

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

2317 EAST JOHN STREET  
SEATTLE, WASHINGTON 98112  
(206) 860-2883, FAX (206) 860-4187

April 16, 2007

**Via E-mail** ([industrialstormwatercomments@ecy.wa.gov](mailto:industrialstormwatercomments@ecy.wa.gov))

Jim La Spina  
Department of Ecology  
P.O. Box 47600  
Olympia, WA 98504-7600

Re: Puget Soundkeeper Alliance's Comments on Draft Industrial Stormwater General Permit

Dear Mr. La Spina:

These comments on the draft 2007 Industrial Stormwater General Permit are submitted on behalf of Puget Soundkeeper Alliance ("PSA"). We appreciate the opportunity to comment on this important permit.

**General Comments**

Comment 1: Over the past two years, PSA has closely examined industrial stormwater permit compliance data, reviewed files, and undertaken numerous citizen enforcement actions under the existing Industrial Stormwater Permit. This experience leads PSA to seriously question the wisdom of the "benchmarks and BMPs" approach to industrial stormwater regulation. The approach is flawed because it does not and cannot achieve its basic purpose: to ensure compliance with water quality standards. Unenforceable benchmarks and action levels allow Permittees to continue to discharge polluted stormwater at levels that are all but certain to cause violations of water quality standards, but the failure to include receiving water sampling makes these violations impossible to prove. Add to this the rampant noncompliance with even the most basic requirements to sample discharges, submit discharge monitoring reports, and develop and maintain a Stormwater Pollution Prevention Plan, as well as Ecology's less than aggressive enforcement efforts, and it becomes clear that the Industrial Stormwater General Permit is simply not designed to accomplish its objective.

Although PSA appreciates certain important improvements in the proposed draft, including lower copper benchmarks and mandates to implement corrective actions within certain timelines, PSA believes more than ever that numeric effluent limitations are the only way to ultimately achieve compliance with water quality standards.

PSA understands that setting numeric effluent limitations would be a difficult, time-consuming, and expensive endeavor, and that there is some concern that collecting the site-specific information necessary to do so would diminish the benefits of a general permit. However, our experience and research leaves us with so little confidence that benchmarks and BMPs will achieve compliance with water quality standards that we believe the time is now to begin this work.

PSA anticipates that permittees will submit comments objecting to the length and complexity of the draft permit. The draft permit, like the current permit, is indisputably long and complex. However, the complexity of the permit is largely associated with Ecology's refusal to include numeric water quality based effluent limitations. PSA believes that the important thing – the objective of the Clean Water Act and the NPDES – is the quality of the discharge and minimization of impacts on receiving waters. We think it more sensible to establish firm and objective measures of discharge quality in the form of numeric effluent limitations than to have a permit that specifies every detail of site operations and requires accompanying documentation. In other words, we do not really want a permit that dictates where, for example, a permittee must locate a dumpster. We really care about what and how much is discharged from a site. In the absence of such numeric effluent limitations, however, there seems no choice but to include ever increasing complexity and specificity in permit conditions concerning permittee source control operations.

Comment 2: One way to start implementing numeric water quality based effluent limitations would be to develop individual permits for the top polluters. The draft fact sheet shows the minimum, maximum, and median values for concentrations of various parameters sampled under the existing permit by various industries. These numbers demonstrate that a few permittees are discharging at levels that are orders of magnitude higher than the median. For example, in the fabricated metals products category, the maximum reported concentration of zinc was 130,000 ug/L, but the median value was only 310 ug/L. Fact Sheet at p. 13. It seems like a straight-forward proposition to identify these “outliers” and move them into individual permits with enforceable numeric effluent limitations.

Comment 3: Furthermore, we do not understand how Ecology has satisfied the requirements of RCW 90.48.555 with this permit and specifically request an explanation of how Ecology believes it has done so. As the Pollution Control Hearings Board recently explained, RCW 90.48.555(3)(d) requires Ecology to determine the reasonable potential of discharges under this permit to cause or contribute to violations of water quality standards. *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 05-150 (Findings of Fact, Conclusions of Law, and Order, Jan. 26, 2007) at 45, n.8. If Ecology finds such reasonable potential, and also determines that effluent limitations based on nonnumeric BMPs are not effective in achieving compliance with water quality standards, it must include numeric water quality based effluent limitations in this permit. RCW 90.48.555(3). Ecology has conducted no reasonable potential analysis for this permit in violation of this statutory requirement.

PSA understands that reasonable potential analysis for a general permit such as this is difficult. PSA suggests that Ecology adopt the approach to this that it took for discharges to 303(d)-listed waters in the 2005 Construction Stormwater General Permit. There, if such a discharge exceeds a benchmark, such exceedance is taken as a demonstration of reasonable potential and the benchmark is automatically by the terms of the permit converted to a numeric effluent limitation. PSA sees this as an acceptable approach at this time (depending, of course, on the values used for the benchmark/effluent limitations) and urges Ecology to adopt it for all permittees under general stormwater permits.

