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March 16, 2012

Via E-mail Only (industrialstormwatercomments@ecy.wa.gov)

Jeff Killelea

Department of Ecology

P.O. Box 47600

Olympia, WA 98504-7600

Re: Comments on February 1, 2012, draft modifications to ISGP

Dear Mr. Killelea:

These comments on the draft modifications to the Industrial Stormwater General Permit are submitted on behalf of Puget Soundkeeper Alliance, Columbia Riverkeeper, and Waste Action Project. These three organizations have been intimately involved in the development and implementation of the ISGP since 2000. Soundkeeper and Riverkeeper were parties to the appeal of the current ISGP that resulted in the Pollution Control Hearings Board's order with which many of the proposed modifications are intended to comply. Soundkeeper, Riverkeeper, and Waste Action Project (collectively, "commenters") have been very active in bringing citizen enforcement actions against violators of the ISGP and so are familiar with numerous particular instances in which the conditions of the permit are being interpreted and implemented. Thus, these three organizations have a very informed perspective on the proposed ISGP modifications.

Conditions S2.B. and C.

The commenters support the proposed modifications to S2.B. and C. to clarify the process for modification of permit coverage.

Condition S4.B.6.

The commenters support the change in qualification for the consistent attainment exemption from monitoring requirements to eight consecutive quarters below benchmark.

We suggest, however, that Ecology include language stating that the exemption expires at some particular date, i.e., the ISGP expiration date. There is no guarantee that the ISGP will be timely reissued so that it does not continue in effect beyond its expiration date. Ecology has not reliably reissued general permits upon their expiration. For instance, the Phase I Municipal Stormwater General Permit issued in 2000 was in effect for years after its 2005 expiration date. If this ISGP continues in effect beyond its expiration date, without the inclusion of a set consistent attainment monitoring exemption expiration date, the exemption continues with it. This would be an unacceptable result and Ecology should take the precautionary step of including an exemption termination date in this condition.

Why is there no expiration date for the consistent attainment monitoring exemption?

Condition S6.C.

The commenters oppose the removal of the numeric fecal coliform effluent limitation for discharges to receiving waters 303(d)-listed for fecal coliform and its replacement with mandatory fecal coliform-specific BMPs. Commenters understand that amendment of RCW 90.48.555 to specifically call for this change is pending, but this modification violates federal law.

The fecal coliform numeric effluent limitations are water quality-based effluent limitations. Where receiving waters do not meet fecal coliform water quality criteria, resulting in their inclusion on the 303(d) list, it is reasonable to conclude that stormwater discharges, or any discharges, that contain a concentration of fecal coliform greater than the water quality criteria contribute to the impairment. Certainly, in such a situation, reasonable potential to cause or contribute to violations of water quality standards (per 40 C.F.R. § 122.44(d)) exists. Under federal law, this reasonable potential means that the permit must include a numeric effluent limitation for fecal coliform, so long as one is feasible. The Pollution Control Hearings Board specifically found that the fecal coliform numeric effluent limitation is appropriately derived. Thus, the fecal coliform numeric effluent limitation is required by federal regulations. There is no legal or appropriate consideration of Ecology's stated basis for this proposed modification – the “uniqueness of fecal coliform” and that “industrial facilities are not considered a significant source of bacteria in Washington's water bodies” – in light of these legal requirements and the findings of the Board. Furthermore, the substitution of a short list of mandatory BMPs (proposed footnote h. to Table 5) for the fecal coliform numeric effluent limitation conflates water quality-based and technology-based effluent limitations. Because the ISGP must require strict compliance with water quality standards, this is insufficient. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999); *see also, Ackels v. U.S. Env'tl. Protection Agency*, 7 F.3d 862, 865-66 (9th Cir. 1993) (when it comes to ensuring compliance with water quality standards, “economic and technological constraints are not a valid consideration” in developing NPDES permits).

Does Ecology contend that the proposed mandatory BMPs constitute an acceptable water quality-based effluent limitation for fecal coliform? If so, why? What information does Ecology have that indicates that implementation of these mandatory BMPs will reduce fecal coliform discharge concentrations to levels low enough to ensure that discharges will not contribute to fecal coliform water quality criteria violations in receiving waters that are 303(d)-listed for fecal coliform?

