

March 15, 2012

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SENT VIA E-MAIL TO: industrialstormwatercomments@ecy.wa.gov
AND TO: jkil461@ecy.wa.gov

Jeff Killelea
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Proposed Amendments to Industrial Stormwater General Permit

Dear Mr. Killelea:

We represent BNSF Railway Company (BNSF). BNSF appreciates the opportunity to comment on the Washington Department of Ecology's (Ecology) February 1, 2010 draft amendments to the Industrial Stormwater General Permit (ISGP).

Proposed revision to Condition S4.B.6

In its April 21, 2011 Findings, Conclusion, and Order in *Copper Development v. Ecology*, 09-131 *et seq* (Order), the Pollution Control Hearings Board (PCHB) criticized Ecology's lack of evidence as to the sufficiency of four quarters of sampling to demonstrate "consistent attainment." The PCHB specifically cited to an internal briefing paper stating that seven quarters are adequate. Order, pp. 65-66. Ecology now proposes to require that facilities successfully sample for eight consecutive quarters to prove consistent attainment. Ecology's Fact Sheet accompanying the draft permit amendments presents no new information or science supporting the increase to eight quarters, the same flaw for which the PCHB criticized Ecology when it set the number at four quarters.

Further, the PCHB gave Ecology the discretion to continue with the present four quarters of sampling to demonstrate consistent attainment if sampling resumed within two to three years, rather than the full five-year permit cycle. Ecology does not explain whether or not it considered this alternative and, if so, why it rejected it.

Proposed revision to Condition S8.B

In its Fact Sheet, Ecology again does not present any reason for selecting a 14-day deadline for initiating investigations as part of Level 1 corrective action responses. The PCHB required only a “reasonably short timeline.” A strict 14-day deadline does not recognize that many businesses rely on the same environmental consultants to perform this work, and that this limited pool of consultants would have to conduct investigations at facilities all over Washington within a greatly compressed time frame. Thirty days is a more reasonable timeline.

Proposed revision to Condition S8.C

Ecology proposes to shorten the deadline for Level 2 and Level 3 corrective actions from September 30th of the following year to July 30th of the following year. The PCHB characterized the Level 2 deadline as “excessively long” only in conjunction with footnote 4 and only in the “absence of evidence that structural source control BMPs typically require this long to implement, become effective, and be evaluated.” Since Ecology deleted footnote 4, which is part of the basis for the PCHB’s disapproval, Ecology should re-evaluate whether the facts justify the current September 30th timeline. For example, most Level 2 and Level 3 treatment options require significant construction, and a permittee will need the full summer construction season to complete this kind of work. Ecology should collect evidence on the timeline for major construction activities before making this type of change to the permit.

Proposed Changes to Condition S2.C

In its effort to eliminate confusion regarding the applicable timeline for consideration of a Level 2/Level 3 modification (waiver or extension), Ecology has introduced other unintentional confusion into the timelines. The PCHB held that the more specific 60-day timeline for review set out in Condition S8 applied to Level 2/Level 3 modifications (extension/waiver) and not the general 30-day deadline set out in Condition S2. In consideration of this decision and the potential confusion, Ecology’s proposed changes simply eliminate the word “modification” from Condition S2. This, however, leaves no deadline for Ecology’s review of permit modifications other than Level 2/Level 3 waivers or extensions.

In order to avoid the inadvertent elimination of any kind of timeline for the review of other permit modifications, Ecology should instead amend Condition S2 as follows:

A. Permit Coverage or Permit Modification Timeline

1. If the applicant does not receive notification from *Ecology*, permit coverage or modification of coverage automatically commences on whichever of the following dates occurs last:

- a. The 31st day following receipt by *Ecology* of a completed *application* for coverage or modification of coverage form-; or
 - b. The 31st day following the end of a 30-day public comment period-; or
 - c. The effective date of the *general permit*-; or
 - d. For modifications of coverage related to waivers of Level 2 or Level 3 corrective actions governed by Condition S8, the 61st day following receipt by Ecology of a completed modification of coverage form.
2. *Ecology* may need additional time to review the *application*:
- a. If the *application* is incomplete.
 - b. If it requires additional site-specific information.
 - c. If the public requests a public hearing.
 - d. If members of the public file comments.
 - e. When more information is necessary to determine whether coverage under the *general permit* is appropriate.
3. When *Ecology* needs additional time:
- a. *Ecology* will notify the applicant in writing within 30 days and identify the issues that the applicant must resolve before a decision can be reached.
 - b. *Ecology* will submit the final decision to the applicant in writing. If *Ecology* approves the *application* for coverage/coverage, coverage begins the 31st day following approval, or the date the approval letter is issued, whichever is later.

