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Via email: industrialstormwatercomments@ecy.wa.gov; jkil461@ecy.wa.gov

Jeff Killelea

Department of Ecology

P.O. Box 47600

Lacey, Washington 98504-7600

**RE: COMMENTS ON THE DRAFT INDUSTRIAL STORMWATER
GENERAL PERMIT**

Dear Jeff,

These comments are submitted on behalf of Puget Soundkeeper Alliance, Columbia Riverkeeper, and Spokane Riverkeeper (collectively, "PSA"). PSA appreciates the opportunity to provide written comments on Ecology's draft Industrial Stormwater General Permit ("draft ISGP" or "draft permit").

PSA is deeply disappointed with the contents of the draft ISGP. During the course of our participation in the ISGP Work Group, we learned that industrial stormwater is likely to violate water quality standards, and that permittees in general are not doing a good job of complying with the permit's adaptive management, sampling, Best Management Practices ("BMP"), Stormwater Pollution Prevention Plan ("SWPPP"), and Discharge Monitoring Report ("DMR") requirements. We anticipated that Ecology's reaction to this information would be to draft a permit that is more protective of water quality. Instead, the draft ISGP allows permittees to sample discharges for less parameters; it contains higher benchmarks by illegally using dilution factors in benchmark calculations; it allows permittees to exceed benchmarks more often before requiring adaptive management actions; it requires less permittee accountability; it allows for less public oversight; and it excuses permittees who have already triggered the requirement to implement treatment under the current permit from doing so under the draft permit. On that last point in particular, this permit appears to be getting worse, rather than better, since the Work Group completed its work. In sum, this permit is less protective of water quality and, frankly, represents a backslide on a permit-wide level. We are dismayed that after participating in the ISGP Work Group for nine months that Ecology is once again backing away from its responsibility to protect water quality.

The general permit is not supposed to be a vehicle for regulating to the lowest common denominator. Instead, Ecology should use conservative presumptions in the development of the general permit because of the recognition of the significance of stormwater discharges to the contamination of Puget Sound. If permittees are able to

show that they deserve more liberal permit terms than are contained in a properly drafted general permit, Ecology should issue them an individual permit. Ecology should not, as it did in this permit, relax general permit terms for all permittees.

PSA is extremely frustrated with the Department of Ecology. With this draft permit, Ecology persists with language and approaches that are plainly contrary to law. In particular, as described below, Ecology's failure to require sampling of the first fall storm event, incorporation of dilution factors in the derivation of benchmarks, and the off-permit, Level Four conclusion to the adaptive management mechanism violate applicable law as interpreted by the Pollution Control Hearings Board in PSA's previous challenges to illegal provisions in Ecology's general stormwater permits. Other provisions of this permit are dubious at best in the contorted interpretations of state and federal law that they represent, not to mention subversion of the stated goals of the Clean Water Act and the National Pollutant Discharge Elimination System. PSA is outraged that Ecology persists in bowing to the wishes of polluters in refusing to do its job and implement the admittedly strict and stringent requirements of water pollution law. Scientific research increasingly points at stormwater as a primary source for the ongoing degradation of Puget Sound and Washington's waterways. While Governor Christine Gregoire, Director Jay Manning, and other politicians and government functionaries talk about commitment to addressing stormwater issues, in drafting general permits Ecology abdicates its proper role, forcing citizens to litigate Ecology's illegal permits before the PCHB over and over again.

PSA is more than frustrated with Ecology's repeated failures to uphold commitments that it has made to PSA and others in the environmental community in agreements and understandings reached in resolution of previous legal disputes over general permit terms. For instance, PSA considers Ecology's refusal to require submission to Ecology of Level One and Two reports to be contrary not only to the language of RCW 90.48.555, but also in breach of the understanding reached to end the appeal of the previous ISGP in the enactment of that statute. PSA is learning that Ecology's commitments in settlements of these programmatic issues are untrustworthy. Given the decisions that Ecology is repeatedly making in general permitting, here and elsewhere, that are contrary to what it has led PSA to believe that it would do so, PSA is becoming disinclined to participate in these meaningless discussions, much less abandon litigation in reliance on representations made.

General Comments

The fact sheet explains that the permit does not set numeric WQBELs because Ecology has found setting them "not feasible," and therefore that the federal regulations do not require them. However, Ecology is setting numeric WQBELs in this permit for many dischargers – those who are discharging pollutants of concern to most categories of 303(d)-listed waters. This shows that it is indeed feasible to set numeric WQBELs in this permit and thus the federal regulations require them. Please explain the basis for Ecology's decision that setting numeric WQBELs in this permit is "not feasible" when

Ecology is in fact doing so for a substantial category of dischargers covered by this very permit?

RCW 90.48.555(3)(d) requires this permit to include numeric WQBELs if Ecology determines that discharges have a reasonable potential to cause or contribute to violations of water quality standards and that “effluent limitations based on nonnumeric best management practices are not effective in achieving compliance with state water quality standards.” As the PCHB explained in *Puget Soundkeeper Alliance et al. v. State of Washington, Department of Ecology*, PCHB Nos. 05-150, 151, 06-034, and 06-040 (January 26, 2007) (the boatyard permit case), at n. 8, in drafting the ISGP Ecology must make the determinations mandated by RCW 90.48.555(3)(d).

The inclusion of numeric WQBELs in this permit is required by RCW 90.48.555(3)(d). Every reasonable study or consideration indicates that discharges regulated by this permit have a strong potential to cause or contribute to violations of water quality standards. Does Ecology disagree? Please explain what Ecology has done and concluded with respect to the reasonable potential for authorized discharges to cause or contribute to water quality standards. In addition, based on the continued elevated levels of metals shown by monitoring results and the low rates of compliance with the permit’s very subjective and difficult to enforce nonnumeric requirements, it is plain that nonnumeric BMP-based conditions are inadequate to ensure compliance with water quality standards and that objective numeric WQBELs are necessary to allow enforcement and measure and ensure compliance. Does Ecology disagree? If so, please explain the basis for Ecology’s disagreement and specify which nonnumeric BMP-based effluent limitations it sees as being effective in achieving compliance with water quality standards and why.

Permit Condition S1.F. Conditional “No Exposure” Exemption

Condition S1.F.1.a states that Ecology will automatically grant No Exposure exemptions 60 days after receipt of a complete and accurate No Exposure Certification Form from any permittee, unless Ecology notifies the permittee in writing. Condition S1.F.1.b states that Ecology will automatically terminate permit coverage when it grants a No Exposure exemption to a permitted facility. PSA is concerned that Ecology will allow permittees to obtain No Exposure exemptions and permit terminations without any oversight or inspections from Ecology ensuring that the permittees meet the requisite standards.

Will Ecology conduct an inspection of each facility that submits a No Exposure Certification Form to ensure that it meets the requirements of 40 C.F.R. § 122.26(g) before granting a No Exposure exemption to the facility?

Will Ecology conduct an inspection of each facility that submits a No Exposure Certification Form to ensure that it meets the requirements of Permit Condition S.13 (“Notice of Termination”) before terminating a facility’s ISGP permit?

Permit Condition S2.B. Modification of Permit Coverage

What is the intent of Ecology with respect to the nature and detail to be made available to the public when a permittee requests modification of the ISGP permit terms as applied to the permittee, either for significant process changes, or for changes to adaptive management requirements under S8., or otherwise? PSA believes that the public notice should include details of the modification requested and the basis for the request. Does Ecology agree? If not, why not? If so, PSA is concerned that the S2.B.2. requirement for public notice is inadequate. S2.B.2. states that the permittee need only comply with the requirements of WAC 173-226-130(5), which, at -130(5)(b) - requires only that the public notice contain identification of the permittee, identification of the activities that result in a discharge, the name of the permit under which coverage is requested, and a statement about the opportunity for public comment. Please explain and describe the requirements for the contents and methods of the public notice for modifications of permit coverage, where these requirements are found, and how they adequately inform the public of the nature and reasons for the changes in permit coverage requested.

Permit Condition S3.B.3.b. General BMP Requirements.

PSA strongly objects to draft ISGP Condition S3.B.3.b, which allows permittees until July 1, 2010, to incorporate all required BMPs into their SWPPPs and to ensure that the BMPs are implemented. Under the current ISGP, each permittee is already required to have an updated SWPPP. The draft ISGP only requires minor changes to each permittee's SWPPP, and permittees are already on notice of the future required changes to their SWPPPs through Ecology's release of the draft ISGP, and will be provided with additional advance notice due to the expected extended period between permit issuance and effective dates. It is unreasonable for Ecology to allow permittees until July 1, 2010, to incorporate all required BMPs into their SWPPPs – Ecology should require all permittees to incorporate all required BMPs into their SWPPPs (and to implement them) starting on the effective date of the permit.