## **S1. Permit Coverage**

Comment 4: Condition S1.C.2. concerns discharges to a municipal combined or sanitary sewer. PSA is concerned that in many areas of Western Washington, combined sewer overflows occur on a frequent basis, resulting in the discharge of untreated stormwater. PSA believes that facilities discharging to combined systems should be covered by the permit until

the CSO problems are effectively dealt with by municipalities (in King County, full CSO control is not projected until 2030). Moreover, our research into facilities discharging to the Duwamish River via combined sewers indicates that responsible municipal authorities are not always vigilant about detecting and/or authorizing such discharges. If Ecology insists on exempting dischargers to combined systems, it should require the facilities to submit proof that their discharge is in fact “authorized by the municipal authority.”

Comment 5: PSA supports Condition S1.D.1, which provides that facilities discharging certain toxic pollutants, including PCBs, are excluded from coverage and required to obtain individual permits.

Comment 6: Ecology previously proposed adding coverage for wholesale nurseries and lawn and garden centers. The fact sheet does not elaborate on Ecology’s decision not to require coverage for these industries. PSA is concerned that such facilities may discharge stormwater contaminated with nutrients from their products, fecal coliform, and suspended solids.

Question 6.1: Why did Ecology drop wholesale nurseries and lawn and garden centers from coverage in this draft?

## **S2. Application for Coverage**

Comment 7: Condition S2.A.1. pertains to facilities currently under permit. PSA supports the requirement that facilities currently under permit submit an NOI to continue coverage under the new permit. PSA believes these facilities should submit with this NOI an up-to-date SWPPP along with attachments. Although the current permit requires Ecology to retain a copy of each facility’s SWPPP, PSA’s attempts to review these materials have been frustrated by the age and staleness of the SWPPPs in Ecology’s files, when they are available at all. Given the adaptive management emphasis of the current permit and current draft, there is little value in Ecology maintaining long-outdated SWPPPs. Permit reissuance and renewal is a logical time to require submission of updated SWPPPs.

Comment 8: Condition S2.A.3.b.iv. allows existing unpermitted facilities 30 days to submit an application for coverage and to “revise and submit the Stormwater Pollution Prevention Plan”. First, in recognition that some existing facilities have failed to obtain coverage to date, this provision should say “develop or revise and submit.” Also, it is unclear from this provision, together with S2.B.1, how long existing facilities have to implement their SWPPPs. If the compliance schedule set out in Condition S2.B.2. applies to these facilities, the permit should refer to the provision in S2.A.3.b.iv.

Question 8.1: Please clarify when existing, unpermitted facilities must implement their SWPPPs.

Comment 9: Condition S2.A.3.c. requires new facilities to apply for coverage at least 180 days before commencement of stormwater discharge. This is a great improvement over the existing permit and the preliminary draft. PSA supports this provision, which will require new facilities to plan for stormwater requirements early in their inception, and allow interested persons the opportunity to object and gain meaningful review of the application by the Pollution Control Hearings Board (PCHB). This requirement is also consistent with WAC 173-226-200(b), which states that applications for coverage shall be submitted no later than one hundred eighty days prior to commencement of the activity that may result in discharge.

Comment 10: Condition S2.B. is confusing as written. (See comment 8 above.) S2.B.1. states that a compliance schedule is authorized only for existing facilities not previously permitted, but S2.B.2., which sets out the compliance schedule, purports to apply to “all other Permittees.” The condition therefore appears to grant a compliance schedule to all permittees EXCEPT for unpermitted existing facilities.

Question 10.1: Please clarify who will receive the compliance schedule set out in Condition S2.B.2.

Comment 11: Condition S2.B.2.a. requires the permittee to submit its SWPPP along with the application for coverage. PSA strongly supports this provision; only in this way can Ecology and the public meaningfully review the application and evaluate whether coverage under the general permit is appropriate.

Comment 12: Condition S2.B.2.b. allows permittees 90 days to implement non-capital BMPs from the date they receive coverage, which may be as long as 60 days after applying for coverage (see S2.D.). This allows permittees five months to implement non-capital BMPs, which is far too long. PSA believes permittees should be required to have implemented non-capital BMPs by the time they receive coverage. Similarly, Condition S2B.3. allows permittees nine months to implement BMPs requiring capital investment. This timeframe is also too long and should be reduced to no more than six months.

Comment 13: Condition S2.D.1. provides for automatic coverage not sooner than 61 days following application. PSA supports this extended timeframe, which allows for more substantive evaluation of the application than the current permit’s 31-day automatic coverage.

Comment 14: PSA supports the inclusion of Condition S2.E.1., which requires compliance with local requirements. This provision encourages protection of water quality standards and efforts by local governments to protect the environment.

Comment 15: Condition S2.E.2. requires permittees that discharge to a storm sewer operated by Phase I and II municipalities to send copies of their applications to the appropriate entity. PSA feels strongly that even those municipalities not yet covered by the Phase II rule should have the opportunity to implement effective, comprehensive stormwater management. Accordingly, all permittees should be required to send copies of their applications to the appropriate municipal entity.

### **S3. Stormwater Pollution Prevention Plan**

Comment 16: PSA is concerned that Condition S3 does not explicitly state that permittees must actually implement their SWPPP and keep it up-to-date. PSA therefore suggests that Condition S3.A.1 be rewritten to require that all permittees “shall develop, implement, and keep up-to-date a SWPPP ...”