Does Ecology contend that there is no reasonable potential for ISGP permittees discharging into receiving waters impaired for fecal coliform to cause or contribute to a violation of the fecal coliform water quality criteria? If so, why?

Does Ecology contend that the inclusion of the fecal coliform numeric effluent limitation is infeasible? If so, why?

The deletion of the fecal coliform numeric effluent limitation violates the anti-backsliding prohibition of 33 U.S.C. § 1342(o) because the modified ISGP will have effluent limitations that are less stringent than the comparable effluent limitations in the current permit. None of the exceptions to the anti-backsliding prohibition apply, so the proposed modification is illegal.

Does Ecology contend that the removal of the fecal coliform numeric effluent limitation does not constitute backsliding? If so, why?

Does Ecology contend that one or more of the 33 U.S.C. § 1342(o)(2) exceptions to the anti-backsliding prohibition applies? If so, which one(s) and why?

Commenters have been involved in citizen enforcement actions against a number of permittees where there are or have been issues of compliance with the fecal coliform numeric effluent limitations. These cases include ones concerning Meltec (Division of Young Corp.), SSA Terminals LLC, Total Terminals, Inc., and Manke Lumber Co. These cases involved sometimes very elevated fecal coliform stormwater discharge concentrations, sometimes an order of magnitude or two above the applicable numeric effluent limitation. In each case, we suspect that the cause of the elevated fecal coliform was not only birds, but also (as identified by proposed footnote h. para. 3) of the draft modified permit) dumpsters, composting materials, food waste, or animal products. In our monitoring of discharge monitoring reports and other submissions by these and other permittees, we have certainly seen indications that permittees can indeed control fecal coliform levels in stormwater discharges and bring them below the numeric effluent limitations through the implementation of reasonable measures.

What is the basis for the fact sheet assertion that permittees currently subject to the fecal coliform effluent limitation are or will be unable to comply “due to factors beyond the control of industrial facilities”? Has Ecology evaluated this assertion in light of examples of permittees that have managed to reduce fecal coliform concentration levels? What analysis of permittee monitoring data has Ecology performed to support this assertion?

In addition, the commenters note that the fecal coliform numeric effluent limitation was part of the 2004 legislative bargain resulting in enactment of RCW 90.48.555. The state statutory mandate to include numeric effluent limitations for discharges into 303(d) listed waters was one of the primary concessions obtained by the environmentalist side from Ecology and the regulated entities in the agreement. As parties actively involved in the negotiations that resulted in RCW 90.48.555, commenters are very dismayed by Ecology’s efforts to remove this effluent limitation.

If the fecal coliform numeric effluent limitation is removed as proposed, what provisions of the permit ensure that discharges to fecal coliform-impaired (303(d)-listed) waters will not contribute to the impairment? Given the ISGP’s treatment of other pollutants of concern (e.g., copper) with stringent benchmarks and corrective actions up to level 3 implementation of treatment BMPs, why is there no benchmark and adaptive management process for fecal coliform?

Condition S8.B.

The commenters support the proposed modification of S8.B. to include a 14-day timeline for commencement of a Level One Corrective Action.

However, the commenters suggest a further modification to provide for summary reporting of Level One Corrective Actions on discharge monitoring reports. The modified S8.B. would continue to limit reporting requirements for Level One to summarization in the annual report. Additional reporting on the discharge monitoring report forms (or in a brief submission accompanying electronically-filed DMRs) would encourage compliance by reminding permittees of the Level One requirements and would facilitate Ecology regulation by providing more timely indications of permittee compliance. As written, an Ecology inspector or facility manager, or a member of the public, has no way to know whether a permittee has performed a Level One Corrective Action before reviewing an annual report without either asking the permittee or conducting an inspection.

Condition S8. Footnotes and S8.C.4.d., S8.C.5., S8.D.4.d., and S8.D.5.