Furthermore, the draft ISGP does not clearly state what BMPs (if any) are required of permittees from January 1, 2010, until July 1, 2010. From January 1, 2010 to July 1, 2010, the draft permit does not require implementation of AKART, much less ensure that discharges will not cause or contribute to violations of water quality standards. It is absolutely outrageous that Ecology proposes to allow permittees to stop implementing BMPs and SWPPPs, albeit for a six month period, that have already been required for years by previous ISGPs. Please explain Ecology's rationale for this and the legal basis to suspend the basic technology-based requirements that have been in place for years.

What BMPs does the draft permit require permittees to implement at their facilities during the period from January 1, 2010 to July 1, 2010?

How does the draft ISGP ensure that discharges from permittees do not cause or contribute to violations of a water quality standard during the period of January 1, 2010 to July 1, 2010? How does it ensure that permittees continue to implement AKART during this period?

What options has Ecology considered for notifying ISGP permittees of the changes to the SWPPP requirements in the draft ISGP in advance of the January 1, 2010 effective date? Has Ecology selected any of these options? Why or why not?

Permit Condition S3.B.5 – Sampling Plan

Must the sampling plan identify all points of discharge from the site? PSA believes that it should, but that the permit language does not clearly require so.

Permit Condition S4. Sampling

According to the Industrial Stormwater General Permit Fact Sheet, June 3, 2009, Comment Draft (“ISGP Fact Sheet”) at pp.46-47, the critical period for both acute and chronic toxicity is the stormwater discharge that occurs after the summer dry period, identified as approximately October 1. However, the draft ISGP requires no sample collection and analysis of a discharge from this first seasonal flush. Instead, only quarterly sampling is required, which allows a permittee to avoid taking a sample during critical discharge conditions when sampling is mostly likely be indicative of contamination and discharge quality problems. Furthermore, in the appeal of the previous ISGP, the PCHB specifically ordered Ecology to require in the ISGP statewide sampling of the first fall storm event. *Puget Soundkeeper Alliance et al. v. Washington State, Department of Ecology*, PCHB Nos. 02-163 and 02-164 (August 4, 2003) (“2003 ISGP decision”). It is outrageous that Ecology is apparently choosing to disregard the clear order of the PCHB as concerns the monitoring requirements in the ISGP, especially when Ecology admits that the first fall storm event represents the critical conditions for both acute and chronic toxicity of the regulated discharges. Please explain the factual and legal basis for Ecology’s disregard of the PCHB’s order. Ecology’s choice to disregard this order makes a mockery of the rights of the public to participate in the permit process through appeal to the PCHB, and may constitute a strong argument for withdrawal of the NPDES permit program delegation. Should Ecology decline to abide by the orders of the PCHB, PSA may resort directly to the superior court for an order to stay the permit and to have Ecology comply with the PCHB’s explicit directive. PSA suggests that the sampling requirement be supplemented with a requirement to sample the first discharge after the summer dry period to make a total of five annual sample events as recommended by the Herrera Evaluation.

S4.B.1.b. requires the permittee to obtain “representative” samples. “Representative sample” is defined as “a sample of the discharge that accurately characterizes stormwater runoff generated in the designated drainage areas of the facility.” PSA is concerned that there is nothing in the permit that clearly requires

samples to be representative of the discharge from the facility as a whole. A facility can consist of numerous “drainage areas,” some of which are likely to be of differing sizes and levels of stormwater pollutant generation potential. S4.B.2.c. is confusing and unclear with respect to which point of discharge must be sampled. For example, what are “pollutant types”? The basic requirement that each distinct point of discharge off site must be sampled and separately analyzed is sound, but the exception is poorly worded. Who determines which points of discharge are to be sampled if fewer than all are to be sampled, and how is this determination made? If the determination is to be made by someone other than Ecology, will Ecology review these determinations or require them to meet some specific standard? What standard? PSA urges that sampling at all points of discharge off site be required until an adequate number of samples are collected, perhaps 8 samples, to see whether any points of discharge are adequately characterized by others and thus their removal from the sampling plan justified. The selection of the sampling location for permittees with multiple points of discharge off site is, in PSA’s experience, a significant opportunity for permittee gamesmanship offering much potential for permittees to hide the most contaminated discharge streams. The loose wording of these permit conditions would allow this gamesmanship. The S4.B.2.c. exception from all points sampling does not even require sampling of the discharge point with the highest pollutant concentrations, stating only that the permittee *may* sample only this point. These conditions are very sloppy and need careful examination and reconstruction with the input of Ecology ISGP inspectors and enforcement staff.

May permittees take samples on-site, for example in a catch basin on-site? S4.B.2.e. appears to disallow this. Please clarify where samples must be taken.

Permit Condition S.5 Benchmarks.

Ecology’s use of Dilution Factors in benchmark calculations:

Ecology claims that its use of a dilution factor in the calculation of benchmarks in the ISGP does not result in granting mixing zones to all permittees. (“The use of a dilution factor in deriving the benchmark is not considered authorization of a mixing zone...”. ISGP Fact Sheet at pp.74-75). This claim is not consistent with the boatyard permit case. In the Findings of Fact, Conclusions of Law, and Order, the PCHB explained how using a dilution factor in the calculation of a benchmark implicates mixing zones in the context of the Boatyard General Permit (“BGP”): “[a]lthough Ecology has not specifically articulated a grant of a mixing zone in the 2005 BGP, it derived the copper benchmarks from the same variables used to formulate site-specific mixing zones in individual permits, particularly a dilution factor.” *Puget Soundkeeper Alliance et al. v. State of Washington, Department of Ecology*, PCHB Nos. 05-150, 151, 06-034, and 06-040 (January 26, 2007), at p. 50. The PCHB then rejected Ecology’s use of a dilution factor in calculating benchmarks – not only could Ecology not show that it had performed any site-specific analysis, but there was evidence of a lack of BMP implementation among the permittees: “the grant of a mixing zone to formulate effluent limitations (i.e., benchmarks) is not warranted in circumstances where there is a lack of application of AKART and evidence of widespread, ongoing violations of water quality standards.” *Id.*

at p.51. In other words, compliance with the BGP was such that Ecology could not meet the requirements of WAC 197-201A-400.

Similar to the BGP, Ecology has documented a lack of application of AKART and a lack of permit compliance by the ISGP permittees which would make application of a dilution factor and a general mixing zone inappropriate and illegal. On average, Ecology inspectors estimate that only 34% of permittees have a Stormwater Pollution Prevention Plan (“SWPPP”) on site, and that only 21% of those SWPPPs (on average) meet permit requirements. Washington State Department of Ecology, 2008 Survey of Ecology Inspection and Enforcement Staff (distributed to Work Group members) (“2008 Survey”). Ecology has also found that only 60-70% of ISGP permittees can identify one or more BMPs that were maintained to manage stormwater. ISGP Fact Sheet at p.36. Ecology’s own analysis shows that only between 56-71% of permittees submit their DMRs to Ecology each quarter as required. Email from Jeff Killelea to Work Group, “Current ISWGP DMR Submittal Rates” attachment (September 24, 2008). In addition, Ecology inspectors have found that ISGP permittees don’t know how to select proper BMPs for their SWPPPs and don’t implement BMPs after they select them. 2008 Survey. In sum, Ecology concludes that “no more than 10 percent [of ISGP permittees] would be considered in full compliance with all permit requirements.” ISGP Fact Sheet at p. 37.

As the PCHB found for the BGP, Ecology may not include a dilution factor in the calculation of benchmarks in the draft ISGP. Using dilution factors in the calculation of general permit benchmarks is analogous to granting a mixing zone. *Puget Soundkeeper Alliance et al. v. State of Washington, Department of Ecology*, PCHB Nos. 05-150, 151, 06-034, and 06-040 (January 26, 2007). Ecology may not use standard mixing zones in general permits. *Id.* at p. 50 (“This Board has previously rejected the use of standard mixing zones in general permits as inconsistent with the overall goals of the CWA”).

PSA is also concerned with Ecology’s characterization of the dilution factor of 5 that it used to calculate the draft ISGP benchmarks as “modest”. ISGP Fact Sheet at pp. 74-75. The use of this “modest” dilution factor has quadrupled the zinc benchmark from between 45-50 ug/L to 200 ug/L (for Western Washington). Water Quality Risk Evaluation for Proposed Benchmarks/Action Levels in the Industrial Stormwater General Permit, Herrera Environmental Consultants (Feb. 9, 2009) (comparing benchmark levels at different dilution factors, and assuming a 10% risk of violating receiving water quality, a zinc benchmark with a dilution factor of 1 is between 45-50 ug/L, while a zinc benchmark with a dilution factor of 5 is 200 ug/L). The use of any dilution factor is prohibited and inappropriate in benchmark calculations for general permits, no matter how “modest”.

