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July 10, 2014

Jeff Killelea  
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P.O. Box 47600  
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Submitted by Email at: [industrialstormwatercomments@ecy.wa.gov](mailto:industrialstormwatercomments@ecy.wa.gov)

Re: Comments on Draft 2015 Industrial Stormwater General Permit

Dear Mr. Killelea:

Gordon Thomas Honeywell, LLP appreciates the opportunity to comment on the Draft 2015 ISGP. We submit the following comments relative to our work for multiple marine terminal, port and industrial clients. Our comments focus on certain definitions that we believe are problematic and on a lingering policy decision by Ecology that has never been the subject of notice and other permit procedures contained in chapters 173-220 and 173-226 WAC.

The Draft 2015 ISGP "applies to *facilities* conducting *industrial activities that discharge stormwater* to a surface waterbody or to a storm sewer system that drains to a surface waterbody." Accordingly, it is critical to have clear definitions of both "facility" and "industrial activity." Yet the Draft 2015 ISGP's definitions are muddled at best. And the confusion is particularly acute regarding the definition of "transportation facility."

(1) "Facility"

The 2010 ISGP defined "facility" as a point source subject to regulation under the NPDES program:

"Facility means any NPDES "point source" (including land or appurtenances thereto) that is subject to regulation under the NPDES program. See 40 CFR 122.2."

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40 CFR 122.2 contains an identical definition of “facility” (minus the CFR reference, of course). The CFR also provides a definition of “point source,”<sup>1</sup> which the 2010 ISGP did not, though the CFR definition is implicitly incorporated by reference.

The Draft 2015 Fact Sheet modifies the definition of “facility” to include not only point sources but other “activities” subject to regulation under the ISGP:

“Facility means any NPDES point source or any other facility or activity (including associated land or appurtenances) subject to regulation under this permit.”

This definition is contrary to law, since the ISGP is an NPDES permit, and an NPDES permit can apply only to point sources of pollution.<sup>2</sup>

The actual Draft 2015 Permit, however, contains yet another definition of “facility” that removes entirely the reference to point sources – and the NPDES program and CFRs – and introduces the entirely new concept of “establishment”:

“Facility means any establishment (including land or appurtenances thereto) that is subject to regulation under this permit. See Special Condition S1.”

Special Condition S1, in turn, is the provision that states that the ISGP “applies to *facilities* conducting *industrial activities that discharge stormwater* to a surface waterbody or to a storm sewer system that drains to a surface waterbody.” It also states that facilities conducting activities set forth in Table 1 must obtain ISGP coverage. As explained in the definition of “industrial facilities,” Table 1 summarizes the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi).

The conflicting and confusing definitions create ambiguity and uncertainty that will only feed future litigation. What is an “establishment?” Does Ecology now maintain that the ISGP applies to non-point sources of pollution? Is Ecology embarking on a new path separate and apart from what the EPA regulates under the federal NPDES program? If so, where is this

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<sup>1</sup> *Point source* is defined in 40 CFR 122.2 as any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

<sup>2</sup> 33 U.S.C. § 1342.

explained, and where is the statutorily mandated economic analysis associated with this change?

Overall, the change from the 2010 ISGP and CFR definition is confusing and unnecessary. Ecology should retain the 2010 definition for “facility.”

**(2) “Industrial Activity”**

As with the 2010 ISGP, the Draft 2015 ISGP and Draft 2015 Fact Sheet contain different definitions of “Industrial Activity.” The Draft 2015 ISGP has three categories and an explanatory statement:

“Industrial Activity means (1) the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) that must apply for either coverage under this permit or no exposure certification, (2) any facility conducting any activities described in Table 1, and (3) identified by Ecology as a significant contributor of pollutants. Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format.”

The Draft 2015 Fact Sheet has two categories and an explanatory statement:

“Industrial Activity means (1) the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) that must apply for either coverage under this permit or no exposure certification, or (2) any facility identified by Ecology as a significant contributor of pollutants. Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format.”

Aside from the confusion created by the differing definitions, the additional category included in the definition set forth in the Draft 2015 ISGP makes no sense, as it is entirely duplicative. The one thing that both definitions agree on is that Table 1 is simply a reiteration in a different format of the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi). Hence, the definition provided in the Draft 2015 Fact Sheet is far more logical than the definition provided in the Draft 2015 ISGP, as the latter creates the illusion that the table represents something different than the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi). Which, of course, is completely contradicted by the last sentence of the definition.

Accordingly, GTH strongly recommends that the definition of “Industrial Facility” set forth in the 2015 Draft Fact Sheet be used in the final 2015 ISGP.

**(3) "Transportation Facility"**

EPA's definition of industrial activities associated with "transportation facilities" limits NPDES coverage to specific portions of a transportation facility:

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. *Only those portions of the facility* that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section *are associated with industrial activity*. . .<sup>3</sup>

This definition is incorporated into the Draft 2015 ISGP through its incorporation of 40 CFR 122.26(b)(14)(i-xi) in its definition of "industrial activity." But the Draft 2015 ISGP and Draft 2015 Fact Sheet continue the omission of the limiting language in the Table 1 summary of the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi). While this omission may seem innocuous given the ISGP's directive that Table 1 is merely 40 CFR 122.26(b)(14)(i-xi) in a different format, the years since the promulgation of the 2010 ISGP have shown that the omission has led to profound confusion and significant consequences that were never identified, analyzed, or subjected to notice and other required procedures in the context of the 2010 ISGP.

