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Via e-mail (industrialstormwatercomments@ecy.com) and U.S. Mail
Lionel Klikoff
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

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

Dear Mr. Klikoff:

These comments on the November 2007 draft Industrial Stormwater General Permit ("ISGP") are submitted on behalf of Puget Soundkeeper Alliance ("PSA"). Due to its concerns over the effects of stormwater discharges on the Puget Sound and its tributaries, PSA has been very involved since 2000 in Ecology's efforts to regulate stormwater discharges. PSA has twice appealed previous versions of the ISGP, in 2000 and 2002, and was a key player in the state legislature's 2004 enactment of 6415, codified as RCW 90.48.555. PSA has also expended substantial efforts to enforce the permit, having brought numerous enforcement actions under the Clean Water Act citizen suit provision both against unpermitted dischargers and permittees who fail to meet permit requirements. These efforts have familiarized us with the potential damage that industrial stormwater discharges can do to water quality, the workings of the current permit, and the challenges of industrial stormwater regulation.

General Comments

PSA was intimately involved in the development and enactment of 6415, codified as RCW 90.48.555. This legislation resulted from the efforts and political power of the regulated community, lead by the Association of Washington Business, to end run good faith negotiations headed by then-Ecology Director Tom Fitzsimmons following the Pollution Control Hearings Board's ruling on PSA and its allies' summary judgment motion in the appeal of the 2002 ISGP. The PCHB's ruling would have left the ISGP with no provision for mixing zones and, more significantly here, no compliance schedule for the numeric effluent limitations for discharges to impaired (303(d)-listed) waters that were included in the 2002 ISGP. RCW 90.48.555 was enacted after hard bargaining between the environmental community and the regulated community. In partial summary, in exchange for dropping the immediately effective numeric effluent limitations and for very conditioned language about presumptions of compliance with

water quality standards, the environmental community obtained important protections for water quality in industrial and stormwater permits – a May 1, 2009, effective date for numeric effluent limitations for discharges to impaired waterbodies (RCW 90.48.555(7)(a)), and a requirement for inclusion of numeric effluent limitations when Ecology finds reasonable potential to cause or contribute to violations of water quality and determines that nonnumeric effluent limitations are ineffective at achieving compliance with water quality standards (RCW 90.48.555(3)(d)). PSA finds it extremely disappointing and disconcerting, at best, that Ecology is proposing to subvert this bargain and the intent of 6415 with the 2007 draft ISGP.

First, with respect to the May 1, 2009, date for numeric effluent limitations for discharges to impaired waterbodies, although the draft permit will presumably be issued for a five-year period sometime in 2008, it includes no provision for such numeric limitations. Instead, as outlined in a separate, undated issue paper ("The Industrial Stormwater General Permit – Issue Paper – Effluent Limits for Discharges to 303(d) Listed Waters"), Ecology presents four options to address this deadline. PSA believes that the most appropriate course is not even suggested here – the establishment of numeric effluent limitations at water quality criteria. The first option presented, which would actually establish numeric limitations, may be acceptable and in accordance with RCW 90.48.555(7)(a), and also seems feasible and appropriate for a general permit. Modeled on a condition in the Construction Stormwater General Permit, it would convert a benchmark set at water quality criteria to a numeric effluent limitation if the permittee exceeds it once. While this would be acceptable to PSA, if it were actually included in the ISGP now, Ecology seems to worry on behalf of permittees that no compliance schedule is provided. This is absurd. The May 1, 2009, date has been known and widely publicized since 2004 and permittees were warned of it in the 2004 ISGP and even required to conduct monitoring for comparison to benchmarks (set at water quality criteria) for the 303(d)-listed parameters. The third option, dismissed by Ecology as untenable due to resource limitations, involves individual engineering reports and water quality assessments for permittees discharging into impaired waterbodies. This approach, while it tends to suggest the propriety of individual permits for these dischargers, would also be acceptable to PSA as protective of water quality, if it were actually implemented in the ISGP now. PSA does not understand why permit fees cannot be raised to cover the actual cost of the permitting program to provide resources for appropriate and legally required regulation. The second and fourth options set out in this issue paper involve seeking legislative changes in RCW 90.48.555(7)(a) to either remove the requirement for numeric effluent limitations or further postpone it. PSA finds it outrageously offensive that Ecology would seriously consider – much less propose – these options given the history of RCW 90.48.555, the groundwork laid for numeric effluent limitations in the 2004 permit, and the well-established substantial contribution of stormwater to impairment of water quality in the Puget Sound basin and throughout the state.

Why does the ISGP not include numeric effluent limitations for discharges to 303(d)-listed waters, effective May 1, 2009, as RCW 90.48.555 requires?

Why does Ecology think it acceptable to consider or propose legislatively modifying or eliminating the May 1, 2009 deadline?

Why can permit fees not be raised to cover program costs necessary to determine numeric effluent limitations to protect water quality?

Second, the draft ISGP presents several problems with respect to the requirements of RCW 90.48.555(3)(d). In sum, Ecology has failed to make the determinations and to include the numeric effluent limitations that this law requires.

RCW 90.48.555(3)(d) requires Ecology to determine two things – whether the regulated discharges "have a reasonable potential to cause or contribute to violation of state water quality standards," and whether effluent limitations "based on nonnumeric best management practices are not effective in achieving compliance with state water quality standards." In making the reasonable potential determination, Ecology is to use procedures that account for existing pollution controls, the variability of pollutants in storm water, and, as appropriate, dilution of storm water in the receiving water. RCW 90.48.555(4). If Ecology determines, as it now should, that authorized discharges have reasonable potential and that nonnumeric, BMP-based limitations are ineffective in achieving compliance with standards, then numeric effluent limitations must be included in the ISGP.

The PCHB has already declared its agreement with this plain-reading analysis:

> RCW 90.48.555(3)(d), which the Board has held does not apply to [the Boatyard General Permit], is instructive in the analysis, as it contains the only state statutory reference to the term "reasonable potential," and mirrors federal requirements. That provision **requires** Ecology to condition stormwater general permits for industrial and construction activities to require compliance with numeric effluent limitations when there has been "a determination by the Department that (i) [T]he discharges covered ... have a *reasonable potential* to cause or contribute to violation of state water quality standards; *and* (ii) [E]ffluent limitations based on non numeric best management practices are not effective in achieving compliance with state water quality standards." (emphasis added [by PCHB]). Thus, under the industrial and construction permits covered by the statute, **Ecology must use its judgment to assess both the likelihood that discharges will violate water quality standards *and* the effectiveness of BMPs to achieve compliance**. ...

Puget Soundkeeper Alliance v. Ecology, PCHB Nos. 05-150, 05-151, 06-034, & 06-040, Findings of Fact, Conclusions of Law, and Order (Jan. 26, 2007) at 45 n.8. (bold added).

Does Ecology contend that RCW 90.48.555(3)(d) does not require it to make these two determinations? If so, why?

From review of the November 21, 2007, Fact Sheet, it is apparent that Ecology conducted no reasonable potential analysis in any form, and has made no provision for any. Ecology seems to consider a reasonable potential analysis ("RPA") to be impossible here, as it defines RPA as "a site-specific assessment of the impacts of a discharge on the receiving water." Fact Sheet at 50. This conception of RPA is so narrow as to be at odds with the RCW 90.48.555(3)(d), as well as EPA and Ecology guidance on RPA. Even if this narrow definition is valid, Ecology could conduct RPA through conditions of the permit, as it has with discharges to 303(d)-listed waters in the Construction Stormwater General Permit.