On what legal basis is Ecology relying for its inclusion of dilution factors in the calculation of benchmarks for the draft ISGP?

What does Ecology mean by its statement at pages 74-75 in the ISGP Fact Sheet that “Ecology has determined that a modest dilution factor 5 is consistent with WAC 197-201A-400”?

Is it Ecology’s position that small or “modest” dilution factors are legally acceptable in general permit benchmark calculations, while larger dilution factors are not? If so, why?

If Ecology does use dilution factors in the establishment of benchmarks for this permit, essentially authorizing mixing zones, it may not do so in a manner that sidesteps the requirements of the mixing zone regulation. Both the PCHB, in the 2003 ISGP litigation and the boatyard permit case, and the legislature, in RCW 90.48.555(12), have explicitly prohibited the authorization of mixing zones in general permits without adherence to the mixing zone regulations. Besides merely exclaiming that it does not authorize mixing zones in the ISGP, how does Ecology explain its proposed use of dilution factors as other than an effort to sidestep these well-explored legal requirements? This course makes a mockery of the public participation process through which PSA has secured orders and clarifications through the PCHB prohibiting exactly what Ecology is doing with dilution factors. Ecology also effectively reneges on the understanding that Ecology, the permittees, and the environmental community reached in resolving the appeal of the previous ISGP in the development of RCW 90.48.555. PSA is learning that Ecology simply can not be trusted to abide by its agreements, or, for that matter, to implement the law as it is plainly required to do. This does not bode well for the potential for the future of negotiated resolutions of contested issues concerning programmatic decisions about Ecology’s water quality program. Ecology’s failure to follow the law in the face of inconvenience or expense to the regulated community leaves it to PSA and other conservationists to expend great efforts and resources to use legal machinery, again and again, to force Ecology to do its job.

Furthermore, in addressing the use of mixing zones and dilution factors in the ISGP, the PCHB has directed that the permittees must be required to conduct receiving water monitoring when it is feasible and there might be a significant environmental risk. *Puget Soundkeeper Alliance et al. v. State of Washington, Department of Ecology*, PCHB Nos. 02-163 and 02-164 (August 4, 2003). Ecology is also attempting to sidestep this requirement in this ISGP. If dilution is to be used in setting the benchmarks, receiving water monitoring must be required.

The proposed zinc benchmark:

Ecology proposes raising the zinc benchmark from 117 ug/L to 200 ug/L. PSA objects to Ecology’s proposed zinc benchmark in the draft ISGP for several reasons. First, we believe that the benchmark is too high because it is based on the illegal use of a dilution factor. In addition, Ecology should not increase the zinc benchmark in light of the growing consensus that stormwater runoff is a major contributor to pollution in Puget Sound.

The Phase 1 Report's found that 77% (or 344 metric tons/year) of the zinc loading to the Puget Sound Basin is from runoff. Phase 1 Report at p. 5. Furthermore, the second phase of that report¹ ("Phase 2 Report") confirmed that runoff from commercial/industrial land use category has the highest median zinc concentrations at 120 ug/L. Phase 2 Report at p. 14. This is well above the acute water quality standards in marine water for zinc of 90 ug/L. Commercial/industrial areas are the second largest source of zinc loading into the Sound. Phase 2 Report at p. 19. Clearly, the commercial/industrial sector should be regulated so as to control discharges of zinc in its stormwater even more effectively. However, in the face of this information, Ecology has chosen to raise the zinc benchmark by 83 ug/L. If anything, Ecology should be lowering the zinc benchmark in the ISGP in recognition of the commercial/industrial sector contribution to zinc loading in Puget Sound.

The failure to require copper monitoring for all permittees:

PSA is disappointed by Ecology's decision to exempt certain SIC codes from the requirement to monitor for copper. This is not consistent with the recommendations of the 2006 Herrera report² or data compiled by Ecology during the course of the Work Group process. Ecology's data indicates that discharges from all SIC codes of permittees monitoring copper between 2006 – late 2008 reported an average copper result of 42 ug/L and a median copper result of 17 ug/L. Email from Jeff Killelea to Work Group, "Overall Percentiles" attachment (September 24, 2008). Both of these results are above Ecology's proposed copper benchmark in the draft ISGP and well above the acute water quality standard in marine water for copper of 4.8 ug/L.

The ISGP Fact Sheet indicates that permittees in many SIC codes are discharging significant levels of copper – not just permittees in the SIC codes that must monitor for copper under the draft permit (33xx, 10xx, 5015, 5093, and 34xx SIC codes). ISGP Fact Sheet, pp. 6-34. The ISGP Fact Sheet shows that permittees in the 17xx SIC code, for instance exceeded the copper benchmark 67% of the time, and the copper action level 33% of the time, during the period for which data is available. ISGP Fact Sheet at p. 9. Permittees in the 22xx exceeded the copper 33% of the time. ISGP Fact Sheet at p. 30. In all, almost every SIC code for which Ecology has data shows permittee exceedences of the copper benchmark, and often of the copper action level as well. However, Ecology exempts the vast majority (75%) of ISGP dischargers from the requirement to monitor for copper, despite this evidence that dischargers across all SIC codes are exceeding the benchmark and action levels and are therefore likely to be causing or contributing to violations of the copper water quality standard.

Ecology states in the ISGP Fact Sheet that copper monitoring is not required for all permittees because Ecology intends to use zinc monitoring as a surrogate for copper (and lead) monitoring. ISGP Fact Sheet at p. 72. However, PSA doubts that zinc

¹ Hart Crowser, et al., Control of Toxic Chemicals in Puget Sound, Phase 2: Pollutant Loading Estimates for Surface Runoff and Roadways (2008) ("Phase 2 Report").

² Envirovision and Herrera Environmental Consultants, Evaluation of Washington's Industrial Stormwater General Permit (2006) ("2006 Herrera Report").

monitoring is an appropriate surrogate for copper. In the boatyard permit case, the PCHB rejected Ecology's use of copper as a monitoring surrogate for lead and zinc because the ratios of the three metals in discharges are highly variable. *Puget Soundkeeper Alliance et al. v. Washington State Department of Ecology*, PCHB Nos. 05-150, 151, 06-034, and 06-040 (January 26, 2007) at pp. 37 – 38. PSA suspects that the same is true for discharges regulated under the ISGP. What are the results of the evaluation of the ratios of these metals in ISGP-authorized discharges that Ecology performed? Please describe this analysis and the data examined. What is the basis of Ecology's conclusion that zinc is an appropriate surrogate for copper and lead? Furthermore, if zinc monitoring is a reliable surrogate for copper monitoring, in theory, Ecology would not need to require any permittee to monitor for copper. Instead, the draft ISGP will require permittees with certain SIC codes to monitor for copper, while other permittees will not. How does Ecology explain the draft permit's requirement for certain SIC codes to monitor for copper, in light of its position that zinc monitoring is a surrogate for copper monitoring?

Both the Phase 1 Report and the Phase 2 Report also point to stormwater as a major source of copper loading into Puget Sound. The Phase 1 Report found that 62% of copper loading, or 102 metric tons/year, to the Puget Sound Basin is from runoff. Phase 1 Report at pp. 5-6. While the Phase 2 Report found that commercial/industrial sources may not be the largest sources of copper loading, it determined that runoff from the commercial/industrial land use category had the highest median concentrations of copper (25 ug/L). Phase 2 Report at pp. 14; 19. From an "end of the pipe" perspective, this study highlights commercial/industrial stormwater dischargers (as a whole) as significant dischargers of this pollutant. PSA is astounded that, in light of this information, Ecology proposes to decrease regulation and monitoring of copper in stormwater for industrial permittees.

There is clearly a reasonable potential for copper to cause or contribute to violations of water quality standards. Ecology is therefore required to include in the ISGP limitations for this parameter to ensure that discharges do not cause or contribute to violations of water quality standards for that parameter. 40 C.F.R. § 122.44; RCW 90.48.555. What are the results of Ecology's analysis of the reasonable potential for copper in ISGP discharges to cause or contribute to violations of water quality standards? Please explain how this analysis was performed. Is Ecology aware that the National Marine Fisheries Service objected to the 14 ug/L copper benchmark included in EPA's draft industrial stormwater general permit on the basis of impacts on the type of Pacific salmon found in many of the waters to which discharges are authorized under the ISGP? How did Ecology consider this expert opinion from the agency charged with protecting threatened and endangered salmon? Does Ecology disagree with NMFS' position? If so, what is the basis of Ecology's disagreement? If not, how does it justify the draft ISGP copper benchmark of 14ug/L? What data and analysis supports Ecology's apparent position that the zinc benchmark of 200 ug/L will ensure that copper discharges above 14 ug/L are detected and appropriate adaptive management responses initiated? Ecology's apparent approach of relying solely upon BMP selection and implementation for controlling copper for approximately 75% of ISGP permittees is inadequate. Without any requirement to monitor discharges for copper, there is no way of gauging the

effectiveness of BMPs in preventing copper in stormwater discharge. Furthermore, with no copper benchmark, there is no adaptive management requirement for these permittees even if they are aware of large concentrations of copper in their discharges. Relying on the requirement of Condition S3 of the draft permit that all SWPPPs contain BMPs necessary to comply with AKART and state water quality standards is simply not providing meaningful guidance for most permittees. The available evidence suggests that permittees are neither properly implementing their SWPPPs nor achieving AKART. *See* 2008 Survey and ISGP Fact sheet at pp. 74-75.