Additional Matters Ecology Should Address at this Time

Other than formal amendments to the permit, Ecology lacks a clear, consistent and reliable means of communicating its policy decisions to the regulated community. It issued a "Frequently Asked Questions" (FAQs) document in mid-March 2011 and, when challenged, it issued a qualification to the FAQ that left the regulated community uncertain as to its continued application. Ecology has previously stated that permittees may call or email Ecology for guidance, but that guidance can be inconsistent. One notable example applicable to transportation facilities is the effect of stand-alone mobile fueling on the obligation to seek permit coverage. In a November 2009 email exchange (see Attachment 1), prior to issuing the current ISGP, Ross Dunning of Kennedy Jenks Consultants asked Ecology two specific questions on this point: "If a facility does not require permit coverage because the[y] don't have a vehicle maintenance shop ... then fueling that is performed onsite does NOT trigger the requirement to apply for permit coverage" and "So it would seem that a transportation facility that performs vehicle maintenance (including fueling) but does not have a vehicle maintenance shop is not required to apply for permit coverage. Can you confirm?" Ecology emailed back confirming the accuracy of these statements. After it finalized the ISGP effective January 1, 2010, Ecology completely changed its position on these points. The

FAQs now state that anywhere a maintenance or fueling activity takes place constitutes a "shop," and therefore mobile fueling from a vendor's truck triggers the obligation to secure coverage.

Ecology should take this opportunity to clearly state its policy decisions via permit amendments rather than continue its *ad hoc* and sometimes inconsistent practice of issuing informal guidance. Therefore, Ecology should further amend the ISGP and address the following issues:

1. Off-site storm water run-on

Ecology's proposed permit amendments for facilities that discharge to 303(d)-listed water bodies raises an issue common to a wide variety of industrial facilities. BNSF applauds Ecology for recognizing the difficult position of Permittees whose facilities exceed benchmarks due to influences outside the Permittees' control, but believes that Ecology should provide a broader solution to address this problem at all Washington facilities, not just those that discharge to a 303(d)-listed waterbody. As currently written, the 2010 ISGP makes Permittees responsible for the pollution that runs onto their property. At some of its facilities, there are sources outside BNSF's control (e.g., public highways and non-point source runoff) that may be the cause of exceedances at some of its facilities, but which are not themselves currently subject to effluent limits for stormwater runoff. There are a variety of reasons why it may be ineffective to negotiate with neighboring landowners (e.g., where there is no existing legal obligation for that neighbor to reduce contaminants in stormwater runoff or the source cannot be identified). Moreover, revising a facility's sampling plan is difficult where, for instance, it is sheet flow from various parts of a neighboring property or non-point source pollution that runs on to the facility from a road that commingles with the stormwater exposed to the Permittee's activities.

In such situations, Ecology should provide a mechanism so that facilities are not unfairly burdened by the (potentially unregulated) discharges of their neighbors. One option would be allowing Permittees to take upstream samples that show that the facility's exceedances are caused by stormwater runoff from neighboring properties or from non-point source runoff. Ecology should revise Condition S4.B.2 to allow Permittees to report the results of sequential samples - one on the source property immediately before the stormwater runs on to the Permittee's property and one on the Permittee's property - that estimate the discharges actually caused by the Permittee. More accurate sample results would help a Permittee expeditiously determine whether its facility is the cause of the benchmark exceedances and, if not, would alleviate the significant cost of preparing a waiver application and/or installing structural or treatment measures to address pollution caused by a neighbor. This information would also help Ecology set its regulatory priorities to address major sources of pollution. BNSF proposes the following language:

S4. GENERAL SAMPLING REQUIREMENTS

A. General Requirements

The Permittee shall conduct sampling of *stormwater* in accordance with this permit and the SWPPP.

B. Sampling Requirements

1. Sample Timing and Frequency

a. The Permittee shall sample the *discharge* from each designated location at least once per quarter:

1st Quarter = January, February, and March

2nd Quarter = April, May, and June

3rd Quarter = July, August, and September

4th Quarter = October, November, and December

b. Permittees shall sample the *stormwater discharge* from the first fall storm event each year. "First fall storm event" means the first time after October 1st of each year that precipitation occurs and results in a *stormwater discharge* from a *facility*.

c. Permittees shall collect samples within the first 12 hours of *stormwater discharge* events. If it is not possible to collect a sample within the first 12 hours of a *stormwater discharge* event, the Permittee must collect the sample as soon as practicable after the first 12 hours, and keep documentation with the sampling records (Condition S4.B.3) explaining why they could not collect samples within the first 12 hours.

d. The Permittee shall obtain *representative samples*, which may be a single grab sample, a time-proportional sample, or a flow-proportional sample.

e. Permittees need not sample outside of *regular business hours*, during unsafe conditions, or during quarters where there is no discharge, but shall submit a Discharge Monitoring Report each reporting period (Condition S9.A).

