

August 10, 2015

Amy Moon
Department of Ecology
P.O. Box 47696
Olympia WA 98504-7696

Sent electronically to cswgpccomments@ecy.wa.gov

Dear Ms. Moon,

Thank you for the opportunity to review and comment on the Draft Construction Stormwater General Permit (CSWGP or permit). Regulatory efficiency and outcomes are strengthened through the public review of draft rules, including the updated CSWGP. Our comments are intended to be constructive and to result in an improved permit prior to its issuance by the Department of Ecology.

The Washington Public Ports Association (WPPA) represents port districts throughout the State of Washington. The mission of our members, established by the legislature, is to provide jobs, move cargo and take other actions to enhance the economic competitiveness of our state. In pursuit of this mission, our members are regularly engaged in construction and infrastructure improvements on their properties.

WPPA offers the following comments for your consideration which show the current draft permit language, Notice of Intent (NOI), and Fact Sheet as bold and italicized; WPPA comments and recommendations are provided immediately following the current draft permit language.

DRAFT CONSTRUCTION STORMWATER GENERAL PERMIT COMMENTS

S1.B.1.a. Clearing, grading, and/or excavation that results in the disturbance of one or more acres (including off-site disturbance acreage authorized in S1.C.2.)...

Comment # 1:

Clearing is removing vegetation to ground level; it should not be considered ground disturbance. Often vegetation (e.g., bushes, forbs, etc.) has to be removed to create staging areas but the ground itself isn't disturbed.

The addition of "including off-site disturbance acreage" is superfluous since it is already covered in S1.C.2. Staging areas, material storage areas, etc. are already considered part of the project site, regardless of location. The creation of a new term, "Off-site disturbance acreage," could have implications for Permittees who use property not associated with the project but may stockpile soil or other materials for other projects.

Recommendation:

- Change the permit language from “clearing” to “grubbing” because grubbing indicates ground disturbance, or define "clearing" in "Appendix B - Definitions" to specify that "clearing" must include soil disturbance to qualify as disturbance acreage.
- Remove “(including off-site disturbance acreage authorized in S1.C.2.)” from the Permit.

S1.B.1.b.i. *Determines to be a significant contributor of pollutants to waters of the State of Washington.*

S1.B.1.b.ii. *Reasonably expects to cause a violation of any water quality standards.*

Comment # 2:

Ecology should clearly identify what criteria the Department will use to determine a "significant contributor of pollutants" and define the individuals or agency contact who is responsible making the determination.

Ecology is also obligated to make notifications to a property owner that their site is considered a "significant contributor of pollutants" prior to an applicant submitting a NOI.

Define what a reasonable expectation is, that a project may cause a violation of **any** water quality standard. Recommend to replace "any" with "appropriate". The lack of a definition is especially troubling.

If the project is less than an acre and/or stormwater will not be discharged to surface waters or a storm system, a NOI typically will not be submitted. Ecology must clarify how the Department declares a "significant contributor of pollutants" if no NOI is submitted.

Overall, WPPA is concerned that the current draft permit language creates significant uncertainty for developers that can be avoided through more careful, specific written language.

Recommended Language:

S1.B.1.b.i. *Has previously declared the site to be a known significant contributor of pollutants to waters of the State of Washington.*

S1.B.1.b.ii. *Expects to cause a violation of a previously established site-specific water quality standard.*

S1.D.7. *Wheel wash wastewater, unless discharged according to Special Condition S9.D.9.*

Recommendation:

Replace “*discharged*” with “*managed*” to remain consistent with language in S1.D.4.

S2.A.1.b. *Permittees unable to submit electronically (for example, those who do not have an internet connection) must contact Ecology to request a waiver and obtain instructions on how to obtain a paper NOI.*
<http://www.ecy.wa.gov/programs/wq/stormwater/construction/index/html>.

Comment # 3:

WPPA recommends moving the link to earlier in the paragraph. As written, it is confusing and could easily be interpreted by those applicants who can't submit electronically that they must go to the Ecology website to obtain a waiver.

S2.A.1.c. *Unless Ecology responds to the complete application in writing, based on public comments, or any other relevant factors, coverage under the general permit will automatically commence on the thirty-first day...*

Comment # 4:

Currently, applicants are not notified if the application is complete. If an applicant does not hear from Ecology within 31 days of the second public notice, they assume they are covered under the permit and start work. The ambiguity this creates can result in an applicant being out of compliance without knowing it.

In order to establish a fully functioning permit system that is reasonably accepted by the regulated community, Ecology must close this regulatory sinkhole. This can be accomplished by establishing a response time that requires Ecology staff to inform each applicant regarding the status of the NOI in a timely manner. At present, PARIS is simply not a reliable source to determine if Ecology deems the application complete.

Recommended Language:

Ecology shall respond to the applicant within seven (7) days providing notice of application status (complete or incomplete). Unless Ecology responds to the complete application in writing that includes an effective date for completed applications, based on public comments, or any other relevant factors, coverage under the general permit will automatically commence on the thirty-first day.

WPPA wishes to emphasize the importance of the integrity of the regulatory system Ecology administers. Ambiguity and uncertainty, intentional or otherwise, undermines public support for the system as a whole.