How does Ecology interpret the phrase “pollutant specific, water quality based effluent limitations,” in RCW 90.48.555(1) to allow the use of a zinc surrogate for copper instead of a copper benchmark or numeric WQBEL? How does Ecology’s approach to controlling copper not render this provision of state law effectively meaningless?

What is the basis for Ecology’s decision to select who must monitor for copper based upon SIC codes?

How did Ecology pick which SIC codes will trigger the requirement to monitor for copper?

Has Ecology determined that stormwater discharging from facilities not required to monitor for copper does not have a reasonable potential to cause or contribute to violations of water quality for copper in the receiving water? If so, what is the basis for that determination?

Has Ecology determined that BMP implementation alone, without monitoring, is likely to result in discharges that do not cause or contribute to a violation of the copper water quality standards? If so, on what information is that decision based?

Does Ecology consider information regarding the existence, effectiveness, or costs of control practices to ensure that industrial stormwater discharges do not cause or contribute to violations of water quality standards with respect to copper to be incomplete? If so, what is the formal adaptive process required by WAC 173-201A-320(6), the Tier II antidegradation requirement, to select, develop, adopt and refine control practices? How does the ISGP ensure that information regarding existence, effectiveness, or costs of control for copper is developed and used expeditiously? How is it possible to satisfy this requirement without collecting and analyzing discharges for copper concentrations?

Ecology’s decision to discontinue laboratory testing for oil and grease:

PSA objects to Ecology’s decision to discontinue laboratory testing for oil and grease and to limit Total Petroleum Hydrocarbons (“TPH”) sampling to approximately one-fourth of ISGP permittees. Ecology should retain the requirement for permittees to submit stormwater samples to laboratories for analysis of oil and grease.

The Phase 1 Report considered oil and grease to be a “chemical of concern”, and found that by far, the largest source of oil and petroleum products loading in Puget Sound is from surface runoff – over 99 %, or a total of 22,580 metric tons/year. Phase 1 Report at pp. 5-6. Furthermore, the Phase 2 Report found that the commercial/industrial land use category had the highest median concentration of TPH at 6,000 ug/L. Phase 2 Report at p. 16. While this category is not the largest contributor of loading of petroleum products in the Sound³, the high median of TPH in commercial/industrial runoff discharges nonetheless confirms that these facilities are significant dischargers of this parameter into Puget Sound.

PSA is concerned with Ecology’s proposal to reduce monitoring of this parameter to an inspection for visible sheen in discharges. In our experience, very few, permittees admit to having seen a sheen on their discharge in their quarterly visual inspections. While this may be due to proper housekeeping at permittee sites, we suspect that some dischargers are not as careful in their observation of this condition as is required. This suspicion is reinforced by Ecology estimates that the majority of permittees are not complying with permit conditions. *See* 2008 Survey; *and* email from Jeff Killelea to Work Group, particularly “Current ISWGP DMR Submittal Rates” attachment (September 24, 2008). Requiring permittees to send stormwater samples to a lab adds objectivity to the monitoring of this parameter that is appropriate in light of its presence in stormwater and the Sound. As with copper, PSA is disappointed that Ecology would diminish monitoring and regulation of a parameter in the face of evidence indicating that the commercial/industrial sector, in particular, is a discharging oil and grease in high concentrations. This, in turn, implicates the same legal considerations regarding Ecology’s responsibility under the CWA as described in the copper monitoring section above.

PSA is also concerned that reducing the monitoring requirements for oil and grease may constitute prohibited backsliding. Pursuant to 33 U.S.C. § 1342(o) and 40 C.F.R. § 122.44(l), effluent limitations in renewed or reissued permits must not be less stringent than in the previous permit, with several exceptions that do not apply here. Information gathered during the current permit term, described above, shows that oil and grease (and petroleum generally) remains a prevalent pollutant in stormwater runoff into the Sound. However, Ecology is relaxing the permit’s regulation of this parameter. Under the current permit, permittees are required to visually monitor for oil and grease sheen on a quarterly basis and measure the amount of oil and grease in discharge on a quarterly basis through laboratory testing. Under the draft permit, permittees must only visually monitor for oil and grease sheen. This constitutes a reduction in the stringency of permit terms regulating this important parameter.

The S5.A. requirement to monitor visible oil sheen is unclear. Where is the monitoring to take place, at the point of discharge only, in any water on the ground of the site, in catch basins? What if the discharge is rapidly flowing water, in which a visible sheen may never be seen no matter how much oil is in the discharge? For how long and over what area must a permittee look for a visible sheen? Must a supplemental light

³ Phase 2 Report at p. 21.

source, flashlight or other, be used if daylight is low? How much sheen is visible sheen? Does a thin thread of apparently oily surface constitute a visible sheen? PSA is concerned that this requirement is so vague as to be meaningless.

The prohibition on oil sheen in S5.F.1. is similarly vague. Please explain where and under what conditions an oil sheen indicates a violation via this condition.

How does Ecology justify reducing the monitoring requirements for oil and grease in the draft permit as compared to the current ISGP?

How did Ecology select which SIC codes will be required to sample for TPH? Why does Ecology not require all permittees to sample for TPH?

Permit Condition S6

When will Ecology make determinations under S6.C.1.b. about permittees' ability to comply by July 1, 2010? Will these determinations be subject to public notice, comment, and opportunity for appeal? May such determinations be made after the issuance of the ISGP? If so, will such determination require a modification of permit coverage? If so, the permit should clearly indicate this.

Permit Condition S7

Before the dates given in S7.A.2. for having site inspections conducted by the specified qualified professionals, who may conduct site inspections? The permit should specify this.

S7.B.1. should be modified to also require observations at locations where stormwater leaves the site to ensure that all appropriate discharge points are covered. "Discharged to storm drains, and to waters of the state" does not cover many situations, including, for example, when stormwater drains off a site into a public street over a driveway.

S7.B.2. should require observations for the presence of the identified items in stormwater on the site, not only in discharges.

Permit Condition S8.A. Level One Corrective Actions.

Ecology's proposal that permittees need not submit Level One Corrective Action documentation to Ecology – public oversight concerns:

PSA objects to the draft ISGP permit term allowing permittees to not submit Level One Corrective Actions to Ecology because it severely diminishes public oversight of permit compliance. Congress specifically directs the States to not only provide for but encourage public participation in CWA enforcement and compliance:

Public participation in the development, revision, and enforcement of any regulation, standards, effluent limitation, plan, or program established by...any State under this chapter shall be provided for, encouraged, and assisted by...the States.

33 U.S.C. § 1251(e).

Congress further emphasizes this point by providing that all documents obtained by the Administrator (in this case, Ecology) shall be available to the public. 33 U.S.C. § 1318(b). It is clear from these passages that Congress intends full public participation in NPDES permitting and compliance efforts by Ecology. Ecology's decision to reduce the amount of compliance documentation submitted to it directly contravenes this directive by making it more difficult for the public to obtain permit compliance information. Under Ecology's draft permit, members of the public must now request specific documentation (such as Level One Corrective Action documentation) from each permittee, and must potentially visit the place of business of each permittee to see the requested documents. Under the current permit, as permittees must submit to Ecology documentation of all required compliance measures, the public may simply review compliance documentation at Ecology offices.

As Ecology is aware, Congress also created a special role for the public in CWA NPDES enforcement through the creation of citizen suits. The public's right to fully and robustly engage in citizens enforcement is integral to the CWA and has been repeatedly recognized as a right that should not merely be tolerated, but encouraged. "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2nd Cir. 1976). "The [citizen suit] provision is directed at providing citizen enforcement when administrative bureaucracies fail to act." 116 Cong. Rec. 33,103 (statement of Sen. Muskie).