2. Sample Location(s)

a. The Permittee shall designate sampling location(s) at the point(s) where it discharges *stormwater* associated with *industrial activity* off-site.

b. The Permittee is not required to sample on-site discharges to ground (e.g., infiltration, etc.) or *sanitary sewer* discharges, unless specifically required by *Ecology* (Condition G12).

c. The Permittee shall sample each distinct point of *discharge* off-site except as otherwise exempt from monitoring as a "substantially identical outfall" per S3.B.5.b. The Permittee is required to monitor only one of the "substantially identical outfalls" if two or more outfalls discharge substantially identical effluents (based on similar industrial activities and site conditions).

d. The exception to sampling each point of *discharge* in S4.B.2.c does not apply to any point of discharge subject to numeric effluent limitations (Conditions S5.C, S6.C & S6.D).

e. Where *stormwater* from adjacent properties discharges to a Permittee's

facility and commingles with stormwater associated with industrial activity at the Permittee's facility, the Permittee may conduct sequential sampling and report the sampling results for the difference in pollutant concentration in the DMR for stormwater associated with industrial activity at the Permittee's facility.

...

Alternatively, Ecology should revise the ISGP to explicitly allow Permittees to obtain a waiver from Level 2 and 3 requirements where the facility has established that the primary cause of the exceedances triggering structural/treatment BMPs is run-on from a neighboring property. The current ISGP requires that a facility demonstrate that structural/treatment BMPs are (1) not feasible; or (2) not necessary to prevent discharges that may cause or contribute to violation of a water quality standard. BNSF suggests that Ecology revise Condition S8.C.4.b and S8.D.4.b as follows:

If installation of [*Structural Source Control BMPs or Treatment BMPs*] is not feasible, ~~or~~ not necessary to prevent discharges that may cause or contribute to a violation of a water quality standard, or where the exceedances requiring the construction of [*Structural Source Control BMPs or Treatment BMPs*] are due to stormwater run-on from adjacent properties, Ecology may waive the requirement for additional [*Structural Source Control BMPs or Treatment BMPs*] by approving a *Modification of Permit Coverage*.

2. Transportation Facilities and Point-source Discharges from Regulated Activities

The permit is presently unclear whether a transportation facility triggers ISGP coverage if it does not have a point source discharge from the triggering activities identified by 40 C.F.R. § 122.26(b)(14)(viii): a vehicle maintenance shop, equipment cleaning, and airplane deicing. The 2010 ISGP defines "facility" in a circular manner as "any NPDES 'point source' (including land or appurtenances thereto) that is subject to regulation under the NPDES program." ISGP, at p. 53 (emphasis added). From this definition, it is unclear whether stormwater discharges from areas of a facility on which no industrial activity takes place require permit coverage if stormwater from areas of industrial activity do not discharge to surface waters. BNSF proposes that Ecology revise Condition S1.A as follows:

1. Facilities engaged in any industrial activities in Table 1 shall apply for coverage if *stormwater* from the *facility discharges* to a surface water body, or to a *storm sewer* system that *discharges* to a surface water body. (Where federal regulations only require coverage if certain "industrial activities" trigger coverage, e.g., 40 C.F.R. § 122.26(b)(14)(viii), a facility is only required to apply for coverage if there is a point source discharge from an area of triggering industrial activities.) The *Standard Industrial*

Classification (SIC) groups generally, but not always, associated with these activities are listed in Table 1.

Ecology should also revise the portion of Table 1 that is directly affected by this change:

Transportation facilities which have a point source discharge of stormwater associated with vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations:

- Railroad Transportation 40xx
- Local and Suburban Transit and Interurban Highway Passenger Transportation 41xx
- Motor Freight Transportation (except SIC 4221–25) 42xx
- United States Postal Service 43xx
- Water Transportation 44xx
- Air Transportation 45xx
- Petroleum Bulk Stations and Terminals 5171

3. Owner and Operator

Missing entirely are definitions of “owner” and “operator,” which are relevant for permitting purposes because federal regulations impose permitting responsibility on the operator of a facility rather than the owner. 40 C.F.R. § 122.21(b). Previous iterations of the ISGP (e.g., the 2002 ISGP) contained definitions to help facilities determine which entities needed coverage. The ISGP also does not answer whether it is possible for different entities to hold ISGP coverage in discrete areas of a large facility. BNSF suggests that Ecology insert, prior to the existing Condition S1.A, the following section (with the existing S1.A becoming S1.B and so forth):

