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VIA U.S. MAIL & E-MAIL

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industrialstormwatercomments@ecy.wa.gov

RE: Comments on Draft Industrial Stormwater General Permit

Dear Mr. Killelea:

Waste Management of Washington, Inc. (WMW) appreciates the opportunity to submit these comments on Ecology’s Draft Industrial Stormwater General Permit (“Draft Permit”). As the owner and operator of facilities throughout the State of Washington that are covered by the General Permit, WMW is very interested in ensuring that the General Permit establishes reasonable, practical, and achievable requirements that will lead to real improvements to Washington’s environment without unfairly or unreasonably imposing cumbersome or unreasonably burdensome requirements on permittees.

WMW is very appreciative of Ecology’s willingness to extend the comment period in this matter. Many interested permittees, including WMW, had anticipated a Draft Permit that would mainly provide incremental changes, clarifications, and improvements to the prior permit. However, as you will see below, WMW was surprised by the Draft Permit’s new language imposing a numeric TSS effluent limit on those permittees who are discharging into “Puget Sound Sediment Cleanup Sites.” We think that the limit will be a big surprise to many other permittees. To WMW, this is not an incremental revision to the General Permit, but is a very substantial, and we believe, unjustified, change. Our comments mainly focus on this issue.

Comment 1. Imposing a 30 mg/L TSS limit on discharges to Puget Sound Sediment Cleanup Sites is unreasonable, technically unsupported, and potentially very expensive.

WMW strongly objects to the proposal to include a 30 mg/L TSS effluent limitation in the Draft Permit for Puget Sound Sediment Cleanup Sites. The current permit sets numeric effluent limits for permittees who are discharging into Section 303(d)-listed waterbodies; however, the **only** numeric effluent limits that apply are the effluent limits for the specific parameters for which the waterbody is Section 303(d)-listed. WMW understands the logic behind setting specific effluent limits for those parameters that have caused the receiving water to be impaired.

But, this same logic does not apply to the proposed changes in the Draft Permit that would impose an overly stringent numeric effluent limit for TSS on permittees who are discharging into

waterbodies that are **not even listed for as impaired for TSS**. The Puget Sound Sediment Cleanup Sites pose complex and difficult cleanup challenges because of decades of contamination from various sources and pollutants. None of these sites are cleanup sites simply because there are high levels of sediments in the waterbodies. All waterbodies – even the most pristine – have sediment. “Sediment” is not a hazardous substance under CERCLA or MTCA and would not – in and of itself – trigger a cleanup. An industrial site that discharges sediment in its stormwater may be discharging clean sediment or sediments that are moderately or heavily contaminated with metals, hydrocarbons, and other pollutants. It is these other pollutants – not the sediments themselves – that Ecology should address. To impose such a stringent effluent limit on TSS – including uncontaminated sediment – is without any technical justification and will force dischargers to treat their sediment discharges to levels that may provide no discernible environmental benefit, but at great expense.

Ecology should delete all references to a 30 mg/L TSS effluent limit for Puget Sound Sediment Cleanup Sites and revert to the use of the 100 mg/L TSS benchmark from the existing General Permit.

Comment 2. The 30 mg/L effluent limit is unenforceable because Ecology has failed to adopt it through APA rulemaking.

While Ecology’s regulations – specifically WAC 173-226-070 – allow for the adoption of numeric effluent limits under certain circumstances, none of those circumstances apply to the general applicability of a numeric TSS effluent limit for all dischargers at Puget Sound Sediment Cleanup Sites. The 30 mg/L TSS limit is not an “effluent limit ... promulgated pursuant to” the federal Clean Water Act. WAC 173-226-070(1)(a). It is not a “discharge standard” under Chapter 173-221A WAC. WAC 173-226-070(1)(b). Nor has it been established on a case-by-case basis or through the use of BMPs. WAC 173-226-070(1)(c) & (d). Ecology has not provided any justification to establish that the 30 mg/L TSS limit is necessary to comply with Chapter 173-221A WAC for the “majority of the dischargers intended to be covered under the general permit.” WAC 173-226-070(2)(a). And most fundamentally, Ecology has not demonstrated why an effluent limitation on TSS will “control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards.” WAC 173-226-070(2)(b).