Perhaps nowhere is the confusion created by omission more apparent than in Ecology's answer to the current Question 10 in the Frequently Asked Questions guidance document ("FAQ") issued 1.5 years after the Draft 2010 ISGP. Question 10 asks "Does the permit apply to the entire footprint of the facility, or just to the area where we conduct vehicle maintenance activity?" The answer starts with "The entire footprint of the industrial facility" but then proceeds to backtrack and states that only "areas of industrial activity" are subject to the permit conditions. Hence, Ecology's answer is internally illogical. More importantly, it is inconsistent with what the 2010 ISGP actually says. And most problematically, one interpretation of the FAQ has been used to justify a grossly expanded scope of coverage vis-

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<sup>3</sup> 40 CFR §122.26(b)(14)(1)(viii) (emphasis added). Notably, this interpretation is followed by California general industrial stormwater permit, which specifies that only the portions of the facility involved in industrial operations are subject to the permit. This is significant for Washington transportation facilities, which must compete economically with California transportation facilities.  
[www.waterboards.ca.gov/water\\_issues/programs/stormwater/docs/industrial\\_permitdocs/att\\_a\\_facilities.pdf](http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/industrial_permitdocs/att_a_facilities.pdf).

à-vis transportation facilities. Notably, internal Ecology communications and deposition testimony of Ecology personnel demonstrate that this attempt to expand Ecology's jurisdiction in the FAQ resulted from internal debate and ever-evolving theories that post-dated the issuance of the 2010 ISGP.

Significantly, Ecology has never provided notice through the permit process or otherwise that it was expanding the scope of ISGP coverage to portions of a transportation facility beyond those identified in 40 CFR § 122.26(b)(14)(1)(viii). Moreover, Ecology has never performed an Economic Impact Analysis regarding the implications of such a profound expansion of coverage. Accordingly, coverage of transportation facilities remains limited as set forth in 40 CFR §122.26(b)(14)(1)(viii), and Table 1 should reflect this to prevent further confusion and litigation.

GTH is aware that Ecology considered similar comments/ criticism when it promulgated the 2010 ISGP. In response to comments to the 2010 draft ISGP, Ecology represented that it was trying to make the ISGP consistent with the MSGP issued by EPA.<sup>4</sup> And although Ecology personnel have demonstrated some confusion on this point in the past, not surprisingly – given that EPA doing otherwise would be unlawful – the EPA's 2008 MSGP defines "industrial activity" at a "transportation facility" with reference to 40 CFR 122.26.<sup>5</sup> Accordingly, the "only those portions of the facility. . ." language is incorporated by reference in the MSGP. Additionally, Part 8 of the MSGP, which sets forth sector-specific requirements for many industries, including both water and air transportation facilities, limits coverage (and corresponding obligations) to only those portions of the site where the industrial activities occur.<sup>6</sup> Finally, EPA Region 10 promulgated FAQs for the 2008 MSGP that reinforce EPA's position that permit coverage is required for only the direct industrial discharges or those that are commingled with them:

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<sup>4</sup> See, e.g., 2010 ISWGP Response to Comments Part 1(A-C), Alaska Airlines/ Horizon Air.

<sup>5</sup> 2008 MSGP at Appendix A.

<sup>6</sup> MSGP 8.S.1 Covered Stormwater Discharges for Air Transportation Facilities ("The requirements in Subpart S apply to stormwater discharges associated with industrial activity from Air Transportation facilities identified by the SIC Codes specified under Sector S in Table D-1 of Appendix D of the permit. 8.S.2.1 *Limitations on Coverage*. This permit authorizes stormwater discharges from only those portions of the air transportation facility that are involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling and lubrication), equipment cleaning operations or deicing operations."); MSGP 8.Q.1 Covered Stormwater Discharges for Water Transportation Facilities ("The requirements in Subpart Q apply to stormwater discharges associated with industrial activity from Water Transportation facilities as identified by the SIC Codes specified under Sector Q in Table D-1 of Appendix D of the permit").

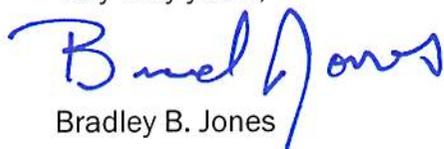
Q32. Please confirm that only those transportation related facilities with vehicle maintenance shops, equipment cleaning operations, or airport deicing operations are required to obtain industrial stormwater discharge permits.

A32: In 40 CFR 122.26(b)(14)(viii), transportation facilities are defined as: "Transportation facilities classified by the SIC codes listed below which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under categories (I)-(vii) or (ix)-(xi) are associated with industrial activity, and need permit coverage. . . .<sup>7</sup>

Finally, Ecology itself has repeatedly maintained that it is trying to be consistent with federal regulations, including 40 CFR 122.26(b)(14)(viii). For example, when Ecology added "material handling facilities" to the Table 1 definition of transportation facilities in the final 2010 ISGP, it quickly removed it in order remain consistent with 40 CFR 122.26(b)(14)(i-xi).<sup>8</sup> It should do the same relative to the specific definition of the coverage area associated with transportation facilities, as described here.

Thank you for the opportunity to comment on these significant matters.

Very truly yours,



Bradley B. Jones

cc: Dianne K. Conway  
Mike Moore, PMSA  
Eric Johnson, WPPA

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<sup>7</sup> [http://www.epa.gov/region10/pdf/npdes/stormwater/msgp\\_Q&A\\_aug2009.pdf](http://www.epa.gov/region10/pdf/npdes/stormwater/msgp_Q&A_aug2009.pdf)

<sup>8</sup> See, e.g., Ecology's Motion for Summary Judgment Regarding Issues Raised by Appellants PSA and Boeing, PCHB No. 90-135 to 90-141, at 2 (filed) (noting that inclusion of "material handling" in the transportation facility description in Table 1 was an error that Ecology corrected through an Errata Sheet in order to "bring it into conformance with" 40 CFR 122.26(b)(14)(viii)).