S1. PERMIT COVERAGE

A. Who Is the Permittee?

The Permittee must have day-to-day operational control to assure compliance and the power or capacity to make timely discovery of discharges and direct the activities of persons who control the mechanisms causing the pollution. The owner is the Permittee if they are also the operator of the industrial facility. If the owner and the operator (or tenant) of an industrial facility are not the same, the operator is typically the Permittee and the owner may choose to be a co-Permittee.

B. Facilities Required to Seek Coverage Under This General Permit

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C. Facilities Not Required to Obtain Coverage

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Thank you for the opportunity to comment.

Very truly yours,

K&L GATES LLP

By



Craig S. Trueblood

cc: Dava Kaitala, BNSF
Dave Seep, BNSF
Jennifer Weiner, BNSF

ATTACHMENT 1

From: Anderson, Jennifer L
Sent: Monday, November 23, 2009 10:15 AM
To: Chris Larkin; Marsi M. Beeson
Subject: FW: Clarifications regarding new Industrial Stormwater General Permit
Attachments: image001.gif; image002.jpg

Add to file

Jennifer L. Anderson
BNSF Railway
Manager, Environmental Operations
206-625-6034

From: Nathan Graves [mailto:NathanGraves@KennedyJenks.com]
Sent: Wednesday, November 11, 2009 12:40 PM
To: Anderson, Jennifer L; Melissa Godlewski
Cc: Ross Dunning
Subject: RE: Clarifications regarding new Industrial Stormwater General Permit

According to Ecology's statements, no permit would be required for maintenance on railcars and DTL fueling ON SITES WHERE THERE IS NO VEHICLE MAINTENANCE SHOP. On sites with a shop, DTL fueling and railcar maintenance would need to be included in the area of coverage.

Nathan A. Graves, CHMM | Vice President
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From: Anderson, Jennifer L [mailto:Jennifer.Anderson@bnsf.com]
Sent: Wednesday, November 11, 2009 11:57 AM
To: Nathan Graves; Melissa Godlewski
Subject: RE: Clarifications regarding new Industrial Stormwater General Permit

So, if only doing maintenance on railcars and DTL fueling- NO PERMIT required?

Jennifer L. Anderson
BNSF Railway
Manager, Environmental Operations
206-625-6034

From: Nathan Graves [mailto:NathanGraves@KennedyJenks.com]
Sent: Wednesday, November 11, 2009 11:42 AM
To: Matt Graves; Graham Anderson; Guthrie, Marilyn; Birdsall, Alan; Mike Stoner; Joanne Snarski; Mary Mattix; lrozmyrn@portoftacoma.com; Kathy Bahnick; Bob Elsner; Connie Thoman; Johan Hellman; Judy Grigg; brandonw@portofeverett.com; Anderson, Jennifer L; Burda, Melvin L; Nehring, Pamela
Cc: Melissa Godlewski; Ross Dunning; Abby Barnes; Deonne Knill; Dan Schultz
Subject: Clarifications regarding new Industrial Stormwater General Permit
Importance: High

Please see correspondence below between K/J and Ecology regarding clarifications we have asked for regarding the ISGP. In summary, Ecology has indicated that they will "modify" the permit to remove "material handling facilities" as a trigger for permit coverage. In addition, it appears that Ecology will clarify (through FAQs?) that fueling (stationary or mobile) alone will not trigger permit coverage. Marina fueling is clearly excluded because it is in a different SIC Code. Rail cars are considered "vehicles" and any maintenance activities on these cars ON SITES ALREADY REQUIRING COVERAGE are subject to inclusion of the area requiring coverage.

We assume that any permit modification would need to go through public comment.

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As a result, it appears that facilities that currently do not require coverage will not now require coverage as a result of the new permit (assuming the modification is finalized as stated). It is still unclear whether facilities that currently have coverage for maintenance activities will be required to include additional areas of the facility under their permit. Clearly, at facilities already subject to coverage, fueling (mobile or stationary) will need to be included.

Wanted to get this out as it is different than what we discussed at the last Environmental Technical Committee meeting or have conveyed to you previously. Please let us know if you have questions.