Has Ecology made any reasonable potential analysis for the ISGP, either generally or for any permittee? If not, why not?

Has Ecology established any mechanism, such as data collection or otherwise, to perform any reasonable potential analysis, either generally or for any permittee? If not, why not?

Ecology's own *NPDES Permit Writers' Manual* explains that, when there is no mixing zone as under the ISGP, a RPA can involve a simple comparison of pollutant concentrations in a discharge to water quality criteria. *Manual* at 99 – 100. The Manual further explains that a permit writer "should use any available effluent monitoring data as well as other information pertaining to the discharge (e.g., type of industry, compliance history, stream surveys) as the basis for [a RPA]. The permit writer may already have effluent data available from previous monitoring ...." *Id.* Here, there is ample monitoring data collected over several years by individual facilities and facility types with which to perform a RPA. For example, for the October 2006 "Evaluation of Monitoring Data from General NPDES Permits for Industrial and Construction Stormwater," Ecology's consultants evaluated monitoring data collected under the 2004 ISGP through only early 2006 to essentially evaluate reasonable potential to cause or contribute to violations of water quality. (Consistent with the interests of their usual regulated-community clients, the consultants were very focused on the dilution "necessary" to meet standards, but since there are no mixing zones under the ISGP, there is no regulatory basis for consideration of dilution.) Ecology could have done a similar statistical analysis, updated with the data collected since that study to evaluate reasonable potential, even on a parameter by parameter and industry by industry basis.

Why does Ecology not use the monitoring data generated under the current ISGP to perform reasonable potential analyses?

Does Ecology contend that its own *NPDES Permit Writers' Manual* is incorrect in its description of how a reasonable potential analysis can be performed? If so, why? - and why does Ecology not change the Manual?

Does Ecology contend that it cannot perform a reasonable potential analysis in the way described by its own *NPDES Permit Writers' Manual*? If so, why?

In the alternative, as Ecology's Gary Bailey and Randy Marshall both testified in the Boatyard General Permit appeal proceedings, it is possible to perform a RPA for a general permit using reasonable assumptions about discharges and receiving water conditions and/or test cases. EPA had developed a method for determining reasonable potential using effluent data only – even with a single effluent sample. *EPA's Technical Support Document for Water Quality-based Toxics Control* (March 1991) at 53 – 54. Furthermore, in explaining the similar federal requirement for a RPA (40 C.F.R. § 122.44(d) – which Ecology is also violating by failing to perform RPA here), EPA provides a method for determining reasonable potential without *any* monitoring data. *EPA's NPDES Permit Writer's Manual* (Dec. 1996) at 103.

PSA notes that the PCHB has previously found Ecology's failure to follow important permit development procedures, and to make required permitting determinations, to be an adequate basis to remand a permit – particularly noting the importance of making the required determinations in the general permit context. *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 02-162 (June 6, 2003). It is an outrageous abdication of its duty and a prime example of bad government for Ecology to essentially force the public and agents of the public interest to take legal action to get Ecology to do its job.

Why does Ecology not use reasonable assumptions about discharges and receiving water conditions and/or test cases to make reasonable potential analyses?

Does Ecology contend that reasonable potential analyses are not required by 40 C.F.R. § 122.44(d)? If so, why?

Does Ecology contend that *EPA's Technical Support Document for Water Quality-based Toxics Control* is incorrect when it asserts that a reasonable potential analysis can be performed solely with effluent data, and even with a single effluent sample? If so, why?

Does Ecology contend that *EPA's NPDES Permit Writer's Manual* is incorrect when it asserts that a reasonable potential analysis can be performed without any monitoring data? If so, why?

Any objective reasonable potential analysis that considered the discharge data collected under the 2004 ISGP would find reasonable potential for a majority, if not all, of the regulated discharges to cause or contribute to violations of water quality standards, including some beneficial uses and some criteria. This would be the result of a RPA based on the elevated pollutant levels described in the October 2006 monitoring data evaluation report in compliance with the direction of RCW 90.48.555(4). Consideration of existing controls on point and nonpoint sources can in no way indicate a lesser impact

on receiving water quality. The volume of data is adequate to account for the variability of stormwater pollutants. Finally, no consideration of storm water in receiving waters is appropriate, both because there is no mixing zone and because, as Ecology explains on page 41 of the Fact Sheet, permit compliance rates, i.e., rates of implementation of AKART, were found to be so low on permit inspections. Without implementation of AKART, there can never be a mixing zone and, thus, no dilution. WAC 173-201A-400. *See, Puget Soundkeeper Alliance*, PCHB No. 02-162 (June 6, 2003) at 13 – 18.

Does Ecology agree that at least a substantial number of permittees' discharges present a reasonable potential to cause or contribute to violations of water quality standards? If not, why not?

Ecology also appears to be dodging its obligation under RCW 90.48.555(3)(d)(ii) to determine whether nonnumeric limitations based on BMPs are effective in achieving water quality standards.

Has Ecology made any determination about whether effluent limitations based on nonnumeric best management practices are effective in achieving compliance with state water quality standards? If not, why not? If so, what is that determination and how was it made?

There is plenty of evidence that such narrative limitations are ineffective at achieving water quality standards. First, these limitations are largely unenforceable. They are by nature highly subjective and compliance with them is very difficult to monitor. Ecology's inspection experience bears this out. As summarized on page 41 of the Fact Sheet, a quarter of permittees could provide no SWPPP, sixty percent had no up to date or fully-implemented SWPPP, thirty to forty percent of permittees could not identify a single stormwater BMP, and only ten percent could be considered in full compliance with all permit requirements. PSA's experience in reviewing files, inspecting facilities, and getting responses to notices of intent to sue further confirms that nonnumeric BMP-based limitations are ineffective because they are highly subjective, not satisfied, and difficult to enforce. Second, the monitoring data collected under the current ISGP confirms that the nonnumeric BMP-based limitation approach of the current permit is not working to achieve compliance with water quality standards. Not only does the data show that discharges are very often quite contaminated, but that the adaptive management scheme that is part of this limitation approach is often ineffective at improving discharges. A permittee need not actually reduce the level of pollution discharged, it only needs to make an effort adequate to satisfy the subjective nonnumeric limitations of the permit. Third, consistent with several previous analyses, the October 2007 "Initial Estimate of Toxic Chemical Loadings to Puget Sound" report, prepared by Hart Crowser for Ecology, identifies urban stormwater as the single greatest cause of toxic chemical loadings. Urban stormwater includes the industrial stormwater discharges regulated by the ISGP, and this report provides further evidence that nonnumeric BMP-based limitations are not effective.

While PSA believes that establishment of numeric effluent limitations at water quality criteria is most appropriate, PSA would find acceptable an approach like that taken in the Construction Stormwater General Permit for discharges to 303(d)-listed waters would provide a solid basis for case-by-case determinations to satisfy the requirements of RCW 90.48.555(3)(d). If a permittee fails to meet a benchmark despite the nonnumeric BMP-based limitations in the permit, this demonstrates both that the limitations are ineffective at achieving compliance with water quality standards and that there is a reasonable potential to cause or contribute to violation of water quality standards.

The inclusion of numeric effluent limitations in the ISGP is the overdue and best method to improve the quality of stormwater discharges. It would set an objective standard against which compliance could be measured and a sound basis for enforcement. For permittees, it could be used instead of increasingly specified methods of operation. Permittees could focus on meeting numeric limitations in whatever way makes the most sense to them, rather than trying to satisfy some standard about BMPs, for example, where to put the dumpster or other similar details about their facilities and operations.