Rather, through the Draft Permit, Ecology appears to be establishing a TSS effluent limitation of general applicability without having promulgated it through statutorily required notice and comment rulemaking. By failing to do so, Ecology’s 30 mg/L TSS limit is unenforceable. Simpson Tacoma Kraft Co. v. Department of Ecology, 119 Wn.2d 640, 835 P.2d 1030 (1992) (water quality standard of general applicability constitutes a rule subject to APA rulemaking).

Ecology should delete all references to a 30 mg/L TSS effluent limit for Puget Sound Sediment Cleanup Sites and revert to the use of the 100 mg/L TSS benchmark from the existing General Permit.

Comment 3. Facilities that have never before been required to sample for TSS may be unfairly placed into immediate violation of the 30 mg/L TSS limit.

There are a large number of currently permitted facilities that discharge to Puget Sound Sediment Cleanup Sites who have never been required to sample for TSS. It is unfair to impose such stringent numeric effluent limits on these facilities at the same time that they must initiate sampling for TSS. Likewise, these facilities may be in immediate violation of the permit limits and consequently subject to enforcement by Ecology and/or through a Clean Water Act citizen suit. Moreover, without any prior

sampling data, these facilities will not have any current information necessary to determine what kinds of controls or BMPs will be necessary to achieve compliance with such a stringent effluent limit. The permit should allow for an adaptive management approach through progressive BMPs for achieving compliance, rather than being placed into an immediate risk of non-compliance, including civil and even criminal liability. In other words, the use of benchmarks, not effluent limits, is the most appropriate approach for addressing this issue.

Moreover, given that the Draft Permit changes the reporting obligation for violations of effluent limits, either Ecology will be inundated with reports of TSS exceedances, or there will be widespread non-compliance with or ignorance of the requirement to report every TSS exceedance within 24 hours and submit a written report within 5 days.

Comment 4. There is no logical basis for Ecology to have determined that TSS discharges above 30 mg/L will have a potential to cause or contribute to a violation of any state water quality standard.

In the Fact Sheet, Ecology provides the following explanation for setting a 30 mg/L TSS effluent limit for Puget Sound Sediment Cleanup Sites:

This limitation is based upon a best professional judgment determination that stormwater discharges with less than 30 mg/L TSS will not cause or contribute to a violation of sediment management standards.

Fact Sheet at 25. This scant and unsupported justification makes no sense. The sediment management standards set standards for specific contaminants in sediments. The 30 mg/L TSS standard will apply regardless of whether the sediment being discharged is pristine or heavily contaminated. The proposed effluent limit bears no relation to the levels of contamination that may exist in the sediments being discharged. For example, a permittee will be in violation of the permit if it is discharging clean sediment at 95 mg/L, yet another discharger will be in compliance even though it is discharging heavily contaminated sediments at 29 mg/L.

Ecology should delete all references to a 30 mg/L TSS effluent limit for Puget Sound Sediment Cleanup Sites and revert to the use of the 100 mg/L TSS benchmark from the existing General Permit.

Comment 5. Ecology has failed to provide an adequate technical basis to conclude that stormwater discharges above the 30 mg/L TSS effluent limit will cause, or have the reasonable potential to cause, exceedances of surface water quality standards.

As quoted above, Ecology asserts that the 30 mg/L TSS effluent limit is based on its “best professional judgment determination that stormwater discharges with less than 30 mg/L TSS will not cause or contribute to a violation of sediment management standards.” Yet, Ecology provides no additional information or discussion as to this “best professional judgment.” Ecology provides no citation or access to any “best professional judgment” determination, nor is WMW aware of such an analysis. Ecology should not include the TSS limit without providing the public and regulated community with the technical justification for its purported “best professional judgment.”

Furthermore, Ecology’s determination is irrelevant. While Ecology may theoretically be correct in concluding that “stormwater discharges with **less than** 30 mg/L TSS will not cause or contribute to a violation,” that is not the legal standard. The real question Ecology must address is whether discharges

that **exceed** the 30 mg/L limit will cause or contribute to a violation. WMW is not aware of any such determination. Indeed, it cannot be disputed that a permittee discharging **clean** sediment at more than 30 mg/L will certainly not be causing or contributing to a violation of sediment management standards for metals, oil and grease, etc.

Ecology should delete all references to a 30 mg/L TSS effluent limit for Puget Sound Sediment Cleanup Sites and revert to the use of the 100 mg/L TSS benchmark from the existing General Permit.

Comment 6. Ecology failed to include the economic impacts of the 30 mg/L TSS effluent limit in its Economic Impact Analysis.