Comment 17: Condition S3.A.3.a. identifies the three Stormwater Management Manuals (SWMMs) that are acceptable sources of BMPs, yet S3.A.3.b. states that new facilities may apply the minimum technical requirements and BMPS found in an “equivalent” manual. Similar language appears in Conditions S3.A.5.a., S3.B.3.e.ii.2 (“other technical documents

approved by Ecology”), S3.B.3.e.iii.3, S3.B.3.e.iv.3, and S3.B.3.e.iv.4 (“other Ecology-approved technical guidance document”).

The PCHB recently rejected similar language in the Construction Stormwater General Permit. AGC/BIAW v. Ecology, Order Granting PSA’s Fourth Motion for Partial Summary Judgment, PCHB No. 05-157, 158, and 159 (January 4, 2007). The PCHB ordered that Ecology modify the permit to allow the use of “equivalent manuals” only after following the modification process outlined in WAC 173-220-190 and 40 C.F.R. §122.62, §122.63 and §124.5.

Question 17.1: Question 15.1: How do the provisions in this draft comport with the PCHB’s ruling pertaining to the use of “equivalent manuals”?

Comment 18: Condition S3.A.3.a(i)(2) requires previously permitted dischargers that have exceeded benchmark or action level to use the 2005 SWMM. PSA appreciates this provision to the extent that it prompts such facilities to employ new BMPs to better control pollution in their discharge.

Comment 19: Condition S3.A.4.c. provides that Ecology may request a current copy of, or update to, the SWPPP. In response to this request, the permittee must submit the “SWPPP/update, site log, and sample results.” PSA is concerned that this description may exclude other relevant materials, and suggests permittees be required to submit the SWPPP, together with “any and all attachments or materials required to be kept with or in SWPPP under permit conditions.”

Comment 20: PSA supports Condition S3.A.4.e.i, which requires permittees to fulfill public requests for copies of the SWPPP within 14 days (the same time period as for Ecology requests). This closes a gap in the current permit that encourages the public to make PDA requests to Ecology for these materials, rather than requesting them directly from the facility. As with S3.A.4.c., requests from Ecology, the Permittee should include “any and all attachments or materials required to be kept with or in SWPPP under permit conditions” in its response to requests from the public.

Comment 21: Condition S3.A.4.e.ii. provides that the permittee “shall contact the requestor to determine if the entire SWPPP is needed or specific portions ...” This provision requires an extra step that is not likely to be necessary in all instances, such as when the permittee is inclined to produce the entire SWPPP. PSA suggests changing “shall” to “may.”

Comment 22: Condition S3.A.3.e.iii. directs the permittee to select “one of the following methods” of providing the SWPPP in response to a public request, but only lists one method. PSA urges that sending a copy of the materials in the mail or via other means to the requester be identified as an appropriate alternative method.

Comment 23: In Condition S3.A.5.a., it appears there should be an “or” between ii and iii, and that iii should not start with the word “when.” S3.A.5.a. also contains an objectionable reference to undefined, unidentified “equivalent SWMMM.” See comment on S3.A.3.a. above.

Question 23.1: Does “when additional BMPs are required to maintain compliance with permit conditions” mean circumstances where additional BMPs are required to meet water quality standards?

Question 23.2:How will Ecology and/or the permittee determine when this requirement is triggered?

Comment 24: Condition S3.A.5.b provides that an existing facility need not revise its SWPPP solely because a SWMM has been revised. PSA is concerned that this approach does not satisfy AKART requirements. At the least, this provision should be rewritten as follows: “Provided that the Permittee of an existing facility is not exceeding the benchmark for any parameter, it need not revise its SWPPP and BMPs solely because a SWMM has been revised.”

Comment 25: Condition S3.A.6.b. and c. refer to “the plan.” To avoid ambiguity, these references should be to “the SWPPP.”

Comment 26: Condition S3.A.9.c. clarifies that Ecology may require additional BMPs where the Permittee exceeds benchmark values. PSA believes feedback loops like this are important, especially in the absence of numeric effluent limitations.

Question 26.1:Please clarify whether S3.A.9.c. action is in addition to S8 Corrective Actions.

Question 26.2:If S3.A.9.c. action is in addition to S8 Corrective Actions, under what circumstances will Ecology take this action?

Comment 27: Condition S3.B.3.e.ii.3 indicates that permittees may select equivalent BMPs that result in equal or better quality of stormwater discharge. This section should say that equivalent BMPs may be selected that result in equal or better quality of stormwater discharge, provided that the permittee documents the technical basis for the equivalent BMPs.

Comment 28: Condition S3.B.3.e.iii.2 provides that the permittee must, at a minimum, include a narrative describing how it determined “that treatment BMPs are required.” The current permit requires the SWPPP to include, at a minimum, a narrative describing how the permittee determined that treatment BMPs are or are not required. Ecology should include the same here, or otherwise clarify that permittees must explain how they determined that treatment BMPs are not required, if that is the case.

Comment 29: Condition S3.B.3.e.iv.4. introduces some confusion about when to include the technical basis for alternative BMPs. According to S3.A.3.d. and S3.B.3.b. and c., only those permittees choosing to use approved, listed SWMMs are excused from the requirement to provide the technical basis for their chosen BMPs. Yet S3.B.3.e.iv.4. purports to excuse those using “other Ecology-approved technical guidance documents” from the requirement to include the technical basis for their chosen BMPs. Ecology should remove the reference to other approved documents. See also Comment 17 above regarding S3.A.3.a. and “equivalent manuals.”