Why does Ecology not include numeric effluent limitations for all dischargers or for any category of dischargers or pollutants in the ISGP?

Another 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, while the median value was only 310 ug/L. Fact Sheet at p. 16. It seems like a straight-forward proposition to identify these "outliers" and move them into individual permits with enforceable numeric effluent limitations.

The ISGP violates federal law, 40 C.F.R. § 122.44(d), because it fails to include effluent limitations necessary to achieve water quality standards. The Ninth Circuit Court of Appeals has confirmed that, with respect to industrial stormwater, the Clean Water Act imposes on state permitting agencies "a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicality." *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (citation omitted). The court held that "Congress expressly required *industrial* stormwater discharges to comply with the requirements of 33 U.S.C. § 1311 [to comply with water quality standards]. ... In other words, industrial discharges must comply strictly with state water quality standards." *Id* at 1164-65 (italics in original, underline added).

Accordingly, EPA regulations mandate that water quality-based effluent limitations ("WQBELs") be included in NPDES permits when there is a reasonable potential to cause or contribute to violation of water quality standards. 40 C.F.R. § 122.44(d)(1)(i). In addition, and independent of RCW 90.48.555, WAC 173-226-070(2)(b) imposes on Ecology the duty to include WQBELs in general permits to "control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards." As discussed above, Ecology has failed to perform this mandatory reasonable potential analysis, but the results would surely show a reasonable potential if such analysis was conducted. Again, the RPA is mandatory, not only under RCW 90.48.555, but also under 40 C.F.R. § 122.44(d)(1). Neither state law nor federal regulations provide any exception to the requirement to perform this analysis, no matter what decisions a regulatory agency has reached about its permitting approach in advance of the analysis. Once reasonable potential is determined, WQBELs must be included in the permit to satisfy the fundamental Clean Water Act objective emphasized in *Defenders of Wildlife.*

There are no conditions of the ISGP that ensure that authorized discharges do not cause or contribute to violations of water quality standards. Neither the benchmarks/thresholds response scheme, nor the narrative condition prohibiting violations of water quality standards, nor any other condition of the ISGP provides the assurance required by state and federal law.

First, as to the benchmarks/thresholds response scheme, the benchmarks – not to mention the thresholds – are set too high. Benchmarks for copper and lead are based on median values from monitoring data collected under the existing permit. Not only do these monitoring data include that from permittees who have not complied with basic permit requirements to implement BMPs, but the derived values have no relationship with water quality standards. This is contrary to the federal requirement that WQBELs be "derived from" and consistent with water quality standards. 40 C.F.R. § 122.44(d)(1)(vii)(A). The benchmarks included in the previous draft of this permit were more appropriate, but even those fell short of what is necessary to protect beneficial uses.

Furthermore, there is nothing in the draft ISGP that actually requires a permittee to ever attain the benchmarks. They serve as triggers for action, but need never be actually met to comply with the permit. Indeed, as Ecology's John Drabek testified in proceedings involving the appeal of the Boatyard General Permit, benchmarks are *intended* to make the permit unenforceable with respect to compliance with water quality standards. The benchmark/threshold scheme can therefore not be consider WQBELs as required by state and federal law.

Second, the ISGP's narrative prohibition on discharges that cause or contribute to violations of water quality standards (S.10) cannot effectively ensure that such discharges do not occur. This condition appears to be included in the permit primarily as a mechanism for Ecology to take enforcement action if it concludes that a violation of

standards has occurred based on the results of an Ecology inspection. Nothing in the ISGP or elsewhere requires Ecology to make any determinations about compliance with water quality standards to make this permit condition work.

Furthermore, this narrative prohibition is not supported by any monitoring requirement sufficient to determine with the certainty necessary for enforcement whether a discharge causes of contributes to a violation of water quality standards. Thus, the narrative prohibition ensures nothing. This is despite the direction of the Clean Water Act that "whenever required" to carry out the objective of the Act, including "determining whether any person is in violation" of any effluent limitation, the permitting authority "shall require the owner or operator of any point source" to "install, use, and maintain such monitoring equipment or methods … sample such effluents" necessary to make such determination. 33 U.S.C. § 1318(a).

Finally, reliance on this general narrative prohibition is contrary to the regulatory direction that WQBELs be pollutant-specific. 40 C.F.R. § 122.44(d)(1)(iii) and (iv). After all, if such general narrative condition can be considered sufficient to ensure compliance with water quality standards, especially where discharged metals concentrations are of such concern, no NPDES permit would ever need to include more.

The implementation of BMPs and AKART have been required of permittees since the issuance of the first iteration of this permit in 1992. Now, sixteen years later, throughout this draft permit, Ecology proposes to allow yet more time for permittees to implement BMPs and AKART. Under the Clean Water Act, 33 U.S.C. § 1342(p)(4)(A), industrial stormwater permits are to require compliance with both technology-based and WQBELs within three years of permit issuance. EPA's regulation on this provision limits the availability of a three-year compliance schedule to meet permit conditions to "initial permits." 40 C.F.R. § 122.42(d). State regulations provide that compliance schedules "shall be developed *to ensure final compliance with all water quality-based effluent limits* in the shortest practicable time" and only "as necessary *to achieve compliance with applicable effluent standards and limitations* …." WAC 173-201A-160(4)(a) (emphasis added) and WAC 173-226-180(1) (emphasis added). With the draft permit, Ecology is really just continuing to extend a seemingly endless compliance schedule for implementation of AKART and compliance with WQBELs.

Condition-specific Comments

Condition S1. Permit Coverage

PSA supports the inclusion of footnote 1 to table 1 in S1.A. The SIC Code classification system is somewhat arbitrary. In its enforcement work, PSA has seen facilities with significant potential pollutant sources, such as uncovered, outdoor fueling stations (e.g., the Port of Bellingham Marine Maintenance facility), escape permit coverage because of a SIC Code reclassification. Industrial facilities with any more than

very minor potential to have activities or materials that present a risk of stormwater contamination should be required to obtain permit coverage, regardless of SIC Code.

Condition S1.C.2. provides that facilities that discharge "stormwater only to a municipal combined sewer or sanitary sewer. Discharge of stormwater to sanitary or combined sewers shall only occur as authorized by the municipal authority responsible for that sewer." PSA is concerned that this condition provides a loophole for facilities that discharge to municipal combined sewer systems. Although the permit says that such discharge "shall only occur as authorized," not all municipalities appear to have a process for granting authorization, nor do they appear to be diligent about discovering unauthorized dischargers. For example, it appears that the City of Seattle has no such authorization process.

Scores of industrial facilities discharge to combined sewer systems in Seattle and King County. In PSA's experience, very few of these facilities have authorization from King County or the City of Seattle to do so. Since these systems regularly overflow, untreated industrial stormwater is in fact being discharged to surface waters. While this issue must also be addressed in upcoming municipal stormwater permits, Ecology should rewrite Condition S1.C.2. to say: "Industrial facilities that discharge stormwater only to a municipal combined sewer or sanitary sewer must obtain coverage unless the discharge is specifically authorized by the municipal authority and proof of authorization is provided to the Department of Ecology."