The public's exercise of its ability to act as "private attorneys general", however, is reliant upon the open availability to the public of permit compliance information. Ecology's proposal to allow permittees to not submit documentation of Level One Corrective Actions will certainly diminish the public's ability to view this information. As described above, the public may now be forced to request information from, and actually travel to the location of, each permittee to see requested documents. Ecology, as delegates of CWA regulation in the state, should certainly not be supporting a policy that implicitly impairs the "important public function" of the public's enforcement rights.

EPA Administrator Lisa Jackson has just issued a memorandum addressing the abysmally low rate of permittee compliance with NPDES permits and instructing the agency to address this issue, in part, by increasing transparency. Memorandum on Improving Water Quality through Transparency and Effective Enforcement of Clean Water Act Regulations, Lisa Jackson, Administrator (July 2, 2009) ("Jackson Memo of July 2, 2009"), attached as **Attachment 1**. She notes that "[d]ata available to EPA shows that, in many parts of the country, the level of significant non-compliance with permitting

requirements is unacceptably high and the level of enforcement activity is unacceptably low”. **Attachment 1**, Jackson Memo of July 2, 2009, at p. 1. Therefore, she instructs EPA to increase the transparency with which they deal with NPDES permits so as make the public more aware of NPDES permit compliance issues. She states:

Americans have a right to know how their government is doing in enforcing laws to protect the nation’s water, **and government has an obligation to clearly inform the public about water quality** and our actions to protect it. **An informed public is our best ally in pressing for better compliance.**

Id.

As EPA’s delegee for CWA regulation in the state, Ecology should also prioritize increasing transparency on the issue of NPDES permit compliance. Part of that effort should be to require permittees to submit all permit compliance documents to Ecology, where they are easily obtainable by the public through a public records act request. Instead, Ecology is moving in the opposite direction – allowing permittees to retain even more documentation on-site, thus frustrating the public’s ability to review permit compliance documents.

Ecology inspectors also acknowledge that possibility of citizen suits are an important part of NPDES compliance. In the words of one, “[t]he only motivation most facilities have is the threat of enforcement and/or citizen’s third-party lawsuits.” 2008 Survey at p. 2.

Although the permit does allow for the public to request documentation of permit compliance from permittees, requesting the information from the permittee (rather than from Ecology) puts the permittee on notice that they are being inspected. This would be similar to Ecology giving notice to each permittee that it wanted to inspect a facility two weeks ahead of the inspection. While there’s no doubt the inspectors would find the sites to be more clean, this would undercut the inspection program in the end – as the whole point is to observe the impact of normal, day-to-day operations.

While Ecology may argue that the exemption for submitting Level One Corrective Actions is a cost-saving issue for Ecology, Ecology should not be cutting costs at the expense of diminishing or constraining the public’s ability to exercise its rights under the CWA. The permit should be changed to mandate that permittees submit Level One Corrective Action compliance documentation with the DMR for the quarter during which the Level One Corrective Action was undertaken.

Furthermore, RCW 90.48.555(8)(a)(v) explicitly requires “reporting to the department” to be part of the “enforceable adaptive management mechanism” that is S8. As federal regulations already require the results of monitoring to be submitted to Ecology, and the parties who negotiated RCW 90.48.555 all knew this, this “reporting” refers to reporting of the “documentation of the remedial actions taken,” required by

.555(8)(a)(iv). This is yet another instance of Ecology violating both the law and agreements it makes with PSA on general permits.

Why does not Ecology not require permittees to submit Level One Corrective Actions to Ecology in the draft ISGP?

Ecology's proposal that permittees need not submit Level One Corrective Action documentation to Ecology – compliance concerns:

Allowing permittees to not submit documentation of Level One Corrective Actions to Ecology is likely to decrease permit compliance to the point where the permit does not ensure protection of water quality standards. PSA has observed that many permittees already fail to complete Level One Corrective Actions (called “Level One Responses” under the current permit), even when they are currently required to submit them to Ecology. Ecology already admits that “no more than 10 percent (of ISGP permittees) would be considered in full compliance with all permit conditions”. ISGP Fact Sheet at p. 37. We have serious concerns about compliance rates when all oversight of this requirement is removed. Permittee compliance with Level One Corrective Actions is especially important because this may be the only adaptive management that a permittee undertakes for several years under the adaptive management schedule contained in the draft permit.

Ecology's own survey confirms our concerns about compliance. As one inspector remarked: “I think there is also a lack of a sense of urgency to implement adaptive management when a benchmark is exceeded”. 2008 Survey at pp. 1-2. Even more concerning is another comment in the survey:

The Level Responses are poorly understood. Most permittees have never even seen those pages buried in the permit booklet. For those who do understand them, they are cunning enough to know compliance merely requires a modicum of administrative responses for three years before actually having to call in the vector sweepers or coat a galvanized roof.

2008 Survey at pp. 4-5.

This does not bode well for Ecology's expectation that permittees will undertake adequate Level One Corrective Actions in the absence of any oversight whatsoever. If Ecology is going to require Level One Corrective Actions, it should require all permittees to submit documentation of them when complete. Even the 2006 Herrera Report supported the concept to submitting responsive reports describing enhanced BMPs, rationalizing that a feedback loop between the permittee and Ecology would benefit the system as a whole.⁴ 2006 Herrera Report at p. 28. Removing agency oversight will result in a step backwards in permit compliance.

⁴ The Report was discussing a proposal for changing the sampling schedule, but the point remains the same.

Permittees should be required to submit to Ecology documentation of their completion of all Level One Corrective Actions. Ecology should require permittees to submit either a summary report of Level One Corrective Actions taken, or photocopies of the SWPPP sections that were updated as part of the Level One Corrective Action, rather than a certification stating that a Corrective Action has been completed. Ecology should require permittees to submit this documentation with the DMR for the quarter during which the Level One Corrective Action was undertaken.

Given Ecology's statements regarding current permit compliance contained in pages 35-37 of the ISGP Fact Sheet and contained the 2008 Survey, what is Ecology's expectation regarding permittee compliance with the Level One Requirements proposed in the draft ISGP?

Ecology's proposal that permittees need not submit Level One Corrective Action documentation to Ecology – self-regulation concerns:

PSA believes that Ecology's proposal that permittees need not submit Level One Corrective Action documentation to Ecology demonstrating that the Level One Corrective Action was undertaken and how the permittee met the Level One Corrective Action requirements may create an impermissible self-regulating system.

The Ninth Circuit addressed this issue in the context of EPA's regulations regarding Phase II municipal permits in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003). In that situation, EPA's regulations allowed MS4 dischargers to implement their own stormwater management programs without any EPA oversight ensuring that the programs met the requirements of the Phase II permit, or the CWA itself. As the court described it, after the permittee decides what BMPs it will implement to protect stormwater, "[n]o one will review [the] operator's decision to make sure it was reasonable, or even good faith". *Id.* at p. 855. The result of this lack of oversight was that EPA could not ensure that the MS4 permits were compliant with CWA standards. As the EPA had set up an "impermissible self-regulatory system" for MS4 permittees, the court found the EPA's rules to be invalid. *Id.* at p. 856.

Ecology's draft ISGP runs into similar problems. The basic scheme of the permit, as in previous iterations, is that Ecology ensures compliance with water quality standards through a system of benchmarks and adaptive management actions involving the addition of BMPs in response to stormwater monitoring. The benchmark and adaptive management actions together form a narrative effluent limit for the permittees. However, a new component of this permit is that Ecology proposes allowing permittees to undertake the first two adaptive management actions without Ecology involvement. Conditions S8.A. and B. require permittees to review the SWPPP, make appropriate revisions and implement additional operational source control or structural source control BMPs, and complete a Level One or Two SWPPP Certification Form and attach it to the SWPPP. Ecology is not notified that a Level One or Two Corrective Action has been started, whether new BMPs have been selected, which BMPs the permittee deemed necessary, and whether the corrective action has been completed. As a result, Ecology

cannot ensure that permittees are actually undertaking adaptive management actions, implementing reasonable BMPs, implementing AKART, or that their discharges are not causing or contributing to a violation of water quality standards. A permittee may discharge stormwater that violates water quality standards for over two years (until the deadline for submission of a Level Three), and by the terms of this permit Ecology has no obligation to review the permittee's selected BMPs or SWPPP. This may create an "impermissible self-regulatory system" for ISGP permittees where Ecology is without responsibility for ensuring CWA requirements are met for, potentially, several years.

The amount of time the permit allows for completion of Level One Corrective Actions:

Ecology proposes giving permittees up to six months to implement Level One Corrective Actions. This is outrageous and not protective of water quality. The current ISGP's Level One adaptive management actions must be completed within two weeks. Ecology should explain its rationale for extending the Level One implementation timeline from two weeks to up to six months, particularly as the new Level One Corrective Actions are almost identical to the current Level One requirements. The main change to this permit term is that it clarifies that permittees must identify *and implement* additional operational source control BMPs. As operational source control BMPs by definition do not require construction of any pollution control devices, two weeks is adequate for their implementation. Ecology should retain the two week timeline for implementation of Level One Corrective Actions.