Comment 30: S3.B.3.e.iv.4. is also confusing in its reference to “the introductory paragraphs of Condition S3.” This appears to be a relic of the current permit; the proposed draft contains no such introductory paragraphs.

Comment 31: It appears that Condition S3.B.4 should be “S3.B.3.e.iv” as another type of BMP that is addressed under S3.B.3.e., which describes all other types of BMPs, instead of S3.B.4. If that is so, this section and its subsections should be renumbered accordingly.

#### **S4. Sampling**

Comment 32: Condition S4.A.1. allows a permittee to submit an alternative sampling plan as a modification of coverage and the alternative plan is approved by Ecology in writing. Such a change in permit requirements should be subject to the modification procedures outlined in WAC 173-220-190.

Question 32.1: Does Ecology contemplate following the modification procedures in WAC 173-220-190 where permittees submit alternative sampling plans?

Comment 33: Condition S5.B.1.a. requires only four samples per year. PSA is concerned that requiring so few samples fails to provide a statistically rigorous monitoring protocol by which Ecology can make informed changes to the program that will promote protection of water quality. PSA believes permittees should be required to sample at least once each month during the rainy season.

Question 33.1: Given that storms following extended dry periods typically contain higher concentrations of several parameters, including metals, how does Ecology justify eliminating the requirement to sample dry weather discharges?

Comment 34: Condition S5.B.1.a. designates the sampling period October 1 – June 30. PSA strongly believes the sample period should be defined as September 1 – June 30. In Western Washington, September storms are the norm. In 2006, for example, a weather station at Boeing Field recorded precipitation of at least 0.1” on each of five days in September (in fact, Seattle broke a record with 0.48” of rainfall in one day on September 14, 2006). In September 2005, there were four days with at least 0.1” of rain at that location, and in September 2004, it rained at least that much on each of eight days. By excluding September from the sampling period, Ecology will lose data concerning seasonal first flush.

Because Condition S5.B.1.a. sets the sampling period to exclude the likely seasonal first flush in Western Washington, it is contrary to the PCHB’s final order on the last ISGP appeal (PSA v. Ecology, PCHB 02-162, 02-163, 02-164 (August 4, 2003)), which required Ecology to collect data on the seasonal first flush:

“... we conclude the sampling requirements are deficient in their lack of a requirement of a baseline sample, based upon the first fall storm. This measurement is the one most likely to measure the maximum pollutant discharge from the source, as a result of the flushing of the accumulation of potential pollutants from the dry season. Regardless of the fact it may be a once per year phenomenon, this event is responsible for a significant amount of storm water pollution, which needs to be addressed, if the state is ever to achieve zero discharge, consistent with the goal of the Clean Water Act. We therefore remand the Permit for Ecology to require sampling of the first fall storm event.”

Question 34.1: How does the draft permit satisfy the mandate of this order of the PCHB?

Question 34.2: Given that Western Washington (where most Permittees are located) normally experiences significant rainfall in September, how does Ecology justify excluding September from the sampling period?

Comment 35: Condition S4.B.1.d provides that “the Permittee shall not sample more frequently than two weeks from the same location.” First, this wording is somewhat unclear. Second, this provision and the structure of the sampling requirement would allow a permittee to collect all samples required for permit compliance within about two months. PSA suggests that the provision should be reworded as follows: “While additional sampling is encouraged and may be useful to determine the effectiveness of BMPs and the effects of facility and operational changes, only samples taken at least four weeks apart satisfy the requirements of this condition.”

Comment 36: In addition, the permit should contain a provision requiring additional sampling in the event that conditions on the site change after all four samples are taken such that the samples are no longer representative of the discharge.

Comment 37: Several conditions, including S4.B.3 and 4 refer to “the site log.” This term is not defined in the permit, and is not included among the specific SWPPP requirements listed in Condition S3.B.

Question 37.1: Please clarify that maintaining a site log is a permit requirement and specify what it must include, as well as where and by whom this log shall be maintained.

Comment 38: PSA is concerned about suspending sampling requirements based on consistent attainment of benchmark values, as allowed by Condition S4.C.2. First, attainment of benchmarks does not necessarily establish that a facility is complying with water quality standards, as required by Condition S6.A.1. Sampling should continue despite consistent attainment to ensure that the facility is not causing or contributing to a violation of water quality standards.

Second, Ecology should gather as much information as possible during this permit cycle to enable it to conduct a Reasonable Potential Analysis and set numeric effluent limitations. By excusing some facilities from sampling, Ecology risks not having sufficient information to make meaningful improvements in the next permit cycle.

Third, we have observed in our review of DMR summaries that some facilities cease sampling on the basis of “consistent attainment” even though they have collected/reported fewer than the requisite eight samples and/or the samples reported are not actually below benchmarks. While this seems to be uncommon, it highlights the need to have Ecology confirm claims of “consistent attainment” before allowing suspension of sampling.

Question 38.1: Please explain the process for allowing Permittees to suspend sampling based upon claims of consistent attainment.

Comment 39: PSA is concerned that suspending sampling requirements on the basis of “extreme hardship,” as provided by Condition S4.C.4, represents a permit modification without the procedures set out in WAC 173-220-190.