PSA objects to the limitation on permit coverage in S1.C.5. There is nothing in the Clean Water Act or any other federal law that exempts any discharge of pollutants from a point source, including stormwater, from the requirement for NPDES permit coverage because of any MTCA order or status. This limitation on permit coverage is illegal, and MTCA facilities discharging stormwater associated with industrial activities will be violating the Clean Water Act if they have no NPDES permit coverage.

PSA is concerned about the omission of wholesale nurseries and lawn and garden centers from the permit coverage requirements. As discussed on pp. 57 – 58 of the Fact Sheet, concerns about toxic discharges of pesticides, fertilizers, and metals from these facilities are significant. Although discharges from these facilities may be caused primarily by excessive irrigation, some discharges are likely caused by stormwater. Coverage under this permit would require control of these stormwater discharges and prohibit discharges caused by excessive irrigation (wastewater). PSA believes that it is better to have these facilities with potentially seriously contaminated discharges under this permit system than under none at all.

PSA is concerned about the way in which the "conditional 'no exposure' certificate" provision of the current permit has been implemented by Ecology. We are aware of at least one instance in which a no exposure certificate was granted, and a permit allowed to be terminated, despite the presence of a leaking trash compactor and a substantial amount of galvanized ductwork at the site. Part of the problem in that

instance was that the information requested on form submitted by the permittee for its no exposure request did not match the criteria for no exposure in the permit. Another part of the problem was an inadequate confirmation site inspection by Ecology staff. If Ecology cannot correct these problems and properly implement the no exposure certificate portion of the permit, this provision should be eliminated from the permit entirely.

40 C.F.R. § 122.4(i) prohibits the issuance of an NPDES permit to a new source or a new discharger of a pollutant of concern to a 303(d)-listed waterbody unless the permitting authority demonstrates that "there are sufficient remaining pollutant load allocations to allow for the discharge" and "the existing dischargers into that [waterbody] segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." This regulation has recently been interpreted by the Ninth Circuit Court of Appeals in a manner that makes illegal Ecology's issuance of the ISGP to new sources or new dischargers of pollutants of concern to 303(d)-listed waterbodies unless a TMDL has been performed, which allows for the new source or discharger; and all existing dischargers, both point and non-point source, are under compliance schedules. *Friends of Pinto Creek v. USEPA*, 504 F.3d 1007 (9th Cir. 2007). Furthermore, the TMDL and compliance schedules must constitute a plan designed to bring the receiving waters into compliance with water quality standards (i.e., off the 303(d) list). A section should be added to S1. to limit the availability of permit coverage in accordance with 40 C.F.R. § 122.4 as interpreted by this court. The permit application form should also be modified as necessary to allow Ecology to determine when compliance with this regulation is an issue.

Condition S2. Application for Coverage

The term "significant process change" should be italicized in S2.A.4.a., c., and e.

With respect to S2.B.2., PSA believes that if the owner and the operator of an industrial facility are not the same entity, then the owner should be required to be a co-permittee. We are aware of several instances when a tenant permittee was unable to make facility improvements because of practical or legal restrictions within the control of the property owner. Making the owner responsible for permit compliance as a partner with the operator will eliminate most of these situations and is also likely to lead to higher rates of compliance as owners will insist that their tenants be diligent in complying with the permit. We are hard-pressed to think of a circumstance in which an owner would volunteer to be a co-permittee, and so think that this provision as written is generally not useful.

A new subsection "d" should be added to S2.E.1. to provide that the date of coverage would be as late as the date that a final decision is made under S2.E.3.b. following notification under S2.E.3.a. Without such provision, there may be a conflict between S2.E.1. and S2.E.3. as to when permit coverage begins.

S3. Stormwater Pollution Prevention Plan (SWPPP)

There appears to be no clear requirement in the draft ISGP for permittees to actually fully implement SWPPPs. If this is so, it represents a major deficiency in the draft permit. The closest we can find to such a clear requirement for full SWPPP implementation is in S3.A.6.c., which concerns only "enhanced/additional BMPs" and requires implementation of these only with "due diligence." What condition of the permit explicitly and clearly requires implementation of SWPPPs?

Please clarify the meaning of the term "objectives" in S3.A.2. Does it here mean the same as "requirements"?

S3.A.3.a.ii. should require permittees to identify the manual and location in the manual of the BMPs selected. Without this requirement, it will be difficult to tell whether a permittee has complied with the BMP selection requirements of S3.A.3.a. A permittee could select a BMP and then later claim that it is close enough to something somewhere in one of the manuals to satisfy S3.A.3.a.ii. Requiring identification and clarification up front will increase clarity and reduce the potential for gamesmanship.

The term "significant process change" in S3.A.3.c. should be in italics.

PSA's experience has demonstrated the importance of the public access provisions of S3.A.4.e., and PSA strongly supports the inclusion of such provisions in the ISGP. However, S3.A.4.e. contains a couple of defects. First, a permittee should not be required to contact the SWPPP requestor to determine whether the entire SWPPP is needed – in S3.A.4.e.ii., "shall" should be changed to "may." Second, there is a conflict between the ways in which the SWPPP access is provided in S3.A.4.e.i. and iii. i., which PSA strongly prefers, requires the permittee to provide a SWPPP copy within 14 days of receipt of a written request. iii. allows the permittee to notify the requestor of when and where the SWPPP can be viewed. These are inconsistent. PSA suggests the elimination of iii. If iii. is retained, and somehow made consistent with i., PSA requests that the location where the SWPPP can be viewed be qualified. The location should be at the permittee's facility, in the vicinity of the facility, or in the vicinity of the requestor. PSA had an experience under the similar provision in the current permit in which a large corporate permittee made SWPPPs for several western Washington facilities "available for review" at corporate headquarters in Tennessee. The permit should plainly preclude "compliance" with the SWPPP public availability provision by such means.

As already mentioned, S3.A.6.c. requires implementation of enhanced/additional BMPs identified in the "plan" with "due diligence." If "plan," also used in S3.A.6.b., refers to the SWPPP, the term should be changed. If it refers to something else, its meaning should be clarified. "Due diligence" is also vague and unenforceable. The permittee should be required to implement the enhanced/additional BMPs within the schedule for implementation and the timelines required in S8. as referenced in S3.A.6.b. and d., respectively. PSA again notes that the implementation of BMPs and AKART

have been fundamental requirements for industrial stormwater dischargers since the issuance of the first iteration of this permit in 1992.

The term "benchmark" in S3.A.9.c. should be in italics.

S3.B.3.a.v. should require a full description of the training plan in the SWPPP.

S3.B.3.a.v.E. should specify that the permittee's employee responsible for implementation of the SWPPP and compliance with the permit should attend a training session. As written, attendance of any of a permittee's employees, no matter his level of involvement with stormwater management, would suffice for compliance with this requirement.

PSA supports the requirement for installation of treatment BMPs in S3.B.3.c.

The term "significant process change" in S3.B.3.d.i. should be in italics.

S3.B.3.d.iv. includes a reference to inclusion of the technical basis for chosen BMPs "as required in Condition S3.B.3.d.iii." However, S3.B.3.d.iii. concerns only BMPs selected from approved manuals and says nothing about documentation of technical basis. While S3.B.3.d.iii. should require identification of the manual and section from which manual-sourced BMPs are selected (see comment on S3.A.3.a.ii. above), S3.B.3.d.iii. should require a documentation of technical basis such as that called for by S3.A.3.a.