What is Ecology's rationale for allowing ISGP permittees up to six months to implement Level One Corrective Actions?

Excusing certain permittees from undertaking Level One Corrective Actions:

PSA is also concerned by Ecology's apparent exemption of all permittees listed in Appendix 6 from completing any Level One Corrective Actions. According to the Level One Corrective Action term, only facilities not listed in Appendix 6 (as being at Level Two or Three) must complete a Level One Corrective Action each time that they exceed a benchmark value. Therefore, facilities that are listed in Appendix 6 will skip the Level One requirements for the entire permit term.

All permittees should be required to undertake Level One Corrective Actions for each benchmark exceedence because all permittees would presumably improve their discharge quality by implementing additional operational source control BMPs each time their discharge exceeds a benchmark. Ecology should change the Level One Corrective Actions term to require that all permittees must undertake a Level One Corrective Action each time their sampling data indicates a benchmark exceedence. However, we understand that after a certain amount of Level One Corrective Actions a permittee may have no further operational source control BMPs to implement. To address this concern, Ecology could also include a way for a permittee to certify that it has implemented additional operational source control BMPs as part of an earlier Level One Corrective

Action, and that it has reviewed its SWPPP and finds no further operational source control BMPs to implement at this time.

Why does Ecology not require that all permittees implement additional operational source control BMPs at least once during the permit cycle?

Is it likely that implementation of additional operational source control BMPs at the Level Two stage could improve stormwater discharges from permittee sites so as to make them less likely to cause or contribute to violations of a water quality standard?

Does the application of additional operational source control BMPs have the potential to reduce exceedences of the permit's benchmarks?

The boxes:

Is the box on page 34 of the draft ISGP part of the permit? What about the similar boxes on pages 35, 36, and 37? PSA objects to the incorporation into the permit by reference to information not contained in the permit and changeable by nature, in this case apparent lists of BMPs available at specified locations on Ecology's website. To avoid violating the law on the incorporation by reference in general permits of undeveloped or changing guidances, as explained by the PCHB numerous times already, the ISGP should either remove the references to websites in these boxes or make absolutely clear that the permittee must ensure that it adheres to the conditions of the permit instead of just doing what Ecology's website says.

Permit Condition S8.B. Level Two Corrective Actions.

Ecology's proposal that all permittees currently at Level Three only have to complete a Level Two Corrective Action:

PSA is outraged by Ecology's proposal that permittees who have triggered a Level Three Response under the current permit are excused from completing Level Three Corrective Actions under the draft ISGP, and instead are only required to complete Level Two Corrective Actions. This new permit condition is impermissible backsliding, in violation of 33 U.S.C. § 1342(o) and 40 C.F.R. § 122.44(l). Ecology must require all permittees who have triggered a Level Three Response under the current ISGP to conduct Level Three Corrective Actions under the draft ISGP.

Draft ISGP requirements for Level Three Corrective Actions are substantially the same as the current permit's Level Three Response requirements. In short, they both require permittees to apply treatment to stormwater discharge leaving the site. Adaptive management mechanisms, such as Level Three Corrective Actions and Level Three Responses, are considered effluent limits within the meaning of the CWA. The CWA and federal regulations require that a successive permit may not contain effluent limits less stringent than in the previous permit. For permittees who are already required to implement treatment under the current permit, the new condition in the draft ISGP

excusing them from implementing treatment is a less stringent effluent limit. Therefore, the draft permit condition requiring that permittees who are at a Level Three Response stage under the current permit only conduct a Level Two Corrective Action under the draft permit is a violation of the anti-backsliding requirements of the CWA and federal regulations. Once again Ecology rewards industrial delay at the expense of a “level playing field” for permittees who follow the law and permit terms.

Why does Ecology propose that permittees who have triggered a Level Three Response under the current permit must only undertake a Level Two Corrective Action (instead of a Level Three Corrective Action) when the draft ISGP becomes effective?

What Corrective Action requirements does the draft ISGP impose on permittees who have already completed a Level Three Response under the current permit? Should such permittees undertake a Level Two Corrective Action?

Is Ecology concerned with issues of fairness towards ISGP permittees who have already installed treatment at their sites pursuant to the current permit’s Level Three Response requirements? If so, how does it respond to charges that it is acting unfairly towards permittees who have already undertaken Level Three Responses by excusing Level Three Response requirements for other permittees who have failed to comply with the permit by failing to undertake Level Three Responses when required?

Does Ecology anticipate that Level Two Corrective Actions will protect receiving water quality as much or more than correctly implemented Level Three Corrective Actions? Why or why not?

Ecology’s proposal that permittees need not submit Level Two Corrective Action documentation to Ecology – public oversight concerns:

PSA stresses that Ecology’s proposal that permittees do not submit any documentation of Level Two Corrective Action compliance to Ecology will result in an unacceptable diminishment of public oversight generally and in the public’s ability to prosecute citizen suits in particular. Ecology should modify the permit to require submission to Ecology of Level Two Corrective Action documentation. We incorporate our arguments on this point from the earlier discussion in the Level One Corrective Actions section of these comments, *supra* pp. 13-16.

Ecology’s proposal that permittees need not submit Level Two Corrective Action documentation to Ecology – compliance concerns:

PSA is concerned that Ecology’s proposal that permittees need not submit Level Two Corrective Action documentation to Ecology will greatly decrease permit compliance. We incorporate our arguments on this point from the earlier discussion in the Level One Corrective Actions section of these comments, *supra* pp. 16-17.

Ecology's proposal that permittees need not submit Level One Corrective Action documentation to Ecology – self-regulation concerns:

PSA is concerned that Ecology's proposal that permittees need not submit Level Two Corrective Action documentation to Ecology may create an impermissible self-regulating system. We incorporate our arguments on this point from the earlier discussion in the Level One Corrective Action section of these comments, *supra* pp. 17-18.

Ecology's proposal that Level Two Corrective Actions need not be undertaken until after the permittee exceeds the benchmarks four times:

Ecology should require that Level Two Corrective Actions be undertaken if the permittee exceeds a benchmark two times, similar to the current permit's Level Two Response requirements. Ecology's decision to allow permittees to exceed applicable benchmarks four times before triggering a Level Two Corrective Action is especially troubling as the Level Two adaptive management actions required under the draft permit is less stringent than the Level Two adaptive management actions under the current permit. Under the current permit, a Level Two Response includes implementation of additional operational and structural source control BMPs. However, under the draft permit Level Two Corrective Actions require only the implementation of additional structural source control BMPs. Doubling the amount of times a permittee's discharge can exceed benchmarks before requiring a (less demanding) corrective action represents an unacceptable step backwards in water quality protection. Ecology should maintain the requirement from the current permit that Level Two Corrective Actions are triggered when a permittee exceeds applicable benchmarks two times.

What is Ecology's rationale for requiring that permittees undertake Level Two Corrective Actions after four benchmark exceedences in the draft ISGP?

Why did Ecology change the requirement in the draft ISGP for undertaking a Level Two adaptive management step from two exceedences of the applicable benchmark, as it is in the current permit, to four exceedences?

Why does the Level Two Corrective Action in the draft ISGP require implementation of only structural source control BMPs, and not also operational source control BMPs?

Ecology's proposal that permittees may have nine months to complete Level Two Corrective Actions:

PSA disagrees with Ecology's decision to allow permittees a period of nine months to complete Level Two Corrective Actions. Currently, the permit allows permittees six months to complete Level Two adaptive management actions, and, as noted above, the current Level Two adaptive management actions are more stringent than

the proposed ones in the draft permit. Permittees should be required to complete adaptive management actions (and thereby improve discharge quality) as soon as possible under permit terms. Clearly, permittees can implement structural source control BMPs within six months – they have been doing so for the last 4 years (since Level Two Response requirements became effective in 2005). Allowing permittees an additional three months to implement Level Two Corrective Actions is another example of Ecology taking a step backwards in water quality protection. The deadline for completing a Level Two Corrective Action should remain six months after the permittee has triggered it.

Why is Ecology allowing permittees up to nine months to complete Level Two Corrective Actions in the draft permit, instead of allowing six months as the current permit does?