Question 39.1:How many “extreme hardship fee reductions” have been requested and granted under the existing ISGP?

Question 39.2:Please clarify whether permit modification procedures apply to requests to suspend sampling on the basis of “extreme hardship.”

Comment 40: PSA is disappointed that Ecology has declined to require receiving water sampling in this draft. The failure to require sampling for receiving water hardness will deprive Ecology of the information needed to develop numeric effluent limitations in the future, and as such, is contrary to the PCHB’s recent ruling concerning the Boatyard General Stormwater Permit (BGP).

The PCHB recently ruled that the BGP was deficient because it failed to require sampling of receiving water. The PCHB ordered Ecology to modify the permit to require receiving water sampling, in part, “to develop numeric effluent limitations, as necessary and appropriate, in the next renewal of the permit.” PSA v. Ecology, PCHB Nos. 05-150, 05-151, 06-034 & 06-050 (January 26, 2007).

Additionally, the permit’s failure to require receiving water sampling for turbidity makes it impossible to assess the impact of permittees’ discharges, since water quality criteria for turbidity are expressed in comparison to background levels.

Question 40.1:Given the PCHB’s reasoning and order concerning receiving water sampling in the boatyards context, how does Ecology justify failing to require such sampling in this permit?

The fact sheet states that Ecology determined that routine receiving water sampling would be too onerous for most permittees and that it supports the 6415 Report’s recommendation for an “auxiliary monitoring program” to be designed and implemented during the upcoming permit cycle.

Question 40.2:What resources does Ecology plan to devote to designing and implementing this “auxiliary program,” and when does it expect to launch this program?

Question 40.3:If routine receiving water sampling would be too onerous for most permittees, why not make such a requirement a component of a Level Two or Level Three Response?

## **S5. Benchmarks, Action Levels, and Discharge Limitations**

Comment 41: PSA strenuously objects to the approach advocated in the 6415 Report. The Report’s recommendation to set benchmarks and action levels based upon existing permittees’ past performance is totally inappropriate and absolutely unacceptable because it does nothing to ensure – or even to encourage – compliance with water quality standards, as is required by law and the permit itself. Benchmarks must be derived from and consistent with water quality standards; it is unacceptable and counterproductive to set benchmarks based upon what most facilities are already discharging.

Furthermore, there is no linkage in the 6415 report between implementation of AKART and the analyzed discharge data. The data from which the report’s suggested

benchmarks are derived includes data from facilities that are implementing all appropriate BMPs and facilities that are failing to implement BMPs. It is inappropriate to base benchmarks on data from facilities that are not implementing AKART.

Comment 42: PSA is still concerned that the benchmark and action levels approach is not designed to effectively achieve compliance with water quality standards. Ecology indicates that benchmarks have been calculated so that “discharges that do not exceed a benchmark are not likely to violate water quality standards. Discharges that exceed one or more benchmarks represent a higher risk of violating water quality standards.” Fact Sheet at p. 60. Given the likelihood that discharges in excess of benchmarks may be causing or contributing to violations of water quality standards, PSA is puzzled that the permit sets action levels at double the benchmarks. If compliance with water quality standards is the mandate for the permit, as the Clean Water Act requires, it seems more appropriate to set the action levels at the lowest concentrations that might cause or contribute to violations of water quality standards (i.e., just above benchmarks). Since most of the adaptive management corrective actions are not triggered until permittees repeatedly discharge concentrations above action levels, the permit appears to be designed to allow violations of water quality standards. PSA suggests that the permit establish only action levels, and that these be set at the lower benchmark levels.

Question 42.1: Please explain how the permit’s action levels ensure compliance with water quality standards.

Question 42.2: The fact sheet indicates that action levels were set at double the benchmarks because this method “assured that all action levels were determined using a consistent methodology.” Please explain how and why Ecology set action levels at twice benchmarks, rather than at 1.25 or 1.5 times the benchmarks, or some other multiple.

Comment 43: PSA appreciates the draft’s inclusion of copper as a core parameter, but opposes eliminating lead from the core parameters. It is not clear from the fact sheet why Ecology has dropped lead. Additionally, the lead benchmark on page 63 of the fact sheet is more than double the benchmark in the current permit, and the fact sheet does not explain the dramatic increase.

Question 43.1: Why does the draft eliminate lead as a core parameter?

Question 43.2: How did Ecology come up with the lead benchmark?

Comment 44: PSA is pleased to see the remarkable reduction in the copper benchmark and action level in Condition S5.A.4. The 11.9 ug/L benchmark would begin to address the deadly impacts of stormwater pollution on salmonids; however, the best available science on this topic indicates that sublethal effects are observed on salmonids at concentrations of dissolved copper as low as 1.9 ug/L and lethal effects are observed at dissolved copper concentrations as low as 9 ug/L. (See Hecht, S., et al., An overview of sensory effects on juvenile salmonids exposed to dissolved copper (March 2007), a copy of which is attached hereto; and Sandahl, J., et al., A Sensory System at the Interface between Urban Stormwater Runoff and Salmon Survival, a copy of which is attached hereto). While we appreciate Ecology’s efforts to recognize the severity of the copper problem, we are afraid even the proposed benchmark does not go far enough to protect species.