S3.B.4.b. concerns representative sampling. In PSA's enforcement work under the current permit, the selection of one or more outfalls among many as representative has frequently arisen as an issue. PSA urges that ample guidance be provided to permittees in the selection of a representative sample point and that the permit require sampling at points that Ecology determines to be representative. The issue of representative sampling is discussed further below.

S4. Sampling

In S4.A.1., it is not clear that the incorporation of an alternative monitoring plan following Ecology's approval in writing would become effective only upon a formal modification of coverage. As the PCHB has ruled, Ecology cannot modify permit conditions by "approval in writing." *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 02-162 (June 6, 2003).

While PSA is glad that Ecology has decided to abide by its legal obligation to follow the PCHB's ruling concerning the collection of samples of the first seasonal flush after the summer (*PSA v. Ecology*, PCHB 02-162, 02-163, 02-164 (August 4, 2003)), PSA has serious concerns about the sampling requirements set out in S4.B.1. First, the number of samples required, 5 for Western Washington and 3 for East of the Cascades, is

inadequate to generate data reliable to determine compliance with water quality standards. Second, it seems to be a grave error to not require collection of samples throughout the summer months. Stormwater discharges during these months are likely to be some of the most polluted, as less frequent rainfall allows contaminants to build up on site if BMPs are not rigorously implemented. Collection of samples throughout the year is essential to achieve representative sampling. Third, nothing in the permit appears to prevent the collection of all required samples in a very short time period. For example, a permittee could collect all five required samples during a rainy week in September, having paid particular attention to implementation of BMPs at that time, and then not have to take any additional samples for an entire year, during which more polluted stormwater caused by lapses in BMP implementation or by any other reason would go undetected. The failure to require the minimum number of samples to be spread out over any time period is a very major fault in the sampling requirements. PSA is very concerned that permittees will pay unusual attention to keeping their sites clean for only as long as it takes to collect the minimum number of samples and then relax efforts throughout the rest of year because there will be no sampling to indicate problems. Fourth, the permit should require additional sampling if site conditions change after the minimum number of samples are collected such that the samples are less representative of discharges.

S4.B.2. omits an important step in determining the discharge point for sampling of a representative discharge. PSA finds acceptable S4.B.2.c., which requires sampling of only the discharge point with the highest concentration of pollutants when pollutant types do not vary. However, the permit should require some minimum number – perhaps one years' worth – of sampling of discharges from all discharge points to determine whether pollutant types do vary and which discharge point has the highest concentration of pollutants. Only with information generated by sampling of all discharge points can anyone know with appropriate confidence in many circumstances which discharge point has the highest concentration. In addition, the permit does not address the situation where pollutant types do vary – again determinable only if sampling of all discharge points is required. If pollutant types do vary, the permittee should be required to sample multiple discharge points to get a representative look at its discharge.

S4.C.1. appears to be an illegal mechanism for changing permit conditions without following permit modification procedures. *See, Puget Soundkeeper Alliance v. Ecology*, PCHB No. 02-162 (June 6, 2003). Under this provision, a permittee can be relieved of sampling obligations on Ecology's say-so. It is also unclear what "unless conditions at the inactive site warrant [sampling]" means. It is insufficient to allow suspension of sampling at an inactive site when "pollutant generating activities are not occurring," because this ignores physical features of a site, for example the presence of galvanized or other metals, historical contamination, and contaminants remaining from BMP failures, that could also contaminate stormwater and that ought to be addressed. Also, the term "inactive" is not defined. Is a site inactive only if nothing at all takes place there and it is gated with no possibility of access? Is a site inactive if there is truck traffic on three days a month? With respect to S4.C.1.d., how long before being relieved of sampling obligations must a permittee send the certification to Ecology? Does Ecology

intend to verify certifications? Do certifications become effective without any Ecology action?

The use of median sample values to automatically suspend sampling for "consistent attainment" in S4.C.2. is wildly inappropriate. Under this scheme, a permittee can be considered in "consistent attainment" if three of the five required samples over a two year period are under the benchmark no matter how astronomically high the other samples may be. In the fact sheet (p.70), Ecology cites EPA's MSGP as the basis for this provision. However, as the fact sheet notes, the EPA permit relies on the average of sample values, not the median, as Ecology does here. This is a fundamental difference. The new "consistent attainment" provision represents a substantial and disconcerting change from the current permit, which generally required eight consecutive quarterly samples to be below benchmark for "consistent attainment." This change is particularly inappropriate given the latitude provided in S4.B.1. for permittees to collect all required sampled during a relatively short period of time. As written, this provision has the potential to swallow the monitoring requirement entirely for many permittees and significantly set back Ecology's regulation of industrial stormwater and the resulting protection of water quality.

In no event should a "consistent attainment" waiver be allowed if a permittee has failed to collect the requisite number of samples, or if a permittee is not in full compliance with all permit conditions. The permit should expressly state this.

The term "significant process change" in S4.C.3. should be in italics. "Significant process change," as defined at p. 63 is really not sufficient to serve the intent of S4.C.3., which, presumably, is to remove a permittee from a de-facto "consistent attainment" sampling waiver when something changes at the permittee's facility. Since without sampling, there is no way to determine whether a facility change "adds different pollutants in a significant amount to the discharge," or "increases the pollutants in the stormwater discharge by a significant amount," the "consistent attainment" waiver will be removed only when a facility adds a new SIC-coded activity or when a substantial amount of new or impervious surface is added.

If Ecology is to go with the new (highly objectionable) sampling regime included in this permit, it should remove the "consistent attainment" sampling waiver provision.

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 potentially helpful for development of 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). 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?

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.

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. What resources does Ecology plan to devote to designing and implementing this "auxiliary program," and when does it expect to launch this program? If routine receiving water sampling would be too onerous for most permittees, why not make such a requirement a component of a response to exceedences of benchmarks or thresholds?

Under the current permit, repeated exceedences of the zinc benchmark triggered a requirement to monitor copper and lead discharge concentrations. The draft omits any requirement to monitor for lead concentrations except for certain industry segments. PSA objects to the removal of the lead monitoring requirement for permittees that have demonstrated elevated metals levels in their discharges. Why was lead monitoring so limited in this draft?

S5. Benchmarks, Thresholds, and Discharge Limitations

The statement in S5.A.1. concerning the likelihood of discharges at or below a benchmark to cause a water quality violation is unfounded and gratuitous. A number of the benchmarks in this permit have absolutely no relationship to water quality criteria. This statement should be removed from the permit. What is the justification for this statement in the permit?

PSA suggests rewording of S5.A.5. to state "Compliance with this permit is assessed at the point of discharge from the site." This reformulation would recognize that agencies other than Ecology, such as the PCHB and the federal district courts, may be called upon to assess compliance with the permit. As is, this is merely a statement of Ecology's intent as to its exercise of prosecutorial discretion.

PSA is very troubled by Ecology's explanation of the new structure of benchmarks and thresholds versus the benchmark and action level adaptive management scheme in the existing permit because it reflects what must be Ecology's true motivation in the changes in this draft from the one presented earlier in 2007. On page 71 of the fact sheet, Ecology justifies the new scheme as one that "will reduce the confusion of permittees, eliminate the endless do-loop, and result in greater compliance with the permit." Lost in this explanation are the objectives of the National Pollutant Discharge

Elimination System and the Clean Water Act – to eliminate pollutant discharges and protect water quality. As the Ninth Circuit explained, "strict compliance with water quality standards" is required of industrial stormwater discharges, no matter how difficult it is to attain this goal. *Defenders of Wildlife*, 191 F.3d at 163 – 165. State law and the governor's stated objective of saving the Puget Sound demand the same. The scheme in the current permit is not really hard to understand, and the "endless do-loop" exists only because that permit includes no requirement for permittees to ever actually meet benchmarks. "Greater compliance with the permit" is not a legitimate objective under the Clean Water Act. Greater protection of water quality is the legitimate objective. In this change, perhaps more than anywhere else in this draft permit, it is evident that Ecology is angling to ease regulation on polluters rather than to appropriately and vigorously address the urgent water quality problem that is urban stormwater.