WAC 173-226-120 requires Ecology to prepare an economic impact analysis (“EIA”) of the Draft Permit. Among other things, the EIA must provide a brief description of the compliance requirements and the estimated cost of complying with those requirements. The EIA for the Draft Permit does not comply with these requirements because it fails to identify the new 30 mg/L TSS limit or the significant compliance costs that will likely result. Indeed, the EIA never even mentions the TSS limit or the “Puget Sound Sediment Cleanup Sites.” This omission is especially significant because the Draft Permit – if finalized – would impose the 30 mg/L TSS limit on all industrial dischargers covered by the General Permit in some of the largest commercial and industrial areas in the State of Washington. Many of these permittees are small business and may face huge costs to treat their stormwater discharges to meet a TSS limit that is 70% lower than the benchmark applicable to all other permittees.

Ecology must either withdraw the 30 mg/L TSS limit from the Draft Permit or withdraw the Draft Permit in its entirety to allow for the completion of a compliant EIA.

Comment 7. Ecology has failed to alert the numerous facilities discharging stormwater to Puget Sound Sediment Cleanup Sites that they will be subject to a significantly more stringent TSS limit than under the existing General Permit.

Given the broad geographic areas and large numbers of industrial and commercial facilities that are located on or near the many Puget Sound Sediment Cleanup Sites, WMW believes that many facilities are unaware that the Draft Permit will impose a 30 mg/L TSS limit, notwithstanding that these sites may have no history of discharging any pollutants above existing benchmarks. Many of these facilities may not even be aware that they are discharging to a Puget Sound Sediment Cleanup Site. Nonetheless, these facilities will see a significantly more stringent TSS limit if the Draft Permit is finalized as proposed. They will then be exposed to immediate and potentially severe enforcement for any exceedance of the effluent limit. WMW recommends that Ecology withdraw the proposed 30 mg/L TSS limit and then undertake broader outreach to the potentially affected facilities before re-proposing any more stringent TSS limit.

Comment 8. It is unclear whether Puget Sound Sediment Cleanup Sites are considered Category 4b or Category 5 sites.

Ecology’s Draft Permit, its Fact Sheet, and Ecology’s 303(d) list fail to provide a clear understanding of whether Puget Sound Sediment Cleanup Sites are Category 4b or 5 sites. Appendix 4 to the Draft Permit lists existing dischargers to impaired waters. For many of those discharges, the “Listing Association Comment” (whatever that means) associates the listed dischargers with Category 5 based on “Sediment Bioassay in Sediment.” However, many of these sites are located on Puget Sound Sediment Cleanup Sites, which, according to EPA’s approval of the 2010 303(d) list, are Category 4b sites. Further confusing matters is the Draft Permit, which discusses Category 5 sites and “Puget Sound

Sediment Cleanup Sites” as if the “Puget Sound Sediment Cleanup Sites” sites are neither Category 5 nor 4b sites. Suffice it to say, Ecology’s integration of its 2010 Water Quality Assessment with the General Permit is extremely confusing, if not incomprehensible.

Comment 9. It is impossible to comment on most of the freshwater effluent limits in Table 6 because Ecology has not identified them.

Ecology is seeking comment on the proposed effluent limits in Table 6 of the Draft Permit, yet the permit does not specify what many of those limits are. Instead, the Draft Permit states that “Site-specific effluent limitations will be assigned at the time of permit coverage.” The lack of these specific permit limits makes it impossible for the permittees to provide any meaningful comment on these limits.

Comment 10. Ecology has not provided any basis for requiring solids monitoring and reporting and should delete the requirement.

In Condition S6.C.2, Ecology further imposes additional and expensive new solids monitoring and reporting requirements on dischargers to Puget Sound Sediment Cleanup Sites, yet fails to provide any explanation as to why this requirement is being imposed or what purpose the information will serve. If a facility detects elevated concentrations of metals in its storm drain system solids, does it mean that the facility’s storm drain system is operating effectively in removing metals from the stormwater discharge or does it indicate that the facility is failing to implement other source control BMPs? Conversely, if the facility reports no or minimal contaminants in its storm drain system, will Ecology conclude that the facility is a clean one or that its BMPs are failing to capture contaminants? Before it imposes additional new sampling requirements, Ecology must justify why. It has failed to do so. Only then can the public and the regulated community provide meaningful comment on the requirement.

Comment 11. Condition S6.C.2.b is unclear what an acceptable sampling regime is for storm drain system solids testing.

