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VIA E-MAIL TO industrialstormwatercomments@ecy.wa.gov

Jeff Killelea
Department of Ecology
PO Box 47600
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RE: Comments on Proposed Revisions to Industrial Stormwater General Permit

Dear Ecology:

Waste Management of Washington, Inc. (“Waste Management”) appreciates the opportunity to submit the following comments on the Department of Ecology’s proposed revisions to the Industrial Stormwater General Permit (the “Permit”). As discussed more thoroughly below, Waste Management has several significant overall concerns with the approach Ecology is taking with the Permit and a number of more specific concerns. Waste Management appreciates your careful attention to these comments.

1. The Permit conflates the permit benchmarks into effluent limits and permit violations.

In spite of comments to the contrary, the Permit represents one step closer to Ecology treating the exceedance of a benchmark as the violation of a numeric effluent limit, and therefore a permit violation or a violation of a water quality standard. Fact Sheet at 89 (“Since benchmark values are not numeric effluent limitations, discharges that exceed a benchmark value are not automatically considered a permit violation or a violation of water quality standards.”). Most certainly, exceedances of benchmarks are not violations of effluent limits or water quality standards. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000) (“The benchmark concentrations are not effluent limitations and should not be interpreted or adopted as such.”). Yet, the Permit now imposes mandatory requirements in the event of a benchmark exceedance that has the practical effect of being a violation in everything but name. In other words, if a facility exceeds a benchmark, it is commanded to undertake mandatory actions and is even at risk of having its coverage under the General Permit revoked. By attaching so many mandatory actions to benchmark exceedances, Ecology has subverted the very purpose of benchmarks, which were intended to merely represent a “level of concern” where further consideration of BMPs may be warranted:

The “benchmarks” are the pollutant concentrations above which EPA determined represent a level of concern. The level of concern is a concentration at which a storm water discharge could potentially impair, or contribute to impairing, water quality or affect human health from ingestion of water or fish. The benchmarks are also viewed by EPA as a level that, if below, a facility presents little potential for water quality concern. As such, the benchmarks also provide an appropriate level to determine whether a facility’s storm water pollution prevention measures are successfully implemented. The benchmark concentrations are not effluent limitations and should not be interpreted or adopted as such. These values are merely levels which EPA has used to determine if a storm water discharge from any given facility merits further monitoring to ensure that the facility has been successful in implementing a SWPPP.

65 Fed. Reg. at 64766-67. Ecology should return to the principles behind the use of benchmarks and stop conflating them into effluent limits.

2. Failure to implement a corrective action does not constitute a permit violation.

Ecology, in the Fact Sheet, makes the astounding statement, “However, if a permittee exceeds benchmarks that trigger a corrective action, but does not comply with the specific corrective action requirements in S8, it would be considered a permit violation.”¹ Waste Management strongly disagrees with this statement. If the exceedance of a benchmark does not constitute a permit violation, the failure to implement a requirement triggered by the exceedance should likewise not automatically constitute a violation. For example, if there is no AKART that will result in benchmark compliance, a facility will be in violation for failing to have implemented a treatment BMP that does not exist or that will not result in meeting benchmarks. Often, there are other explanations for why a benchmark cannot be met, such as background levels of pollutants. The Permittee should not be subject to penalties and citizen suit liability for failure to implement BMPs that will not result in achieving benchmarks.

3. Condition S3.A.4.b: A permittee should have to update its SWPPP only if there is a there a significant “negative” effect on the discharge of pollutants to waters of the state.

As proposed, Condition S3.A.4.B requires updating a SWPPP if “there is a change in design, construction, operation, or maintenance at the facility that has, or could have, a significant effect on the discharge of pollutants to waters of the state.” As a result, a change that results in a significant **positive** effect would require an update to the SWPPP. This seems to be a meaningless requirement. The Condition should be revised to require a SWPPP update only if there is “a significant **negative** effect on the discharge of pollutants to waters of the state.”

¹ This seems akin to stating, “While driving your car at 55 mph is not a violation of the speed limit, the failure to reduce your speed below 55 mph is.”

4. Condition S3.A.5: Plans or other documents that are incorporated by reference into the SWPPP should not be “enforceable” requirements.