The commenters support the removal of the confusing footnotes 4 and 5. However, while the proposed new language in S8.C.4.d. and S8.D.4.d. certainly represents an improvement in clarity, we suggest the following language for S8.C.4.d. and S8.D.4.d., which is yet more clear:

Permittees do not trigger additional Level 2 or 3 Corrective Actions if they are already implementing a Level 2 or 3 Corrective Action (for the same parameter) triggered the previous calendar year and the applicable Level 2 or 3 implementation deadline has not yet passed.

The new language in S8.C.5. and S8.D.5. is also helpful for clarification. We suggest further clarification by inserting the words “or after the applicable deadline for Level 2 implementation has passed,” after “has been completed” in S8.C.5., and “or after the applicable deadline for Level 3 implementation has passed,” after “has been completed” in S8.D.5. This is important to notify permittees that failure to meet the implementation deadlines does not afford them additional time to exceed benchmarks without triggering a new Level Two or Level Three Corrective Action.

Condition S8.C.4.

While the modifications to the Level Two Corrective Action timing requirements represent an improvement over the current permit language, they do not satisfy the PCHB’s order. The modifications simply move up by two months the deadlines for implementation of Level Two Corrective Actions and for waiver or time extension requests. The PCHB rejected the Level Two timeline because it provides “a permittee up to one and one half years of the five year permit cycle to implement a Level 2 corrective action, depending on when during the calendar year the benchmark exceedences occur.” *Copper Dev. Ass’n v. Ecology*, PCHB No. 09-135, Findings of Fact, Conclusions of Law, and Order (4/25/11) at 67. This deficiency is not adequately addressed by taking two months off the schedule – leaving a permittee with up to one

year and four months of the five year permit cycle to implement a Level 2 corrective action if it is triggered in the second quarter of a calendar year. Ecology probably must depart from its dependence on the calendar year-based Level 2 implementation schedule to satisfy the PCHB's order. We suggest that the permit allow six months from the second benchmark exceedence to implement the additional structural source control BMPs required for Level 2, or until the next July 30, whichever is later, if necessary construction work can only be legally performed during the dry season.

Condition S8.D.

The commenters are concerned that the additional language in S.8.D.2. makes yet less clear what is required for a Level Three Corrective Action. We worry that the addition of this language is likely to seriously complicate efforts to enforce Level Three Corrective Action requirements, a crucial part of the ISGP scheme. We support the additional language in S8.D.3. and believe that the inclusion of this language would suffice to comply with the PCHB's order that Level Three "should *also* require the use of monitoring, assessment or evaluation information as a basis on which Ecology and the permittee may determine whether *further* modifications of the BMPs or additional BMPs are necessary" and the inclusion of this information in the annual report. *Id.* at 71 – 72 (emphasis added). In its order on this point, the PCHB was addressing Boeing's complaint about Level Three with a mandate for feedback and iterative evaluation to avoid an endless do-loop of successive Level Three Corrective Actions. *Id.* at 39, 71 – 72. The PCHB did not tell Ecology to remove or lessen the requirement to implement additional treatment BMPs as part of a Level Three Corrective Action, which is a possible interpretation of the confusing and contradictory new language in S8.D.2.

The existing S8.D.2. language provides unequivocally that Level Three entails revision to the SWPPP to include additional treatment BMPs. The proposed additional language muddies this relatively clear direction by stating that the SWPPP revisions are to be based on monitoring, assessment or evaluation "to determine whether further modification of the Level 3 Treatment BMPs or additional BMPs are necessary" Does this mean, as permittees and their lawyers are likely to assert, that the SWPPP revision need not include additional treatment BMPs unless this monitoring, assessment or evaluation information indicates that such are necessary? If it does, what is the standard for determining the necessity of the additional treatment (or other) BMPs? This interpretation of this additional language would render S8. inadequate to ensure that discharges do not cause or contribute to violations of water quality standards, as Ecology intended it to do. The proposed language should be removed from S8.D.2.

How does the proposed modification to S8. substantively change what a permittee must do to satisfy the Level Three Corrective Action requirement? How are the two sentences of S8.D.2. reconciled with each other?

Thank you for consideration of these comments.

Very truly yours,

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

By: *s/Richard A. Smith*
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