Ecology’s proposal to grant waivers for Level Two Corrective Actions through permit modifications:

PSA objects to draft permit Condition S8.B.5., which states that Ecology may grant waivers for the installation of structural source control BMPs as part of Level Two Corrective Actions if the BMPs are not feasible or not necessary to prevent discharges that may cause or contribute to violations of water quality. PSA is concerned by this permit term because it allows Ecology to waive BMPs if they are “not feasible”, even if they are necessary to prevent discharges that may cause or contribute to violations of a water quality standard. This is illegal. Ecology is required by 40 C.F.R. § 122.44(d) to condition the ISGP so as to prevent discharges that may cause or contribute to violations of a water quality standard.

Will Ecology waive Level Two Corrective Action requirements to implement structural source control BMPs in response to a permittee’s request, even if those structural source control BMPs are necessary to prevent discharges that may cause or contribute to violations of water quality in the receiving water?

How does Ecology interpret the term “feasible”, as it is used in draft permit Condition S8.B.4.b?

How will Ecology determine whether installation of structural source control BMPs is feasible at a permittee’s facility? What type of evidence or information will Ecology require permittees to submit in order to make that determination?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement structural source control BMPs based upon lack of feasibility before it grants such a waiver?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement structural source control BMPs before the draft permit’s Corrective Action Deadline based upon lack of feasibility before it grants such a waiver?

How will Ecology determine whether installation of structural source control BMPs is necessary to prevent discharges that may cause or contribute to a violation of a water quality standard? On what information will Ecology rely to make this determination?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement structural source control BMPs because the facility believes such BMPs are not necessary to prevent discharges that may cause or contribute to violations of a water quality standard before Ecology grants such a waiver?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement structural source control BMPs before the permit's Corrective Action Deadline because the facility believes such BMPs are not necessary to prevent discharges that may cause or contribute to violations of a water quality standard before Ecology grants such a waiver?

If Ecology modifies a permittee's permit so as to waive the requirement to implement structural source control BMPs as part of a Level Two Corrective Action, would additional benchmark exceedences by that permittee still trigger Level Three and Four Corrective Actions?

Permit Condition S8.C. Level Three Corrective Actions.

Ecology's proposal that Level Three Corrective Actions need not be undertaken until after the permittee exceeds the benchmarks eight times:

Ecology should require that permittees undertake Level Three Corrective Actions after four benchmark exceedences, similar to the current permit's requirements for triggering Level Three Responses. The requirements for Level Three Corrective Actions under the draft permit are not significantly different than Level Three requirements under the current permit. However, Ecology proposes to double the times that permittees may exceed the benchmarks before requiring them to implement Level Three Corrective Actions. Increasing the amount of times a permittee's discharge can exceed benchmarks before requiring a corrective action represents another unacceptable step backwards in water quality protection in this permit. Ecology is required to condition the ISGP so that it is protective of water quality standards. 40 C.F.R. § 122.44(d). The benchmarks are the numeric portion of the permit's narrative water quality based effluent limitations. Writing a permit that, in essence, allows permittees to ignore the benchmark for an additional year (or four quarterly monitoring events) before undertaking corrective actions to reduce discharge pollutants is simply not being protective of water quality. Ecology should maintain the requirement from the current permit that Level Three Corrective Actions must be undertaken when a permittee exceeds applicable benchmarks four times.

What is Ecology's rationale for increasing from four to eight the amount of benchmark exceedences permittees may report before requiring that a Level Three adaptive management action must be undertaken?

Ecology's proposal to grant waivers for Level Three Corrective Actions through permit modifications:

Ecology must change Condition S8.C.4. to clarify that permit modifications may only be granted if installation of treatment BMPs is not necessary to prevent discharges that may cause or contribute to violation of a water quality standard. PSA incorporates its discussion above on the similar term in the Level Two Corrective Action section of these comments, *supra* pp. 22-23.

Will Ecology waive Level Three Corrective Action requirements to implement treatment BMPs in response to a permittee's request, even if those BMPs are necessary to prevent discharges that may cause or contribute to violations of water quality in the receiving water?

How does Ecology interpret the term "feasible", as it is used in draft permit Condition S8.C.4.b?

How will Ecology determine whether installation of treatment BMPs is feasible at a permittee's facility? What type of evidence or information will Ecology require permittees to submit in order to make that determination?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement treatment BMPs based upon lack of feasibility before it grants such a waiver?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement treatment BMPs before the permit's Corrective Action Deadline based upon lack of feasibility before it grants such a waiver?

How will Ecology determine whether installation of treatment BMPs is necessary to prevent discharges that may cause or contribute to a violation of a water quality standard? On what information will Ecology rely to make this determination?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement treatment BMPs because the facility believes such BMPs are not necessary to prevent discharges that may cause or contribute to violations of a water quality standard before Ecology grants such a waiver?

Will Ecology inspect each permitted facility that requests a waiver of the requirement to implement treatment BMPs before the permit's Corrective Action Deadline because the facility believes such BMPs are not necessary to prevent discharges

that may cause or contribute to violations of a water quality standard before Ecology grants such a waiver?

If Ecology modifies a permittees' permit so as to waive the requirement to implement treatment BMPs as part of a Level Three Corrective Action, would additional benchmark exceedences by that permittee still trigger a Level Four Corrective Action?

Permit Condition S8.D. Level Four Corrective Action.

The Level Four Corrective Action permit terms, as written in the draft permit, do not meet the state and federal requirements that a NPDES permit explicitly contain all of its terms, do not ensure compliance with AKART, and do not ensure compliance with water quality standards. PSA demands that Ecology either remove the Level Four Corrective Action from the draft permit, or condition it so that it meets state and federal requirements.

Federal regulations require that the conditions of NPDES permits must be expressly incorporated, or incorporated by reference to a citation or other requirement. 40 C.F.R. § 122.43(c). The state iteration of this requirement for general permits is at WAC 173-226-080(1)(a), which requires that all discharges authorized by the permit must be consistent with the permit. In sum, NPDES permits must clearly state all permit requirements that a permittee must abide by to remain in compliance. Ecology's proposal of listing various options that it may take when a permittee triggers Level Four does not meet this requirement. Ecology's list of potential actions does not make clear to the permittee what actions it will be required to take to maintain compliance with the permit – instead, as the list commits to no particular action by Ecology, the list has the opposite effect. Uncertain permit terms are actually written into the permit.

Furthermore, Ecology must condition its permits so as to not allow discharges that may cause or contribute to violations of water quality. 40 C.F.R. § 122.44(d). Ecology accomplishes this in the ISGP by requiring the application of AKART and compliance with a benchmark (which is the numeric portion of a narrative water quality based effluent limitation) through BMP implementation. The problem with Ecology's proposed Level Four Corrective Action is that when a permittee arrives at Level Four, the compliance requirements "stall out". There are no deadlines for Ecology to act upon (or demand compliance with) any of the Level Four Corrective Action permit terms. And while the permittee is waiting for Ecology to require compliance with Level Four Corrective Actions, it is discharging pollutants that are presumably exceeding benchmarks, but is under no further obligation to take any more corrective actions or apply any more BMPs until Ecology tells it to. Under the permit terms, this state of affairs could continue until the permit expires, or beyond. Therefore, the inclusion of the Level Four Corrective Action permit term, as it is written now, means that the ISGP is not protective of state water quality standards.

In addition, the open-ending, non-specificity of Level Four violates RCW 90.48.555(8)(a). .555(8)(a) requires "permits" to include an adaptive management

mechanism, which “shall include elements designed to result in permit compliance” This means that the “permit” has to include the elements of the adaptive management mechanism designed to result in permit compliance, including the requirement that discharges not cause or contribute to violations of water quality standards. The draft ISGP, with its current Level Four, fails to do this, instead leaving the concluding steps of the adaptive management mechanism for permittees unable to meet benchmarks with Level Three treatment BMPs to Ecology’s further, off-permit action and discretion. RCW 90.48.555(8)(a) does not allow this.

PSA suggests that Ecology limit the Level Four Corrective Action to a requirement either that the permittee implement active treatment, as it is defined in the permit, or that general permit coverage is terminated within twelve months of triggering a Level Four Corrective Action. This creates a compliance endpoint within the permit term.

On what legal authority is draft permit Condition S8.D based? How does it satisfy the requirements of RCW 90.48.555(8)(a) and those of the federal regulations cited above?

If a permittee triggers a Level Four Corrective Action, when will Ecology take one or more of the actions enumerated in draft permit Condition S8.D.1?

If a permittee triggers a Level Four Corrective Action, are there any permit terms or legal requirements that will cause Ecology to take one or more of the actions enumerated in draft permit Condition S8.D.1 by any particular date?

If a permittee triggers a Level Four Corrective Action, how will Ecology determine which of the actions enumerated in draft permit Condition S8.D.1 to take?

If a permittee triggers a Level Four Corrective Action, will the public be notified of this fact?

Permit Condition S9.A.6.b. Reporting.