By including a provision that makes every document incorporated into a SWPPP an enforceable part of the SWPPP, Ecology will create ample opportunity for citizen suits plaintiffs to bring lawsuit based on alleged violations of documents that are wholly unrelated to stormwater of the SWPPP. For example, a facility might cross-reference to an solid waste permit in the SWPPP. If there is a violation of the solid waste permit in an area of the facility where there are no stormwater discharges, a plaintiff might try to argue that the incorporation by reference of the solid waste permit makes the non-stormwater related violation subject to a citizen suit claim under the Clean Water Act.

5. Special Condition S3.A.5 is unclear in its cross-reference to Condition S3.A.4

This condition references “the availability requirements of the SWPPP (see Condition S3.A.4).” This reference appears to be wrong in that Condition S3.A.4 does not make reference to “availability requirements. Should this reference be to Special Condition S9.E?”

6. Condition S3.B.3.b.i.3.c is unnecessary for facilities that store, repair, and/or manage dumpsters and there is no stormwater exposure to solid waste.

Condition S3.B.3.b.i.3.c requires all dumpsters to be stored with lids closed when not in use. This condition is obviously targeted to facilities that use solid waste dumpsters or similar containers to store solid waste prior to collection by solid waste companies. Waste Management strongly supports this condition in those situations. Waste Management does however manage a large number of empty dumpster – including new, refurbished, damaged, undergoing repair, cleaned, etc. – at its facilities. Since these dumpsters are not being used to store solid waste, this condition should not apply to those facilities where dumpsters are being stored for other purposes. Waste Management believes that the exception in S3.B.3.b can be fairly read to allow Waste Management and similar companies to store dumpsters without closed lids when they are clean and not being used to store solid waste prior to collection.

7. Neither the Fact Sheet nor the Permit explains why there are different zinc benchmarks for Western and Eastern Washington.

It is not apparent from the Permit or Fact Sheet why Ecology has established different benchmarks for zinc, depending on which side of the Cascade Crest a facility is located. Further explanation is warranted.

8. Condition S5.C.4 is vague in its reference to non-hazardous waste landfills subject to the provisions of “40 CFR”

As Ecology is aware, Title 40 of the Code of Federal Regulations (40 CFR) includes all EPA regulations for all facilities and all media. They span multiple volumes and include air, underground storage tanks, water, solid waste, hazardous waste, cleanup regulations and many more. Accordingly, it is unclear what landfills are intended to be covered by this condition. Since it is hard to imagine a landfill that in some way is not “subject to the provisions of 40 CFR”, it would seem that all landfills would be covered. Are there any landfills that are not covered? The definition of

“40 CFR” in the permit is not at all enlightening. Is 40 CFR merely referencing the federal stormwater regulations at 40 CFR Part 122, or 40 CFR Part 445, or does it mean all regulations throughout Title 40. Ecology should clarify this language.

9. Table 4: The Effluent Limits in Table 4 apply only to “contaminated stormwater” as defined in 40 CFR § 445.2(b)

Table 4 in the Permit has been derived directly from EPA’s effluent limits for Subtitle D landfills, codified at 40 CFR Part 445. The effluent limits in Table 4 are applicable to “contaminated stormwater” and are not applicable to “non-contaminated stormwater”, as defined in 40 CFR § 445.2. See 40 CFR § 445.2(f). “Contaminated stormwater” is defined as:

storm water which comes in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater as defined in paragraph (f) of this section. Some specific areas of a landfill that may produce contaminated storm water include (but are not limited to): the open face of an active landfill with exposed waste (no cover added); the areas around wastewater treatment operations; trucks, equipment or machinery that has been in direct contact with the waste; and waste dumping areas.

40 CFR § 445.2(b). In contrast, “non-contaminated stormwater” is defined as,

storm water which does not come in direct contact with landfill wastes, the waste handling and treatment areas, or landfill wastewater that is defined in paragraph (f) of this section. Non-contaminated storm water includes storm water which flows off the cap, cover, intermediate cover, daily cover, and/or final cover of the landfill.

40 CFR § 445.2(g). Accordingly, Ecology must revise Table 4 and its accompanying footnotes to clarify that the effluent limits are only applicable to contaminated stormwater, as defined in 40 CFR § 445.2(b). EPA, in its Multi-Sector General Permit has adopted this approach. See MSGP at § 8.L.10 note 1.

