.” Condition S9.D.9.b. Soundkeeper suggests that the permit should also require permittees to report to Ecology the presence or storage of hazardous chemicals at the site, including the relevant material safety data sheets, to allow Ecology to access this information in event of accident, catastrophic event, or other potential release at regulated sites.

Comment 8

Condition G11. Includes an impermissible new second sentence purporting to limit the incorporation into the permit of “all other requirements of 40 CFR 122.41 and 122.42” to “requirements established on or before the date this permit was issued.” This violates the 40 CFR 122.4(a) prohibition on issuance of an NPDES permit that does not provide for compliance with regulations promulgated under the CWA, and the 40 CFR 123.25(a)(12) and (13) requirements

for Ecology to implement provisions 40 CFR 122.41 and 122.42, without limitation based on permit issuance date.

Sincerely,

SMITH & LOWNEY, PLLC

By: s/Richard A. Smith
Richard A. Smith

Seattle Department of Transportation

see attached file

Construction Stormwater General Permit Reissuance Public Comment

Michael Cawrse, Seattle Department of Transportation
PO Box 34996, MS 3800
Seattle, WA 98124-4996
michael.cawrse@seattle.gov

Regarding Section S1.B.1.a Permit Coverage, please provide clarification on the threshold for requiring a CSGP. The section states that construction activity requires permit coverage if it results in 1-acre or more of ground disturbance and discharges stormwater to surface waters of the State. Seattle DOT was required to obtain a permit for a project that although has more than 1-acre of ground disturbance, only 0.25 acre of the project discharged to surface waters of the State, with the remaining area draining to the combined sewer system which discharges to a treatment plant operated by King County.



August 14, 2020

Noel Tamboer
Washington Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

RE: Comments on the Draft Construction Stormwater General Permit and Fact Sheet

Dear Ms. Tamboer,

The Washington State Department of Transportation (WSDOT) appreciates the opportunity to provide comments on the draft Construction Stormwater General Permit (draft permit) and Fact Sheet. WSDOT has a strong interest in working with the Washington Department of Ecology (Ecology) because the Construction Stormwater General Permit (permit) substantially impacts WSDOT policy and construction operations.

WSDOT would like to provide the following general comments on the draft permit or implementation thereof:

1. General Comment: WSDOT understands that Ecology generally follows the federal Construction General Permit (CGP) requirements for emergency projects. However, the federal CGP only provides details for the Notice of Intent (NOI) process and initial Stormwater Pollution Prevention Plan (SWPPP) development. Since Ecology's permit is very different from the CGP, the compliance expectations (e.g., sampling and reporting) could be clarified to prevent confusion and ensure consistent expectations regionally.
2. General Comment: While the new language added to the definition for *construction activity* and the new definition for *construction support activity* appear consistent with the existing permit requirements, WSDOT would like to note these definitions relate to a long-standing topic of discussion between our agencies. WSDOT understands the permit authorizes specific discharges from support activities (provided appropriate controls are used), and uses contract specifications to require contractors to modify existing TESC plans to include off-site support areas they obtain outside of WSDOT's operational control. WSDOT continues to interpret off-site areas outside of our project right-of-way procured by contractors to be outside of our operational control, and as such, compliance

concerns regarding these areas should be coordinated with the entity with operational control of those off-site areas.

WSDOT would like to provide the following specific comments on the red-lined version of the draft permit:

3. Page 11, S2.A.1.e:

Comment: WSDOT continues to interpret our Temporary Erosion and Sediment Control (TESC) plan and Spill Prevention Control and Countermeasures (SPCC) plan (used in conjunction) as equivalent to the Stormwater Pollution Prevention Plan (SWPPP). Therefore it creates confusion to list them as different documents.

Recommendation: Delete example *iii* as TESC and SPCC plans are WSDOT specific plans intended to be equivalent to the SWPPP, and referencing them is redundant with *iv* and adds confusion to a general permit.

4. Page 12, S2.A.2.ii:

Comment: WSDOT interprets the new language, (*When a current discharger (Permittee) transfers a portion of a permitted site, the current discharger must also indicate the remaining permitted acreage after the transfer*), as referring to the existing Transfer of Coverage (TOC) form and does not identify a separate notification process. In addition, this new language does not appear related to bullet *ii* and may warrant its own bullet (i.e., *iii*).

Recommendation: If our interpretation of this new language is incorrect, please clarify the expectation. Designate this new language with a separate bullet if appropriate.

5. Page 12, S2.B:

Comment: The new language, (*...must be run after the NOI has been submitted...*) suggests the public notice must occur after a Permittee selects the “submit” button in the eNOI system. However, there is a difference between the NOI being submitted and the NOI being considered complete by Ecology, and this distinction can be particularly confusing on projects with existing contamination or discharges to impaired waters when supplemental documentation is required during the NOI process. The fact sheet provides a general definition for “completed application” but does not provide insight for interpreting the expectation of the new language. This comment is related to comment 6 and 10.

Recommendation: If the expectation is to publish the public notice after the Permittee selects “submit” in the eNOI system, then no clarification is needed. However, if the expectation is to publish the public notice after the NOI is considered complete (i.e., after supplemental documentation is reviewed and accepted by Ecology), please clarify this expectation in the permit and fact sheet.