Indeed, the National Marine Fisheries Service explained in its comments on EPA's draft MSGP (attached to PSA's comments on the preliminary draft) that "appreciable adverse effects to salmonids may be expected around **5 ug/L or less**" of copper. NMFS Letter at p. 11 (emphasis added). Thus, even the much reduced copper benchmark is insufficient to protect the health of salmonids and their prey base.

PSA urges Ecology to consider setting a lower copper benchmark.

Comment 45: PSA supports Ecology's effort in reducing the zinc benchmark from the existing permit; however, PSA is concerned that zinc concentrations from 109 ug/L to the action level of 218 ug/L will cause violations of water quality standards. PSA urges Ecology to further reduce the zinc benchmark.

## **S6. Discharges to 303(d)-listed or TMDL Waters**

Comment 46: PSA's concerns about the benchmark/action level approach apply here as well. Where a water body is already degraded to the extent that it appears on the 303(d) list, it does not seem like good policy to allow further degradation. PSA appreciates that Ecology has assigned lower benchmarks and action levels to many parameters; however, we believe that numeric water quality based effluent limitations are urgently needed for discharges to impaired waterbodies. We urge Ecology to adopt the benchmark-to-numeric effluent limitation approach used in the 2005 Construction Stormwater General Permit (and discussed in Comment 3 above) for these discharges in particular. If the benchmark/action level approach is to be retained, PSA suggests that these draft levels should be even lower, if not zero.

Comment 47: Due to the significant role that stormwater plays in the impairment of Washington's waters and the high degree of variability in stormwater discharges, PSA also urges that collection of more than four stormwater samples per year is warranted. Four samples are simply too few to provide any reasonable assurance that discharges do not contribute to water quality impairment. PSA suggests that two samples should be collected per month, at least until a long and consistent record of standards attainment is demonstrated.

Comment 48: Condition S6.A.1 merely recites the law in general terms and does not provide a useful or enforceable condition. Ecology should use the same language here as in Condition S10.A., which provides that "Discharges shall not cause or contribute to a violation of Surface Water Quality Standards .... Discharges that are not in compliance with these standards are not authorized." Additionally, Condition S10.D, which provides that Ecology will assess compliance at the point of discharge from the site, is useful language that should be included in S6.A.

## **S7. Inspections**

Comment 49: Condition S7.A. requires Permittees to conduct monthly visual inspections from October through June and also to conduct visual inspections of the site each time a stormwater discharge is sampled. Condition S7.C. requires one dry season inspection each year. PSA appreciates this improvement to the current quarterly visual monitoring requirements during the wet season; however, we believe that monthly inspections should also occur during the dry season to ensure that BMPs are properly implemented and

maintained when a summer storm would collect and discharge contaminant material that may accumulate on a site.

Comment 50: Condition S7.B.3. requires permittees to “observe for” visible sheen in the stormwater discharge. Permittees should be required to inspect the site for visible sheen in puddles and on surfaces, as well, since oil and grease on the site will eventually appear in stormwater discharge without proper cleanup.

Comment 51: Condition S7.C.4.b allows permittees 30 days to eliminate an illicit discharge discovered during a dry season inspection. In some cases, illicit discharges may present serious problems for water quality, and 30 days is too long to await a response. PSA suggests this provision be rewritten to allow Ecology, upon the notification required in S7.C.4.c, to require the permittee to eliminate the illicit discharge immediately or at least within a shorter timeframe.

## **S8. Corrective Actions**

Comment 52: PSA strongly prefers the corrective actions process in the proposed draft to that advocated in the 6415 Report. The 6415 Report’s proposal to reduce reporting to only two times per year would greatly diminish the ability of Ecology and the public to track performance and compliance. The proposal to compare the annual median, rather than actual values, to benchmarks and action levels would mask significant excursions and delay necessary action to correct problems. The proposal to have permittees submit results along with a response plan at the end of the wet season does not seem to be as effective in addressing persistent pollution problems as the escalating responses required by the proposed draft.

The proposed draft’s process is superior because it provides reasonable, enforceable deadlines for action when permittees exceed action levels. The escalating requirements reasonably address persistent pollution problems, and at the same time, provide an incentive for early, effective responses.

Comment 53: However, even with the improvement over the existing permit and the superior approach to the 6415 Report’s proposal, PSA is concerned that the permit still does not ensure attainment of benchmarks, not to mention water quality standards. Indeed, the permit does not explicitly require attainment of benchmarks. Further, PSA’s research revealed many instances where, despite implementation of all mandatory BMPs and adaptive management corrective actions, discharges continue to result in excursions of benchmark values. The PCHB recently recognized the same deficiency in the Boatyard General Permit, and ordered the permit be modified to address the flaw:

“It shall ... explicitly require that permittees must continue implementing required remedial actions unless and until the benchmarks and other limits are achieved. To that end, the Permit must address the contingency that implementation of all BMPs and remedial actions required in the [permit] might fail to achieve the applicable benchmarks. Such provisions shall include a reasonable time frame within which Ecology will respond to such situations and specify that Ecology will require the addition of individual, site-specific conditions under the general permit (such as additional BMPs, monitoring, monitoring triggers, numeric effluent limitations and/or compliance schedules) and/or that the boatyard facility obtain an individual NPDES permit.”