1. Condition S5.D.2.f: Waste Management disagrees with the inclusion of “uncontaminated” ground water or spring water in the list of conditionally approved non-stormwater discharges.

Permittees cannot be reasonably expected to be responsible for controlling, treating, or eliminating discharges consisting of contaminated ground water or spring water where such contamination originates off-site, either from another contaminated property or because of natural background conditions. By following the requirements proposed in Condition S5.D.1, to include and describe such discharges in the SWPPP, and by demonstrating through reasonable means that contaminants in such discharges are unrelated to regulated site activities, the permittee should have satisfied their obligations in this regard. Furthermore, there is no explanation or definition as to what “uncontaminated” means. Arguably, the presence of any material at any concentration in ground water or spring water would be considered a contaminant. To address this concern, we suggest that the reference to “uncontaminated” be deleted from the Condition S5.D.2.f.

2. Table 5, Note h incorrectly lists SIC code 2873 for compost facilities.

Ecology has used the wrong SIC code for compost facilities. SIC code 2873 applies to manufacturers of nitrogenous fertilizer and specifically excludes composting. Waste Management believes that the correct SIC code for composting operations is SIC 4953. Although the description of SIC 4953 does not mention compost, the NAICS code 562219 does. <http://www.census.gov> (“562219 Other Nonhazardous Waste Treatment and Disposal ... Compost dumps are included in this industry.”). The NAICS code 562219 translates to SIC code 4953.

3. Special Condition S7.A.2 requiring a CISM, CPSWQ, or Professional Engineer will undermine the effectiveness of the visual monitoring requirements.

While the intention of this condition has superficial appeal, Waste Management believes that it will undermine the effectiveness of the visual monitoring program because it will mean that fewer employees will be able to conduct visual monitoring during a qualifying stormwater event, which in turn may result in stormwater events that cannot be monitored if qualified personnel are not on-site during the storm event. This problem is even more acute because the Permit adds another prerequisite for a person conducting visual monitoring: the person must be either a G2.A signatory or an authorized individual under G2.B, which is limited to a very few persons who can qualify. For example, if the environmental manager is responsible for and certified to do visual monitoring, but is not present during a storm event, an assistant could not perform the monitoring, even if he or she were a CISM because he or she does not have “overall responsibility for environmental matters.” As a result, no visual monitoring would occur. While Waste Management understands that it is important for permittees to have a sufficient number of persons trained to perform visual monitoring in case someone is not available, the certification requirement will make it even harder to ensure that the necessary visual monitoring will occur. Ecology should delete Condition S7.A.2 and S7.A.2.a.

4. Condition S7.C.1.d: The certification should not be required for visual monitoring reports that are maintained as part of the SWPPP.

Condition S7.C.1.d requires the person conducting visual monitoring to certify each visual monitoring report. Waste Management disagrees with including this requirement in the General Permit. *First*, neither 40 CFR § 122.44 nor WAC 173-220-210 requires certification of reports or documents that are not submitted to Ecology. In the Permit, visual monitoring reports are maintained with the SWPPP, but are not reported to Ecology; therefore, there should be no obligation to include the certification.

Second, in many instances, the person who does the inspection will not have the necessary authorization to sign a certification in compliance with Condition G2. Condition G2 – and its corresponding requirement under 40 CFR § 122.22(b) – requires that “a duly authorized representative” who signs a certification must meet three requirements:

- The authorization is made in writing;
- The authorization is submitted to Ecology;
- The duly authorized representative must have “overall responsibility” for the facility’s operations or its environmental matters.

In many instances, persons other than the facility operations or environmental manager will conduct visual monitoring. In that case, the person conducting the inspection could not meet the third criterion and could not sign the certification. Further delegation is not allowed. Accordingly, this Condition will limit the number of persons who can actually perform visual monitoring, which in turn will likely reduce the number of visual monitoring events – i.e., if a “duly authorized representative” is not on-site during a rainfall event, then the permittee would be excused from visual monitoring. This problem is made even more acute given that the Permit will now require that the person conducting the visual monitoring must be a CISM, CPSWQ, or Professional Engineer. In other words, the universe of persons who can perform visual monitoring is reduced to persons (a) who are on-site and available at the time of the storm event, (b) fall into one of the categories under General Condition G2.A or B, and (c) is qualified to undertake visual monitoring as a CISM, CPSWQ, or Professional Engineer.