S2.A.1.f. *Applicants must notify Ecology if they are aware of contaminated soils and/or groundwater associated with the construction activity. Provide detailed information with the NOI (as known and readily available) on the nature and extent of the contamination (concentrations, locations, and depth), as well as pollution prevention and/or treatment BMPs proposed to control the discharge of soil and/or groundwater contaminants in stormwater.*

Comment # 5:

Define “*contaminated soils and/or groundwater*”. Without a quantifiable definition of what Ecology considers contaminated, **any** site with above natural background levels of a contaminant could be considered contaminated (i.e., any urban area within Puget Sound and many other regions). Presence of a contaminant does not necessarily mean a site is contaminated. Some areas have naturally occurring concentrations of contaminants that are above “natural background”. Ecology must determine what sites should be deemed “contaminated” prior to submitting a NOI. It should not be left up to the applicant to make the determination as to whether a site should be considered contaminated.

Define “*readily available*”. What if data exist but are not “readily available”? What if contamination is suspected but there are no data? This goes back to the point that an applicant should not be making the “contaminated site” determination.

Contamination may be present within the project area but located outside the ground disturbance area (e.g. an already stabilized staging area, etc.); Ecology should only need to be informed of contamination that is within the soil disturbance area.

WPPA is deeply concerned that the proposed draft permit language in this section goes beyond the intent of Ecology’s construction stormwater mandate. In addition, the proposed language only adds to existing confusion, potential legal liabilities, and project delays. We read the draft language to mean that Ecology could issue Administrative Orders prior to any proof that water quality standards have been violated—or an immediate concern that they could be violated due to a Permittee’s neglect. If this is the correct reading, the language should be deleted from the permit.

Recommendation:

Remove S2.A.1.f. from the Permit.

S2.A.1.f.i. *List or table of all known contaminants with laboratory test results showing concentrations and depth,*

Comment # 6:

Requiring applicants to list **all** known contaminants, regardless of concentration is excessive and unnecessary. This reinforces the ideology that presence equates contamination. “Contaminant” has not been properly defined. Having a consistent definition of what “contaminated” means will allow applicants to prepare a NOI that is accurate and complete prior to submittal.

Sites that have contaminants at concentrations higher than the appropriate cleanup level should already be on Ecology’s radar (i.e. MTCA cleanup sites, etc.). Ecology programs should coordinate with one another during DCAP development so stormwater considerations can be addressed during the implementation of the plan and the CSWGP can remain a “general permit”.

WPPA questions the purpose of this section. Why is comprehensive information necessary to protect water quality? While it may be needed in the case of high levels of contamination that are known in advance of Permittees, it is hard to imagine the public benefit of the costs associated with testing for "all known contaminants."

In our view, Ecology decision-makers would be wise to separate water quality objectives and regulatory prescriptions from those more properly related to the Model Toxics Control Act (MTCA). Even the perception of MTCA liability can have a profound effect on the viability of development projects that otherwise make good environmental and economic sense. The extent to which the agency has permitted these issues to become conflated in internal discussions and policy proposals is detrimental to the interests of the state.

Recommendation:

Remove S2.A.1.f.i. from the Permit.

S2.C.4. ***The waiver is not available for facilities declared significant contributors of pollutants as defined in Special Condition S2.B.1.b. or for any size construction activity that could reasonably expect to cause a violation of any water quality standard as defined in Special Condition S1.B.1.b.ii.***

Comment # 10:

The terms (significant contributor of pollutants, and construction activity that could reasonably expect to cause a violation) are not defined in S1.B.1.b. or S1.B.1.b.ii. They are referenced but a definition of what these terms mean is not provided. See comments for S1.B.1.b.i and ii. Please define these terms.

WPPA believes an appropriate definition is needed.

G13. ***Ecology may establish specific monitoring requirements in addition to those contained in this permit by administrative order (sic) or permit modification.***

Comment # 11:

WPPA's members have observed that Administrative Orders are becoming increasingly common. As a result, providing more specifics about Administrative Orders, e.g. what triggers them, would be useful to the regulated community. Again, we observe that having contaminants onsite does not automatically qualify a site to be considered a "significant contributor of pollutants", nor will discharging stormwater from a site with contaminants automatically create a violation of water quality standards. As a result we would not support a system under which the mere presence of contaminants is the determining factor in issuing an Administrative Order.

Appendix A – Uncontaminated

Comment # 12:

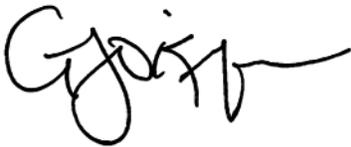
This definition is not helpful, nor consistent with previous experience with Ecology on projects containing “contaminants”. MTCA is not necessarily used to determine whether a site is “contaminated” or “uncontaminated”.

Again, WPPA emphasizes in the strongest possible language our belief that the conflation of water quality and MTCA goals are not in the long-term interest of the State of Washington.

Conclusion

On behalf of our members, I appreciate the opportunity to provide comments to Department of Ecology on the Draft Construction Stormwater General Permit. WPPA and Ecology have a long history of constructive and collaborative approaches to environmental regulation. I am hopeful that our comments are used to improve the Permit that is issued in Washington.

Best Regards,

A handwritten signature in black ink, appearing to read "Gerry O'Keefe". The signature is stylized and cursive, with a long horizontal flourish extending to the right.

Gerry O'Keefe
Senior Director of Environmental Affairs