PSA v. Ecology, PCHB Nos. 05-150, 05-151, 06-034 & 06-050 (January 26, 2007), pp. 65-66.

Question 53.1: How does this draft require permittees to “continue implementing required remedial actions unless and until the benchmarks and other limits are achieved” as the PCHB has determined is necessary?

Question 53.2: How does this draft comport with the PCHB’s reasoning and order concerning the adaptive management process in the boatyards context?

Comment 54: Condition S8.A.1 allows permittees up to two weeks to conduct an inspection of industrial areas after receiving sampling results above benchmarks. Elevated samples may indicate a serious, although perhaps elusive and transitory, problem, so this preliminary inspection step should be required immediately upon receiving the elevated sampling results.

Comment 55: Condition S8.A.2 gives permittees up to 30 days to implement the operational BMPs that had not been implemented as required by their SWPPP, as well as any additional BMPs and sampling determined to be necessary. This timeframe seems too lengthy in general, but at a minimum, permittees must be required to implement the BMPs identified in their SWPPPs immediately upon discovering the oversight. Otherwise the permit unacceptably excuses noncompliance for six weeks (two weeks for inspection plus 30 days to implement BMPs) following receipt of sample results above benchmarks.

Comment 56: Condition S8.A.5. requires the permittee to include “a brief summary of the [Level One] report, or a certification that the Level One report has been completed and placed in the SWPPP, with the next Discharge Monitoring Report submitted to Ecology.” PSA supports the requirement to put the completed Level One, Two, Three, and Four reports in the SWPPP; however, this provision is insufficient to provide assurance to Ecology and the public that permittees are taking the requisite action. The permit should require submission of the entire Level One report with the next DMR (as is required with all other corrective action reports). At a minimum, the permit should require both a summary of the report and a certification. From a citizen group’s perspective, the inability to easily tell from file reviews whether a facility is complying with the permit by adequately completing the Level One response is likely to prompt increased scrutiny, including further public records requests and requests for access to facility SWPPPs, which might otherwise be avoided. Access to information about a permittee’s corrective actions is essential to public participation in ensuring compliance with permit requirements as contemplated by the Clean Water Act. See 33 U.S.C. § 1251(e) (public participation in enforcement to be provided for, encouraged, and assisted).

Question 56.1: Why doesn’t the draft require Level One reports to be submitted to Ecology?

Comment 57: Condition S8.B. applies to sampling results after September 30, 2007. PSA is concerned that the permit fails to address those facilities that have been exceeding benchmarks and action levels during the current permit when establishing this set of corrective actions. By stating that the new system of corrective actions applies “after September 30, 2007,” the permit appears to ignore the benchmark excursions that have occurred during the current permit, essentially allowing permittees to reset their compliance records.

Question 57.1: Please explain whether and how the draft addresses repeated excursions of benchmarks during the current permit.

Comment 58: Condition S8.B.3. directs the Permittee to implement necessary additional operational source control BMPs within 45 days of starting a Level Two action, and to implement necessary capital BMPs within six months of starting a Level Two action. PSA supports strict timelines, which ensure that necessary improvements are made quickly and that Level Three responses – which are triggered in part when 2 samples exceed action levels following implementation of Level 2 BMPs – are also taken in a timely manner when necessary.

PSA believes, however, that 45 days is too long to implement operational source control BMPs. This is especially so given the requirement in S8.A.2. that additional source control BMPs be implemented within 30 days. The permit should allow no more than 15 days to implement source control BMPs in Level Two.

Question 58.1: Why does the permit allow 45 days to implement source control BMPs in Level Two when it allows only 30 days in Level One?

Comment 59: Condition S8.C refers to samples taken after “December 31, 2004.” PSA hopes this date is an intentional attempt to address those facilities that have been exceeding benchmarks during the current permit, but is concerned that it is instead merely a relic of the previous permit language.

Question 59.1: Is “December 31, 2004” the right date in this section?

Comment 60: Conditions S8.C.2 and 3 direct the Permittee to investigate and select all “applicable and appropriate” stormwater capital, operational source control, and treatment BMPs to reduce contaminant levels to or below benchmarks. As mentioned above, however, PSA believes the goal of capital and other BMPs should be compliance with water quality standards, not just meeting benchmarks. Nevertheless, PSA believes it is appropriate to require treatment at this stage and supports that provision.

Question 60.1: Who determines which BMPs are “appropriate”? What criteria apply to this determination?

Comment 61: Condition S8.C.6 allows Permittees six months to submit the Level Three report to Ecology for its approval. First, PSA strongly supports the requirement that Ecology review and approve the report, and believes this will help ensure that all appropriate and necessary actions are taken. However, six months to produce the report seems excessive. PSA suggests this report be due to Ecology within three months.

Comment 62: PSA supports Condition S8.C.4’s requirement that the Level Three report include an implementation schedule not to exceed 12 months. PSA is concerned, however, that a 12 month implementation schedule, together with S8.C.6’s provision allowing Permittees six months to submit the report, gives Permittees 18 months to implement BMPs that are crucial for water quality. This is too long – the report should be due within three months and the implementation schedule should commence at that time. PSA notes that most permittees have been under permits since 1992, and, per the requirements of 33 U.S.C. §1342(p)(4)(A), should have been required to attain strict compliance with water

quality standards by 1995. Ecology's persistent efforts to delay compliance with this federal statutory deadline are exasperating.