Third, the certification requirement in Condition G2 does not require that the person who actually conducted the inspection to sign the certification. It merely requires that the representative certify that the reports were prepared under his or her direction or supervision and that he or she has made inquiry as to the accuracy of the information presented.

Ecology should revise Condition S7.C.1 as follows:

- e. Name, title, and signature of the person conducting site inspection; ~~and the following statement: “I certify that this report is true, accurate, and complete, to the best of my knowledge and belief.”~~
- f. ~~— Certification and signature of the person described in Condition G2.A, or a duly authorized representative of the facility, in accordance with Condition G.2.B.~~

Alternatively, Ecology could require the person conducting the visual inspection to certify the truthfulness of the inspection, but delete the requirement that the certification be made by a person qualified under General Condition G2. This change would require Ecology only to delete Condition S7.C.1.f.

5. Condition S8: The Permit should allow permittees to be de-listed from Appendix 6 if there are no benchmark exceedances for four consecutive quarters.

The Permit proposes a scheme whereby a permittee that is currently listed on Appendix 6 cannot be removed from the list even after implementing the required BMPs or demonstrating continuing benchmark compliance. This is fundamentally unfair and unnecessary. A facility that currently meets all benchmarks and has implemented all BMPs will nonetheless continue to be listed on the Appendix 6 list, yet an unlisted facility that now exceeds benchmarks will not be listed. Retaining such a facility on the Appendix 6 list serves no purpose. Waste Management proposes that any permittee that is listed in Appendix 6 should be de-listed if the permittee meets all applicable benchmarks for four consecutive quarters (including quarters preceding the issuance of the Permit).

6. Condition S8: Facilities that are meeting benchmarks for at least two quarters prior to the issuance of the Permit should be de-listed from Appendix 6 now.

There are likely a number of facilities listed in Appendix 6 that are currently meeting benchmark limits. Those facilities should be removed from the Appendix 6 list, otherwise Ecology is punishing them for having taken the steps to reduce their discharges to below benchmarks. Removing them from the Appendix 6 list will not impair Ecology's implementation of the Permit since those facilities will be subject to the various Corrective Action responses if they should exceed benchmarks in the future.

7. Condition S8 is ambiguous, vague, and confusing.

The entire Condition S8 is a problem because it is ambiguous, vague, and confusing. For example:

- If a facility has four quarters of benchmark exceedances and triggers a Level 2 Corrective Action, what happens if the facility exceeds the benchmark in the fifth quarter? Does it trigger Level 2 again? Does it trigger Level 1? Does it trigger no Corrective Action?
- If a facility has four quarters of benchmark exceedances and triggers a Level 2 Corrective Action, what happens if the facility meets the benchmark in the fifth quarter? Does it do another Level 2 response since it still has four quarters of exceedances on "its record"?
- If a facility has four quarters of benchmark exceedances and triggers a Level 2 Corrective Action, what happens if the facility meets the benchmark in the next four quarters, but then exceeds a benchmark in the ninth quarter? Does it do another Level 2 response since it still has four quarters of exceedances on "its record"? Does it do a Level 1 response since it now has one benchmark exceedance? Does it do nothing since it already did a Level 2 response and has not yet triggered the Level 3 response?

The potential for confusion and even litigation over the meaning of this section is so severe that Ecology should revise and re-publish the permit for further comment.

8. Condition S8.B, S8.C, & S8.D: The Level 2, 3 and 4 Corrective Action Levels should not preclude the permittee from implementing BMPs applicable to lower Corrective Action Levels.

As proposed, once a permittee triggers a Corrective Action Level of 2 or higher, the permittee cannot implement an additional lower level BMP that might result in benchmark compliance. This is unreasonable and technically unsound. It is especially unfair for a facility listed in Appendix 6 where, for example, implementation of an operational source control BMP may result in benchmark compliance. It appears that Ecology is making an incorrect assumption that there is a rigid hierarchy of BMPs in terms of cost, resources, and effectiveness. (E.g., operational BMPs \leq structural BMPs \leq treatment BMPs). For example, increasing sweeping frequency would be a Level 1 Corrective Action and construction of a small diversion berm would be a Level 2 Corrective

Action. While the sweeping BMP may be more effective and than the berm construction, the Level 2 Corrective Action could not include this operational BMP alone, even if it would achieve benchmarks. Likewise, a Level 2 structural BMP may be more effective than a Level 3 treatment BMP, yet the Permit mandates that the Level 3 BMP be installed.