As discussed in the general comments section of this letter, PSA strongly objects to the basing of the copper benchmark on a median of samples from dischargers, a large proportion of which have not implemented BMPs, rather than on water quality criteria and the needs of salmonids. Furthermore, this data comes only from permittees required to monitor copper concentrations under the current permit when they had elevated levels of zinc in their discharges. In the current permit, zinc concentrations are considered indicators of probable problems with other metals, including copper and lead. In other words, this data upon which Ecology is proposing to base the copper benchmark is skewed to reflect copper concentrations in discharges from permittees that have already consistently found elevated metals concentrations in their discharges. It is very likely that a data set from all permittees, had all of them been required to monitor copper, would have had a substantially lower median value as it would include permittees who consistently exceed zinc benchmarks. The method and reasoning here is fundamentally flawed.

While the fact sheet references NMFS' objections to the proposed EPA MSGP benchmarks, it does not disclose that the copper benchmark at issue was 14 ug/L and that NMFS' objections came from an evaluation based largely on the effects of copper at low levels on salmonids, a species commonly found, of course, in the receiving waters of discharges that will be regulated by the ISGP. PSA has previously provided this information to Ecology (Hecht, S., et al., An overview of sensory effects on juvenile salmonids exposed to dissolved copper (March 2007); Sandahl, J., et al., A Sensory System at the Interface between Urban Stormwater Runoff and Salmon Survival; NMFS' Comments on EPA's Draft MSGP). This information indicates that copper levels in stormwater should be kept below 10 ug/L or an even lower level. Indeed, NMFS explained in its comments on EPA's draft MSGP (attached to PSA's comments on the first 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 of the first draft (11.9 ug/L) would be insufficient to protect the health of salmonids and their prey base. Please explain how the benchmarks and thresholds and adaptive response scheme established in this permit protect salmonids in Washington waters in light of this information and the expert opinion of NMFS.

PSA questions the approach that Ecology has taken to benchmarks for the timber products industry. If Ecology believes that the approach to developing generally applicable benchmarks suggested for copper and zinc by the 6415 report is appropriate, then why are not the benchmarks suggested by this report for COD and TSS for the Timber Industry also appropriate? Instead of adopting the stringent COD and TSS benchmarks suggested by the report, the draft permit only retains the BOD benchmark from the existing permit, apparently for the primary reason that most permittees in this sector can comply with it, despite the "lack of BMP implementation that many Ecology field inspectors observe at permitted facilities." Fact Sheet at 82. PSA again suggests that this points out Ecology's misplaced priority in the development of this permit to allow permittees to comply rather than force the cleanest possible stormwater and protect water quality.

PSA objects to the arbitrary establishment of thresholds at ten times the benchmarks. Does Ecology truly think it acceptable to allow a permittee who repeatedly, if not always, discharges stormwater with a copper concentration of 180 ug/L or 1000 ug/L of zinc to report these results to Ecology once a year, and to have no obligation to take immediate corrective action? If the threshold concept is to be used in this permit, PSA suggests that a far lower level, perhaps one and a half times the benchmark, would be a more appropriate place to set thresholds.

PSA supports the updating of the analytical methods for the reasons stated in the fact sheet. It is entirely appropriate to obligate permittees to ensure that the labs they use provide analysis results that comply with the specified quantitation levels.

With respect to the sampling requirement for the air transportation industry addressed in S5.B., Table 3 and footnote e., PSA objects to the use of the 100,000 gallon glycol-based deicing/anti-icing and 100 tons or more annual urea usage criteria for the monitoring requirement. PSA is aware of at least one airport (Bellingham International Airport) that sampled to find an exceedence of current permit benchmarks even though it did not need to sample under the monitoring criteria. This airport collected and analyzed samples despite not being required to do so because of the monitoring requirement criteria, and found that it had elevated levels of nutrients and BOD in its discharge. It was only through this permittee's inadvertent sampling that this problem was ever detected. When confronted with the problem and its lack of appropriate adaptive management response, the permittee rightly pointed out that it needed not have collected the samples in the first place. Airports have serious potential for stormwater contamination when they use any of these deicing or anti-icing agents, and this instance demonstrates that the gallon and tonnage criteria used here are inadequate to ensure that problem discharges are detected. PSA urges Ecology to modify or do away with these criteria. In light of the experience at this particular airport, what is the basis for these criteria?

The use of the term "process stormwater" in S5.E.1. is potentially confusing. From the context, it appears to refer to stormwater that is commingled with process wastewater, thus becoming process wastewater, but it is unclear. Please clarify the meaning of this term.

S6. Additional Requirements for Discharges to Impaired (303(d)-Listed or TMDL) Waters

As discussed in the general comments section, this permit should establish numeric effluent limitations for discharges to 303(d)-listed waters effective May 1, 2009, as required by RCW 90.48.555(7).

As discussed in the comments on S1., this permit should not be issued for new sources or new dischargers to 303(d)-listed waters unless the requirements of 40 C.F.R. § 122.4(i) are satisfied.

Ecology's *Water Quality Program Permit Writer's Manual* provides specific instructions and language to be used in general permits where discharges to 303(d)-listed waters are concerned:

> General permits are issued under the same laws and regulations as individual permits, however, Ecology is unable to invest the time necessary to make the site-specific decisions regarding the water quality at the point of discharge for the large number of permittees wanting coverage under general permits. **Therefore, general permits will contain language which says, "The permittee's discharge must not cause or contribute to an excursion of the State's water quality standards, including the State's narrative criteria for water quality [40 CFR 122.44(d)(1)(i)]. If you discharge a pollutant which is named as a pollutant causing a water quality standards violation at the location named on the State's 303(d) list you shall not discharge that pollutant at a concentration above the State's water quality standard."**

Manual at VI-39 (emphasis added).

PSA notes that this passage from the manual is consistent with the requirements of RCW 90.48.555(7), and that the language in S10. is not the equivalent because it does not clearly prohibit discharges of pollutants of concern at concentrations above water quality criteria.

Why does this draft permit not include the language mandated by the manual? Does Ecology believe that the language in the manual is inappropriate? If so, why and why does Ecology not remove this passage from its manual? What is the source and genesis of the passage in the manual?

It is not entirely clear from the draft permit language whether the requirements of S6.B. apply to impaired waters with TMDLs. These requirements should apply since many TMDLs include nothing specific to require implementation of adequate controls on stormwater discharges. Do the requirements of S6.B. apply to impaired waters with TMDLs?

The establishment of thresholds at ten times the benchmarks is particularly inappropriate for discharges to impaired waterbodies. Does Ecology really think it appropriate and acceptable for a discharger of a pollutant of concern to discharge that pollutant at levels of as much as nine times the benchmark without having to report to Ecology or take immediate action? How does this scheme comport with the above-cited language from Ecology's permit writer's manual, or to 40 C.F.R. § 122.44(d)?