Nathan A. Graves, CHMM | Vice President
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From: Killelea, Jeff (ECY) [mailto:JKIL461@ECY.WA.GOV]
Sent: Tuesday, November 10, 2009 1:53 PM
To: Ross Dunning
Cc: Nathan Graves; Moore, Bill (ECY)
Subject: RE: Can you confirm?
Importance: High

Hi Ross,

Some quick feedback:

Bullet 2 does not accurately represent my statements yesterday. I tried to explain that Ecology has not developed the implementation policy on this issue and will provide guidance as soon as possible. It is possible that some clarification will be provided as part of the upcoming permit modification, but that decision has not been made yet.

Bullet 9 is either not accurate, or is a gross oversimplification of how a Level 3 waiver request could be resolved, so it should not be characterized as Ecology's intent.

The other 8 bullets appear to be accurate.

Thanks, Jeff

Jeff Killelea
Washington State Dept. of Ecology
Water Quality Program
(360) 407-6127
jkil461@ecy.wa.gov
From: Ross Dunning [mailto:RossDunning@KennedyJenks.com]
Sent: Tuesday, November 10, 2009 7:24 AM
To: Killelea, Jeff (ECY)
Cc: Nathan Graves
Subject: Can you confirm?

Hi Jeff,

Given the importance of our discussion yesterday, I was hoping that you could confirm my understanding of the subjects we discussed yesterday. I'd really like to make sure I'm on the same page with Ecology's intent as we move forward and I make recommendations for direction to my clients. A clear understanding of the requirements is key to maintaining our clients permit compliance and protecting them from citizen suits.

Maybe with a phone call if not formally. I believe that I understood your intent but want to make very sure before I speak out loud. Sorry about the length.

- Ecology will remove "material handling facilities" from the list of transportation facilities requiring permit coverage listed in Table 1.

- Ecology will further rescind the comment that they have taken the approach in EPA's MSGP and not include the "only those portions of the facility that are involved in vehicle maintenance..." statement. The definition of industrial activity contained in the glossary referencing 40 CFR 122.26(b)(14)(viii) that states that "only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations.....are associated with industrial activity." is reinstated with the understanding that mobile fueling (in addition to fixed) is covered under this definition and all basins where the industrial activities (listed in 40 CFR 122.26) are performed must be included in the permitted area and be monitored.

- If a facility requires permit coverage (because they have a vehicle maintenance shop, equipment cleaning operations, or airport deicing operations) then areas where vehicle maintenance (including fixed and mobile fueling) are performed are included in the area requiring permit coverage and must be monitored.
 - If a facility does not require permit coverage because they don't have a vehicle maintenance shop, equipment cleaning operations or airport deicing operations, then fueling that is performed onsite does NOT trigger the requirement to apply for permit coverage.
 - So it would seem that a transportation facility that performs vehicle maintenance (including fueling) but does not have a vehicle maintenance shop is not required to apply for permit coverage. Can you confirm?
 - Marinas that have vehicle maintenance shops would be required to apply for ISGP coverage and their fueling operations would be covered.
 - Marinas that do NOT have vehicle maintenance shops would NOT be required to apply for ISGP coverage and their fueling operations would NOT be covered. (this seems to conflict with the following specific response from Ecology listed in part 2 of the response to comments: Please clarify whether mobile or fixed fueling alone are operations requiring coverage under the ISGP at sites without vehicle maintenance shops. Also, at many sites, only those portions of the site where vehicle maintenance occurs are covered and included in the facility Stormwater Pollution Prevention Plan (SWPPP). Requiring coverage for areas where fueling alone occurs or where mobile fueling occurs at sites with vehicle maintenance shops would expand coverage considerably, including marinas and many commercial and general aviation operations. Permit Coverage Vehicle Maintenance Sl.A.1 EPA recently clarified to Ecology that mobile fueling (or other vehicle maintenance activity) at transportation facilities does in fact trigger permit coverage.
 - It is the responsibility of permittees to verify that they DO NOT discharge to a 303(d) listed water body independent of whether their DMR includes specific 303(d) provisions and are included in Appendix 4 or not.
 - If a permittee demonstrates that they have applied AKART (including any required AKART studies) and still cannot meet benchmarks they have completed the requirements of the corrective action process and will not need to continue implementing further actions.
 - A rail car (even those without motor driven conveyance) are considered vehicles (similar to truck trailers) and the vehicle maintenance triggers and requirement of the ISGP apply (e.g. rail car repair areas require permit coverage at facilities with vehicle maintenance shops. Facilities with rail car maintenance activities that do not have vehicle maintenance shops would NOT need to apply for a permit).
- Thank you for the frank discussion and clarification. My clients really just want to know what's required and how they can comply with the permit.

Thanks for your efforts to help us help them.

Ross.

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