Furthermore, this rigid approach fails to recognize that the selection of BMPs will be based, in part, on the magnitude of the exceedance. For example, if a facility significantly exceeds the TSS benchmark in one quarter, it might increase the frequency of sweeping from monthly to weekly. Even then, there might be another three quarters of *de minimis* BMP exceedances which trigger a Level 2 Corrective Action. Yet, the most appropriate BMP might simply be to increase the sweeping frequency to every other day, rather than weekly. The Permit would not permit this solution, but would instead mandate a structural and possibly more expensive source control BMP that will achieve the same result as the operational BMP.

The Permit's use of a false BMP hierarchy is antithetical to the adaptive management requirements in RCW 90.48.555(8). Rather than allowing for professional judgment in the selection and implementation of BMPs regardless of the type, the Permit prescribes certain categories of BMPs (e.g., operational, structural, and treatment) that must be used, even if another category of BMP would be more effective. Nothing in RCW 90.48.555(8) dictates that adaptive management means establishing a strict hierarchy of types and schedules of corrective actions.

9. Condition S8: Level 2-4 Corrective Actions should only be triggered if there are benchmark exceedances of the same parameter.

As drafted, it appears that exceedances of different benchmarks will all count toward determining whether a higher level Corrective Action has been triggered. There is no good basis for this condition. An exceedance of one parameter in one quarter may indicate a different problem than an exceedance of another parameter in another quarter. Given the stringency of benchmarks already, the combining of different benchmark exceedances will result in most facilities being driven quicker to Level 4 Corrective Action even though they have implemented appropriate BMPs for the benchmark exceedances. Waste Management strongly recommends that the higher Corrective Action levels are triggered only if there are multiple exceedances of the same parameter.

10. The Corrective Action deadlines in Table 6 for Level 4 Corrective Actions should be deleted.

It is unclear why Table 6 lists Corrective Action deadlines for Level 4 Corrective Actions because Condition S8.D does not specify any Corrective Action deadline for Level 4 Corrective Action. Moreover, it is not apparent why the Corrective Action deadlines for a Level 4 are shorter (three months) than for Level 2 or 3 Corrective Actions (6 months). Rather, it appears that the Corrective Action deadlines will be dictated by the Corrective Action that Ecology selects.

11. Condition G2.B.1: There is no legal basis to require submittal of a corporate authorization to Ecology.

This condition creates yet another unnecessary bureaucratic hurdle to surmount in this Permit. It requires that a person who signs a report must have sent a corporate authorization to

Ecology prior to signing. It does not appear that this requirement is found anywhere in WAC 173-220-210(3)(b), in spite of Ecology's representation to the contrary. Not only is this another burden that must be done and updated, this requirement will potentially undermine the monitoring program. As discussed elsewhere in these comments, only a few individuals will be qualified to perform visual monitoring under the Permit. If person is qualified to perform visual monitoring and actually performed the monitoring, the results of that monitoring would nonetheless not be reportable if that person had neglected to transmit the corporate authorization to Ecology. Condition G2.B.1 is a needless and bureaucratic requirement that Ecology should delete to read:

- B. All reports required by this permit and other information requested by Ecology shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - 1. The authorization is made in writing by a person described above. ~~and submitted to the Ecology.~~

12. General Comment: Ecology Should Adopt EPA's Section/Paragraph Identification Scheme.

Five years ago, Waste Management commented that the General Permit's scheme for numbering conditions and paragraphs makes it difficult and confusing to navigate through the permit. 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). Waste Management suggests that Ecology adopt the same approach. Otherwise, the result is permit conditions that are a headache to trace, such as Special Condition S3.B.3.b.i.3.c. Often, one must page back several pages in the Permit to figure out in which subsection a particular provision falls. While Ecology might have justified not changing the numbering scheme in order to allow for easy comparison of conditions between permits, such a justification cannot be made given the wholesale renumbering of the entire Permit.

July 15, 2009

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Waste Management appreciates the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink that reads "Andrew M. Kenefick". The signature is written in a cursive style with a clear, legible font.

Andrew M. Kenefick

cc: Jeff Altman

[LL re Comments on Stormwater Permit \(2009\) \(7/15/09\)](#)