The sampling frequency for discharges to impaired waterbodies, five samples during the wet season west of the Cascades and only three on the east side, is wholly inadequate to ensure detection of problem discharges. Sampling should be required on at least a monthly basis, year-round. The problems with this sampling schedule discussed in the comments on S4. above are even more pronounced with respect to these discharges. How can it be acceptable to allow all the samples of a discharge of a pollutant of concern to an impaired waterbody to be taken over the course of a few weeks a year? Again, PSA stresses that this sampling frequency and regime are primary deficiencies in this draft permit that represent a major reduction in the protection of water quality provided by the ISGP.

S7. Inspections

Inspections should be required at least monthly, year-round, as well as when stormwater discharge samples are collected, and, during the summer months, before forecasted significant storm events. This permit's reliance on non-numeric BMP-based limitations calls for a high frequency of thorough inspections to ensure that BMPs are properly implemented and maintained. The inspection regime provided in the draft permit is insufficient to perform this function.

The requirement to perform only a single dry season inspection per year is especially troublesome. It is during the summer months, when storm events are infrequent but sometimes intense, that inadequate or poorly implemented BMPs are likely to result in the accumulation of potential contaminants that can be washed off site during rainfall to produce a heavily contaminated discharge. Given that no sampling is required during the summer, the dry season inspection is the only site monitoring that takes place during this time. This is outrageously insufficient. Inspections should be required at least monthly throughout the summer, as well as when significant summer storm events are forecast.

S7.B. should require inspections to include observations of visible sheen, discoloration, turbidity, odor, and other stormwater contaminants of water on site, in

standing water, puddles, or running water, not merely in the stormwater discharge (S7.B.3.). The presence of these detectable contamination problems in on-site waters should not be allowed to be ignored, but should be required to be looked for. Looking for these indicators on the ground, instead of merely in the discharge, can better lead to source identification in at least some instances.

The prefatory paragraph of S7.D. should require inspection records to be kept "as part of" the SWPPP, rather than "with" it. This is important to ensure that these records are available to Ecology and the public under the provisions of S3.A.4.

PSA suggests rewording of S7.D.3. (and elimination of the identical S7.D.7.) to better satisfy the requirements of 40 C.F.R. § 122.44(i)(4)(ii): "A statement certifying whether the permittee is in compliance with the SWPPP and the terms and conditions of the permit, and identifying any instances of non-compliance." As now written, the permit fails to satisfy the requirements of this regulation because it does not require certified identification of instances of non-compliance.

S8. Corrective Actions

This section on corrective actions is both confusing and probably unenforceable. For the reasons already stated, PSA strongly urges Ecology to reconsider its approach in this permit and include numeric water quality based effluent limitations. In the alternative, PSA urges Ecology to continue the benchmark exceedence response regime established in the current permit and as proposed in the earlier draft replacement permit.

With respect to responses for exceedence of a threshold (S8.B.), PSA first again suggests that the thresholds are far too high and lenient. The sort of quick responses contemplated by S8.B. should be required for discharges that exceed benchmarks by much lower margins. This threshold structure provides insufficient protection to water quality from heavily contaminated stormwater discharges.

Second, with respect to S8.B., PSA notes that while S8.B.4.b. refers to "actions taken immediately" in response to a threshold exceedence, nothing in S8. requires any immediate action whatsoever. Instead, S8.B.2. requires permittees only to identify and correct BMPs within *two weeks*. This is a very lax requirement in response to a discharge of a pollutant at more than ten times the benchmark level, which represents a need for urgent action. It should be further noted that, generally, sample results will not be known to the permittee for some period of days or weeks after the sample has been taken, and during this whole time any improperly installed, constructed, or maintained BMPs may well have remained in place, functioning improperly and allowing further serious pollution. PSA suggests that S8.B.2. be changed to require identification and correction of BMPs within 24 hours of the time that a permittee learns of a threshold exceedence, and be reported on to Ecology soon thereafter.

That a permittee need not report to Ecology on its response to a threshold exceedence, with a Form 2 report, until what may be months after the threshold exceedence is a significant impediment to enforcement and accountability to the detriment of water quality from extremely polluted discharges.

The Form 2 reports themselves should be amended to require identification of the specific pollutants that are addressed by the measures described. This will increase accountability, make enforcement easier, and allow Ecology to better track what is happening at a facility that exceeds thresholds.

With respect to corrective actions for exceedences of benchmarks, PSA again objects to the use of median values. Use of the median not only discounts sample results that may far exceed the benchmark, but it invites gamesmanship in monitoring – a permittee may temporally bunch sampling events to avoid times of greater facility activity, or take additional samples when there is less site activity to drive the median down. The permit also fails to address a situation where a permittee takes fewer than the required number of samples. In this circumstance, PSA suggests that the permittee should be considered to have a median above benchmark for all parameters for which an inadequate number of samples was collected.

With respect to corrective actions for exceedences of benchmarks, in numerous places in S8.A., C., and D., there are references to what are essentially deadlines that are problematically indefinite. S8.A.2.d. imposes a requirement "after the Permittee has implemented the corrective actions in S8.C." When exactly is this? A more certain date or method of calculating this time should be included. S8.C.1. imposes a requirement "within 2 weeks of entering Step A Corrective Action status." When exactly is this? Is this the date that the (westside) permittee has gotten three sample results above benchmark, indicating that the median will exceed benchmark, or is it after all sampling for the rainy season is completed, or is it May 1, when the DMR is finally submitted? This should be specified as the earliest of these times, and less than two weeks should be allowed for identifying and correcting BMPs. S8.C.2. and 3. do not state when the tasks described there must be completed. Furthermore, S8.C.3. is not clear about the starting date for the 18 months given to reduce pollutant concentrations. Is this from entry into Step A Corrective Action status, or from some other time? In addition, with respect to S8.C.3., 18 months is far too long a time for permittees to have to implement BMPs which should have been implemented already, or under the current permit following a benchmark exceedence. Implementation of BMPs have been required of permittees since the first iteration of this permit in 1992. It appears that Ecology is trying to relieve permittees of accountability for implementing BMPs and meeting benchmarks for as long as possible. S8.C.4.a. and b., S8.C.5., C.6., and C7. also all include references to the temporally indefinite entry into Step A Corrective Action status. Without further definition, in any attempt to enforce these requirements, the time periods are likely to be considered as starting at the latest possible date.

PSA respectfully requests that the permit writer and permit writing team consult with Ecology water quality enforcement staff about the enforceability of the provisions of S8., as well as the permit in general. What does this enforcement staff say about it? PSA understands how having a permit that is difficult to enforce protects the interests of permittees, but how does it protect water quality?

Is the Step A Corrective Action status implementation schedule, not to exceed 18 months, an enforceable requirement of the permit? In other words, must the implementation schedule be followed, and must it be completed within 18 months? If not, this is another serious accountability and enforcement problem. If so, the permit should be changed to clearly state this because it currently does not.

Forms 3 and 4 Reports should be changed to require identification of the particular pollutant of concern and separate reports should be required for each pollutant for which there is a Step A Corrective Action required. This will improve accountability, enforceability, and the ability of Ecology and other to track what is happening at these facilities.

S8.D. includes several provisions that have indefinite temporal requirements. S8.D.1., 2., and 3. all use "entering Step B corrective action [or status]" as a marker for timelines. This presents the same clarity and enforceability problems as described above for the S8.C. timelines. On what date exactly does a permittee "enter Step B corrective action [or status]"? Form 5 includes this same ambiguous language, which makes the 12 month schedule for submission of the engineering report very difficult to enforce.