6. Page 26, S8.B.3:

Comment: WSDOT is unclear on how and when the applicant is made aware Ecology has made an, “*affirmative determination that the discharge will not cause or contribute to the existing impairment or exceed the TMDL.*” It is WSDOT’s understanding that Ecology reviews supplemental documentation requested during the NOI process to make this *affirmative determination* and this is conveyed to the applicant indirectly by way of permit issuance. However, it is unclear if this *affirmative determination* affects the public notice timeline requirements in S2.B (comment 5).

Recommendation: Please add clarification to S2.B if Ecology’s *affirmative determination* is an important determination prior to publishing the public notice.

7. Page 32, S9.D.5.d, e, and f:

Comment: It is WSDOT’s understanding that the soil covering timelines in S9.D.5.d. for exposed and unworked soils is applicable to stockpiles. Further, it is WSDOT’s understanding that if stockpiles are being worked and in compliance with S9.D.5.e and f., that stockpiles do not need to be covered at the end of every day.

Recommendation: Please clarify that S9.D.5.d is applicable to stockpiles or clarify stockpile covering expectations in S9.D.5.f.

8. Page 50, Appendix A:

Comment: The subjective nature and variable natural conditions of establishing “permanent vegetative cover” in the definition of final stabilization can lead to challenges during Notice of Termination (NOT) procedures. As stated in WSDOT’s comment letter for the draft SWMMs, our [Standard Specifications](#) for 8-02.3(9)*E Protection and Care of Seeded Areas* have been updated to improve contract enforcement of this expectation. While WSDOT appreciates recent updates made to Ecology’s Stormwater Management Manuals to provide more

measurable performance expectations that are easier to enforce contractually, we believe this expectation could be further improved to prevent NOT challenges.

Recommendation: To help ensure stakeholders are aware of the new percentage vegetative cover performance expectations in the SWMMs, please consider editing the new language in the definition for final stabilization to state, “*See the applicable Stormwater Management Manual for more information on vegetative cover expectations (BMP C120) and equivalent permanent stabilization measures.*”

WSDOT also recommends Ecology incorporate language clarifying how percent cover will be evaluated during the NOT site inspection. WSDOT proposes adjacent areas with established vegetation under similar conditions be considered in the determination of what is feasible in revegetated areas; this will accommodate factors such as:

- Patchy coverage may represent natural conditions (even with topsoil amendments).
- Vegetation may be absent in shaded area.
- Root mass should be considered vegetative cover because it provides erosion and sediment control benefits.

9. Page 51, Appendix A:

Comment: The term *numeric effluent limit* is used throughout the permit, in the definition for benchmark, and is an important definition for understanding compliance expectations.

Recommendation: Add a definition for *numeric effluent limit*.

WSDOT would like to provide the following specific comment on the fact sheet:

10. Page 36:

Comment: The fact sheet states, “*the permit application must also include a certification that the public notice requirements have been met*”, which conflicts with the expectation to publish public notice after the NOI has been submitted (see comment 5).

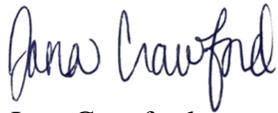
Recommendation: Please reconcile and clarify the public notice and certification timelines and expectations in the permit and fact sheet.

August 14, 2020

Page 5

Thank you for the opportunity to provide input regarding the draft permit and fact sheet. Please direct questions about these comments to Elsa Pond (for Jeannie McCully on maternity leave) at elsa.pond@wsdot.wa.gov or 360-481-8989.

Sincerely,

A handwritten signature in blue ink that reads "Jana Crawford". The signature is written in a cursive style with a large initial "J" and "C".

Jana Crawford
Stormwater Branch Manager
Environmental Services Office

JC:ep

From: [Tamboer, Noel C. \(ECY\)](#)
To: [Tamboer, Noel C. \(ECY\)](#)
Subject: FW: ECO 3 CESCL Lists
Date: Monday, November 9, 2020 9:54:48 AM

From: Tamboer, Noel C. (ECY)
Sent: Tuesday, August 25, 2020 3:35 PM
To: Phil Fortunato <phil@eco-3.com>
Subject: RE: ECO 3 CESCL Lists

Received. I will include this comment in the response to comments summary and consider your proposed language. Thanks for your input.

Noel

From: Phil Fortunato
Sent: Tuesday, August 25, 2020 11:34 AM
To: Tamboer, Noel C. (ECY)
Subject: Re: ECO 3 CESCL Lists

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I think this minor change would make it clearer.

d. If an applicant intends to use a Best Management Practice (BMP) selected on the basis of Special Condition S9.C.4 ~~that is not on the approved ("demonstrably equivalent" BMPs) list~~, the applicant must notify Ecology of its selection as part of the NOI. In the event the applicant selects BMPs after submission of the NOI, it must provide notice of the selection of an equivalent BMP to Ecology at least 60 days before intended use of the equivalent BMP.

We have been able to do some in the field trips, but it has been tough getting people to allow outside people on their jobsites.

Phil

Phil Fortunato



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