This condition needs clarification specifying the number, type, and location of samples needed to comply. For example, if a facility has more than one stormwater drainage system, must the permittee sample each system or will a single sample suffice from one system for Permit compliance? Must the sample be a grab or is compositing also acceptable? The requirement also does explain where storm drain system solids should be sampled from. The likely sampling location would typically be from a settling chamber of an oil/water separator or other treatment-type device (e.g.; Stormceptor®) if a facility is so equipped. The permit should specify that solids sampled solely from these devices suffices for compliance with the condition. Otherwise, it could be construed to require sampling solids from each location where they are accumulated and must be removed from (i.e., inlets, catch basins, sumps, conveyance lines and oil/water separators).

Comment 12. Footnote f to Table 6 has an incorrect reference to Permit Condition S6.C.1.c.

WMW believes that footnote f to Table 6 incorrectly references Permit Condition S6.C.1.c. In the Draft Permit, Permit Condition S6.C.1.c. has been deleted. It is unclear as to what permit condition this footnote is intended to reference because WMW cannot identify any permit condition that requires “permittees discharging to a waterbody impaired for any sediment-quality parameter [to] clean out storm drain lines.” We suspect that this reference was intended to be to Permit Condition S.6.C.2.

Comment 13. Ecology should adopt EPA's section/paragraph identification scheme.

The General Permit's scheme for numbering conditions and paragraphs makes it difficult and confusing to navigate through the permit. EPA, in its Multi-Sector General Permit ("MSGP"), no longer uses the "I.B.3.e" lettering/numbering scheme. In 2000, EPA provided a good explanation of this problem:

Also note that the section/paragraph identification scheme of today's final MSGP has been modified from the 1995 MSGP. The original scheme utilized a sometimes lengthy combination of numbers, letters and Roman numerals (in both upper and lower cases) which many permittees found confusing. Today's reissuance identifies sections/ paragraphs, and hence permit conditions, using numbers only, except in Part 6 (which also incorporates the sector letters from the 1995 MSGP for consistency). Under the original permit, only the last digit or letter of the section/paragraph identifier appeared with its accompanying section title/ paragraph, making it difficult to determine where you were in the permit. In today's reissuance, the entire string of identifying numbers is listed at each section/paragraph to facilitate recognizing where you are and in citing and navigating through the permit. For example, paragraph number 1.2.3.5 tells you immediately that you are in Part 1, section 2, paragraph 3, subparagraph 5; whereas under the 1995 MSGP you would only see an "e", thereby forcing you to hunt back through the permit to determine that you were in Part I.B.3.e.

65 Fed. Reg. 64746, 64747 (Oct. 30, 2000). WMW suggests that Ecology adopt the same approach. WMW notes that it made this same comment in 2004. Ecology recognized the merit of the comment but deferred making the suggested change "due to time constraints." Given the decade that has elapsed since, it is unfortunate that Ecology did not make this formatting change. It should do so now.

Comment 14. Ecology should include NAICS codes in addition to SIC codes.

Ecology should consider including the NAICS codes in its General Permit, in addition to the SIC Codes. The NAICS classification system is replacing the SIC code classification system, as EPA recognized 14 years ago:

EPA also recognizes that a new North American Industry Classification System (NAICS) was recently adopted by the Office of Management and Budget (62 FR 17288, April 9, 1997). NAICS replaces the 1987 standard industrial classification (SIC) code system for the collection of statistical economic data. However, the use of the new system for nonstatistical purposes is optional. EPA considered the use of NAICS for the today's MSGP reissuance, but elected to retain the 1987 SIC code system since the storm water regulations (40 CFR 122.26(b)(14)) reference the previous system and this system has generally proven to be adequate for identifying the facilities covered by storm water regulations. EPA will consider transitioning to the new NAICS system in future rule making.

65 Fed. Reg. 64746, 64749-64753 (Oct. 30, 2000). Other states are doing so. For example, the State of California has begun to include NAICS codes in its Stormwater General Permit.

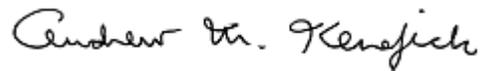
July 11, 2014

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Thank you for your attention to these comments. WMW looks forward to working with Ecology to address these issues and make the necessary changes to the General Permit.

Sincerely,

WASTE MANAGEMENT OF WASHINGTON, INC.

A handwritten signature in cursive script that reads "Andrew M. Kenefick".

Andrew M. Kenefick
Senior Legal Counsel