PSA objects to having the permittee wait until the spring reporting date to submit Form 5. It should be submitted as soon as the permittee learns that it must undertake Step B. Form 5 should require identification of the pollutant parameters that are the subject of the Step B Corrective Action.

If, under S8.D.4., Ecology denies an engineering report and requires resubmission on a schedule, what happens in the meantime? A Step B Corrective action should require the submission of an engineering report that satisfies a certain standard that allows Ecology to approve it, such as design to meet benchmarks and implementation within 12 months. If the engineering report is disapproved because it does not meet this standard, or for other reasons, the permittee should be considered to be in violation of the permit. This is important to ensure that benchmarks are actually ever met and to avoid gamesmanship in the submission of inadequate engineering reports to avoid implementation of remedies for stormwater contamination.

S8.A.3. is also ambiguous. S8.A.3.b. and c. should refer to permittees "required to undertake" a Level 2 or Level 3 Response because "who is in" such Response is potentially unclear. S8.A.3.b. and c. should also be changed to require the immediate submission of Forms 3, 4, and 5, as appropriate, instead of delaying submission to May 1. This is particularly important if this permit is not to be issued until after May 1, 2008,

because, if it is, these forms need not be submitted until May 1, 2009, as the draft permit is currently worded. This would reduce accountability and result in delay in implementation of facility improvements for permittees already required to perform Level 2 or 3 Responses. Furthermore, it appears that this permit would extend the time allowed for submission of engineering reports for permittees from whom Level Three Source Control Reports are already required under the existing permit. Since Level Three in the current permit requires implementation of stormwater treatment, it is essentially the functional equivalent of an engineering report. For example, a permittee who triggered the requirement for a Level Three Response in June 2007 would have to submit a Level Three Source Control Report by June 2008 under the current permit, but, under the proposed permit, the engineering report would not be due (presuming a May 2008 issuance date for the new permit and June 2008 effective date) until June 2009. Furthermore, in this hypothetical, under the current permit stormwater treatment BMPs would have to be actually implemented by June 2008 when the Level Three report is submitted. This retreat is wholly inappropriate, and may violate the anti-backsliding provision of CWA § 402(o). It also contributes to violation of CWA § 402(p)(4)(A), which requires compliance with standards, including technology standards, within three years of permit issuance. *See, Puget Soundkeeper Alliance*, PCHB No. 02-162 (June 6, 2003) at 13.

PSA is also concerned that the draft permit retreats entirely from the requirement of a Level Three Response in the current permit to actually implement treatment BMPs when discharge pollutant levels are consistently elevated. The Level Three Response requirement in S4.C. of the current permit plainly contemplates that treatment BMPs are required. In the description of Level Three on page 26 of the current permit, "the permittee shall"... "implement additional source control, operational control and stormwater treatment best management practices ... within twelve months." In action item 6 of the Level Three Response, a waiver must be requested within a limited time for a permittee to get relief from the treatment requirement. Nothing in the proposed permit appears to require the implementation of treatment BMPs.

S9. Reporting and Recordkeeping

PSA supports the requirement of S9.A.2. that information about individual samples and results be included on DMRs.

PSA strongly objects to allowing monitoring results to be submitted once per year. This makes it very difficult for Ecology or the public to monitor permit compliance and whether permittees are satisfying monitoring and other requirements related to discharge quality. If a permittee is not collecting samples, either of the first flush in September or later throughout the wet season, there is no notification provided to Ecology of this problem until May, when the single annual DMR is required. At this point, it is too late to collect samples during that sampling period. Given that Ecology's penalties for failures to monitor are typically very small, this potentially creates an incentive for some permittees to not collect samples if they fear that sample results will show results above

benchmarks to postpone the expenses of taking corrective action. This is another serious enforcement problem, and PSA respectfully requests that the permit writing team consult with Ecology water quality enforcement staff about this permit requirement.

S9.A.7. includes a statement that failure to obtain the appropriate number of samples does not relieve the permittee of the responsibility of maintaining compliance with S4.B. and/or S6. What does this mean? How could failure to obtain the appropriate number of samples provide relief from monitoring requirements? More important, and unaddressed here, is what the failure to obtain the appropriate number of samples means with respect to the requirements of S8. PSA suggests that if a permittee fails to collect the requisite number of samples, uncollected samples should all be presumed to be above benchmarks for the purpose of S8, or the median of samples should be considered to be above benchmarks. Otherwise, a facility with poor stormwater management, inattention to permit requirements, and the probably resulting poor stormwater discharge quality may avoid triggering Step A Corrective Action requirements. This would be unfair to other permittees who do collect the required samples and would endanger water quality.

S10. Compliance with Standards

With respect to S10.B., PSA agrees with the statement on page 91 of the Fact Sheet that repeated exceedences of benchmarks provide evidence that a permittee has not implemented AKART. PSA sees a fundamental problem with the approach taken in this permit in that it requires, as it must, implementation of AKART through the SWPPP and BMPs and then, in responses to exceedences of benchmarks and thresholds, purports to allow additional time for these same BMPs which were required to implement AKART in the first place.

S13. Notice of Termination

PSA requests that Ecology carefully review the NOT Form to ensure that it accurately tracks the conditions in which termination is allowed. PSA also requests that termination of permit coverage not be automatic, but only allowed on Ecology notification following Ecology verification, by inspection or other reliable means, that the conditions for termination are satisfied.

G14. Upset

The third paragraph of G14. includes a reference to notification as required in S5.F. There is no S5.F. in this draft. Ecology should rewrite this condition to ensure that the notification requirement for an upset satisfies the requirements of 40 C.F.R. § 122.41(n)(3)(iii). *See, Associated General Contractors of Washington v. Ecology,* PCHB Nos. 05-157, -158, and -159 (Order Granting PSA's Fourth Motion for Partial Summary Judgment, Jan. 4, 2007).

G25. Bypass Prohibited

This section is sloppy and should be rewritten. The last sentence of G25.A. allows bypass if one of circumstances 1, 2, 3, or 4 is applicable. This does not mesh with the rest of G25.A., which includes 5 enumerated items, one of which (no. 3) qualifies when condition 2 can be used to allow bypass.

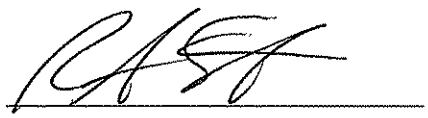
Furthermore, G25.A.3.c. refers to non-existent Condition S9.E. As with the Upset provision, Ecology should rewrite this condition to ensure compliance with federal notification requirements (40 C.F.R. § 122.41(m)(3)). *See, Associated General Contractors of Washington v. Ecology,* PCHB Nos. 05-157, -158, and -159 (Order Granting PSA's Fourth Motion for Partial Summary Judgment, Jan. 4, 2007).

Conclusion

While PSA appreciates the challenges facing Ecology in the issuance of this permit, we are profoundly disappointed with this draft. It represents a major backward step in requirements to protect water quality from one of the well-documented primary causes of its degradation. With this draft, Ecology is utterly failing to live up to its mission and to implement the law. PSA urges Ecology to reconsider its approach to this permit. A major rewrite, or at least a reversion to the draft permit issued earlier in 2007, is warranted.

Very truly yours,

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

By: 
Richard A. Smith

c: Dave Peeler (via email only)
Jay Manning (via email only)