Question 62.1:When does the 12 months commence? Please clarify.

Comment 63: Condition S8.D describes the Level Four response, which is triggered only after the permittee repeatedly exceeds action levels despite implementing various BMPs. Under those circumstances, PSA questions whether it is appropriate for the facility to remain covered in a general permit. We suggest that coverage under the general permit be terminated at the point that the Level Four response is triggered, and that the facility be required to obtain an individual permit instead.

However, if these facilities remain within the general permit, PSA strongly supports the Level Four requirement to prepare an engineering report including an AKART analysis and water quality analysis.

Comment 64: Condition S8.D.4 allows permittees six months to submit Level Four reports to Ecology. Again, PSA strongly supports the requirement that Ecology review and approve the report, and believes this will help ensure that all appropriate and necessary actions are taken. This timeframe seems lengthy, but is perhaps necessary to allow time for completion of the engineering report. PSA suggests Ecology require monthly progress reports to ensure that the process stays on track.

Comment 65: Condition S8.D.6 refers to Ecology's approval of the "engineering report" and S8.D.4 refers to Ecology's approval of the "Level Four report." It is unclear whether the engineering report is a component of the Level Four report, and if not, whether Ecology will review and approve/deny/conditionally approve both reports.

Question 65.1:Is the engineering report a component of the Level Three report? If not, when is the engineering report to be submitted to Ecology?

Comment 66: Condition S8.D.6 allows permittees to request a waiver from implementing stormwater treatment BMPs if the facility does not discharge to impaired waters for the parameter of concern in the discharge. This "waiver" option is unacceptable. Presumably, the engineering and level four reports would not recommend treatment BMPs unless they were necessary for compliance with water quality standards and AKART. To "waive" these requirements would therefore be inconsistent with the CWA and Washington law. Moreover, it is absurd to waive the culmination of many years of adaptive management efforts (and associated cost). In circumstances where treatment BMPs are "infeasible" for whatever reason, the permittee should be required to obtain an individual permit that can be properly tailored to its "unique site conditions."

## **S9. Reporting and Recordkeeping.**

Comment 67: Condition S9.A.5 states that neither sampling nor a DMR is required for the months of July, August, and September. As indicated above, PSA is concerned that eliminating sampling events during these months will make it impossible to gather information concerning the discharges that are likely to have the greatest concentrations of contaminants, including the seasonal first flush which usually occurs in September in Western Washington. PSA urges Ecology to require at least one sampling event during the dry season.

Comment 68: Condition S9.A.8 directs permittees to submit a DMR whether or not a facility has discharged stormwater from the site, and to mark the “no sample obtained” check box if there was no discharge. PSA strongly urges Ecology to require that whenever that box is marked, the permittee explain the circumstances preventing sampling. To prevent facilities from improperly avoiding the sampling requirement, Ecology should also include a provision making failure to sample a permit violation unless the permittee can document that there had been no rain and/or no discharge during the reporting period.

Comment 69: Condition S9.D applies when the permittee’s inability to comply with any terms and conditions of the permit could result in the discharge of pollutants “in a significant amount”. This highly subjective phrase is not defined in the permit. It has been PSA’s experience that noncompliant permittees uniformly justify failure to prepare a noncompliance notification on grounds that the discharge was not, in their opinion, “in a significant amount.” Ecology should define this phrase and/or provide guidance as to how to determine whether discharge of pollutants in stormwater meets this threshold.

Comment 70: PSA appreciates Condition S10.B, which provides the only indication that permittees are required to actually implement an adequate SWPPP using all BMPs necessary to avoid discharges that would cause or contribute to violation of water quality standards. PSA suggests this requirement should also appear in S3.A. (SWPPP General Requirements).

#### **G14. Upset**

Comment 71: Condition G14. is sloppily written. It includes a mistaken reference to Condition S5.G. and is inconsistent with the federal requirements for reporting for an upset defense. To qualify for an upset defense, any upset must be reported, not just an upset that a permittee deems to cause a threat to human health or the environment. 40 C.F.R. § 122.41(n). The PCHB recently addressed this identical issue in the appeal of the Construction Stormwater General Permit. See *Associated General Contractors v. Ecology*, PCHB No. 05-157 (Order Granting PSA’s Fourth Motion for Partial Summary Judgment, Jan. 4, 2007). The permit should be changed to comport with the PCHB’s decision in that case and 40 C.F.R. § 122.41(n).

#### **G25. Bypass Prohibited**

Comment 72: Condition G25. is also sloppily written and inconsistent with federal regulations. The first paragraph of G25.A. references circumstances “1, 2, 3, or 4,” and then lists items numbered 1 to 6. G25.A.4.c., like G14., incorrectly references Condition S9.E. and seems to also allow bypasses without reporting as 40 C.F.R. § 122.41(m) requires. The PCHB’s order in the appeal of the Construction Stormwater General Permit referenced in the preceding paragraph addresses a similarly deficient condition in that permit. G25. should be rewritten to comply with the PCHB’s order and 40 C.F.R. § 122.41(m).

Thank you for your work on this draft permit and for your consideration of and responses to these comments.

Very truly yours,

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

By: Richard A. Smith