Permit Condition S9.A.6.b. should clarify that if sampling has been suspended due to consistent attainment for any parameter, that the permittee shall submit a DMR indicated “consistent attainment” was reached for that parameter.

Permit Condition S9.C. Additional Sampling by the Permittee.

Ecology should clarify how they want permittees to include the results in the calculation and reporting of any additional stormwater sampling in a DMR. For example, in the current permit, Condition S4.C. states that “[a]ny facility monitoring more than once per quarter shall use the average all of (sic) the monitoring results for each parameter monitored during the quarter to determine whether the...adaptive management requirements are applicable.”

Permit Condition S9.D.1. Noncompliance Notification.

The term “significant amount” is a defined term and therefore should be italicized.

Permit Condition S9.E. Access to Plans and Records.

Condition S9.E.2.b. does not give PSA or the public adequate access to permittee records and documents. Ecology should retain the current permit requirements for permittees to submit all Corrective Action documents and a copy of the SWPPP to Ecology. The public is then assured of access to these important permit documents without having to visit each permittee’s facility.

If Ecology retains draft permit Condition S9.E., it should change the terms of this condition to specify that when the Plans and Records are requested by the public, that permittees may either forward the requested documents to Ecology, or mail them to the requestor. There was recognition in the last Work Group meeting that PSA and the public should not have to go out to individual permittee sites to see permit documentation. This recognition was based mainly upon safety concerns, but we also believe that forcing the public to find and visit individual sites may limit access to the requested documents.

If Ecology retains draft permit Condition S9.E., PSA proposes that it be changed as follows:

S9.E. Access to Plans and Records.

The Permittee(s) shall retain the SWPPP, and all other plans, documents and records required by this permit (hereby called "plans and records"), on site or within reasonable access to the site and make it immediately available upon request to Ecology or the local jurisdiction.

1. A copy of plans and records shall be provided to Ecology within 14 days of receipt of a written request for the SWPPP from Ecology.
2. A copy of plans and records shall be provided to the public when requested in writing, as follows: Upon receiving a written request from the public for plans and records, the Permittee shall provide a copy of the plans and records to Ecology or to the requester within 14 days of the written request. If the plans and records are provided to Ecology under this subsection, the Permittee shall provide written notification to the requester of this fact.

a. Providing a copy of the plans and records to the requester pursuant to this section means to mail the plans and records to the requester via first class U.S. Mail, postage pre-paid.

Ecology has raised concerns about causing permittees to pay for postage for mailing the Records and Plans to the requestor. PSA points out that Ecology's draft permit Condition S9.E. already contemplates permittees "submitting" records to Ecology for the public's review, without charging postage to the permittee. Nevertheless, PSA observes that Ecology could address any postage payment issues in this permit term as well.

PSA strongly prefers that Ecology retain the current permit requirements to submit all important permit documentation to Ecology, or in the alternative, that Ecology adopt the language proposed above. However, if Ecology retains draft permit Condition S9.E. in its current form, PSA's comment is that Ecology should re-number Condition S9.E.3 to make it a part of Condition S9.E.2.b, consistent with the identical permit condition in The Sand and Gravel General Permit. The way that Condition S9.E. is currently written makes it unclear as to what Condition S9.E.3 is referring to.

Permit Condition G8. Duty to Reapply.

Permittees must apply for permit renewal at least 180 days before the expiration of the permit. WAC 173-226-210.

Appendix 2 – Definitions. "Facility".

The definition of "facility" does not make sense: "Facility means any industrial activity identified in Condition S.1 including, but not limited to associated land, structures, stormwater, conveyance systems, and appurtenances. Including those aspects separated by distance." Ecology should correct this definition.

Lack of Access to SWPPPs.

The current ISGP, at Condition S5.A., obligates Ecology to maintain a copy of the SWPPP for each permittee at the appropriate Ecology regional office so that the public may view it. This term should be included in the draft ISGP, but is not. We demand that Ecology include this term in the draft ISGP.

The absence of this term from the draft permit is another example of Ecology's diminishment of public access to permittee compliance documents. Presumably, the public is left to resorting to the new Condition S9.E. in order to see these documents – in other words, the public must submit an individual request to each permittee asking to see their SWPPP. Then, the public must travel to the permittee's location to view the SWPPP when the permittee decides to provide access. This is completely unacceptable. The SWPPP is the keystone to the entire adaptive management process and it is outrageous that Ecology is not interested in obtaining a copy for itself, let alone for the

public. Even if Ecology is not going to review the SWPPPs, it should at least be able to provide access to the public for the SWPPP – as it is the document containing all BMPs and all Corrective Action documentation. Ecology should absolutely maintain copies of all permittee SWPPPS at the regional offices.

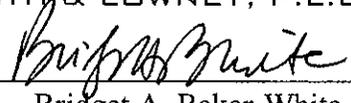
Why does the draft ISGP not require permittees to submit a current copy of their SWPPPs to Ecology?

Conclusion

PSA thanks Ecology for the opportunity to review and provide comments on the draft Industrial Stormwater General Permit. We look forward to working with Ecology on improving the ISGP, and welcome any questions or concerns Ecology has regarding our comments.

Very truly yours,

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

By: 
Bridget A. Baker-White
Richard A. Smith



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 2 2009

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Improving Water Quality through Transparency and Effective Enforcement of Clean Water Act Requirements

FROM: Lisa P. Jackson
Administrator 

TO: Cynthia Giles
Assistant Administrator for Enforcement and Compliance Assurance

Clean and safe water is a priority for this Administration. The Clean Water Act plays a central role in protecting this nation's waters. The American public has a right to expect their water will be clean, and EPA has an obligation to use its resources and authorities to the fullest to ensure this result. Despite the successes we have achieved over the years, water in the United States is not meeting public health and environmental goals. Too many of our streams, lakes and rivers do not meet our water quality standards.

We are also falling short of this Administration's expectations for the effectiveness of our clean water enforcement programs. Data available to EPA shows that, in many parts of the country, the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. Our commitment to the rule of law as a foundational principle for EPA requires that we take action against significant violations and that we assure a consistent standard for compliance across the country. A level playing field for enforcement and compliance is important for fair treatment of industrial facilities across the country and to prevent some regions from achieving an economic advantage over others.

Compliance with the Clean Water Act is a shared responsibility of EPA and the states. I recognize that resources are limited at the federal and state level during these challenging economic times and that we must meet our highest environmental priorities first. However, I believe that, working together with states, there are positive steps we can take quickly to improve compliance and enhance water quality.

The first step is to improve transparency. Americans have a right to know how their government is doing in enforcing laws to protect the nation's water, and government has an obligation to clearly inform the public about water quality and our actions to protect it. An informed public is our best ally in pressing for better compliance. Therefore I am directing you

to improve and enhance information that is available through the EPA web site on compliance with the Clean Water Act and the level of enforcement activity in each state, showing connections where possible to local water quality. This information should be user-friendly and provide a way to look at performance of individual businesses as well as state and national performance. State-by-state performance reports that have already been released under the Freedom of Information Act should also be posted to the web, together with tools to analyze the data EPA prepared for those reports.

Second, we need to raise the bar for clean water enforcement performance. We must make sure that strong and effective action is taken when serious violations of law threaten water quality, and we must boost EPA's enforcement presence against serious violators, recognizing that authorized states have the first opportunity to act. EPA must also improve its own enforcement performance in states where EPA directly implements the clean water program. And we must assure that we are doing the work that is most important to clean up our nation's waters. Because EPA and the states face significant and competing demands for resources, we need to place a high priority on the problems that have the biggest impact on water quality, such as wet weather pollution, which are not currently well represented in the information we have on Clean Water Act compliance.

Third, we need to move EPA's information technology into the 21st century. We need to transform EPA to be not only a collector and disseminator of information but an analytical resource that can present information in a form that is easily understood and useable by the public. We have seen that when information is made public, it can be a powerful tool to help improve the environment directly. We need to launch into a major shift of EPA's Clean Water Act information systems – so that data on both facilities' discharges and compliance and water quality and other environmental conditions will be readily available and transparent to both federal and state regulators and the public, over the web, on a real-time basis.

So that we can identify the concrete steps that EPA should take to accomplish these goals, I am directing you to work with the Office of Water to develop an action plan to further enhance public transparency regarding EPA and state Clean Water Act enforcement program performance, to strengthen that performance, and to transform our water quality and compliance information systems. A critical part of this process should be close consultation with EPA Regional Offices and with states, including the Environmental Council of the States (ECOS) and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). You should gather the best ideas from the states and regions, as well as outside stakeholders, and report back to me within 90 days with your recommendations.

cc: Scott Fulton
Diane Thompson
Bob Sussman
Mike Shapiro
Assistant Administrators
Associate Administrators
Regional Administrators