# RESPONSE TO PUBLIC COMMENTS

## Draft Construction Stormwater General Permit

## Addendum to Fact Sheet: Appendix D

The Washington State Department of Ecology (Ecology) received public comments on the draft Construction Stormwater General Permit (CSWGP) that was released for public comment on July 1, 2020. Ecology also accepted oral testimony on the draft permit on August 4 and August 6, 2020, however, no oral testimony was received. Public comments were submitted by a range of stakeholders and interested parties, prior to the close of the public comment period on August 14, 2020.

Ecology has assembled summaries and excerpts from public comments into this document, and organized them by topic and/or permit condition. Ecology has provided a written response to comments on proposed permit conditions, and indicated where revisions were made to the CSWGP. Underlined language is used to indicate new final CSWGP language compared to the draft 2020 CSWGP.

Numerous commenters provided introductory statements and general comments along with more detailed questions and comments on specific permit conditions. These statements and comments provided important perspective and context that ultimately helped Ecology finalize the CSWGP.

Copies of all public comment letters and emails are posted on Ecology's Construction Stormwater General Permit website: http://www.ecology.wa.gov/programs/wq/stormwater/construction/index.html.

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# General Comments and Process

## Contaminated Sites

### Permit coverage should be required for contaminated sites

**Commenter:** Norman Peck

**Comment:**

A Construction Stormwater Permit should be required for construction work involving excavation, grading or soil movement at any site that is contaminated with hazardous substances as defined in MTCA (at or above MTCA cleanup standard levels). At any site contaminated with a hazardous substance at above MTCA cleanup standards where construction work or cleanup work occurs without a formal MTCA Order or Consent Decree, contaminants at the site should be identified to Ecology, and monitoring for those contaminants in stormwater should be required. In the alternative, a separate General or Site Specific Construction Stormwater Permit should be required at contaminated sites. Discharge monitoring of stormwater that discharges to groundwater should be monitored at contaminated sites.

**Response:**

Section S1.B.1.b of the general permit allows Ecology to cover any size construction activity under the permit based on the reasonable potential for a violation of water quality standards or a determination that the site is a significant contributor of pollutants to Waters of the State of Washington. Discharges must comply with Chapter 173-201A WAC (Surface Water Quality Standards), Chapter 173-200 WAC (Ground Water Quality Standards), Chapter 173-204 WAC (Sediment Management Standards), and the federal water quality criteria applicable to Washington (40 CFR Part 131.45). Certain contaminated construction site operators may be issued an Administrative Order, in companion with their permit coverage, requiring additional monitoring for any known constituents of concern in order to prevent discharges that may cause violations of any water quality standard. Condition G12 (Additional Monitoring) is based on Section 308 of the Clean Water Act, and 40 CFR 122.41(h); and allows Ecology to cover contaminated construction sites under the general permit.

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## Emergency Projects

### Need for clarification of compliance expectations

**Commenter:** Washington State Department of Transportation

**Comment:**

WSDOT understands that Ecology generally follows the federal Construction General Permit (CGP) requirements for emergency projects. However, the federal CGP only provides details for the Notice of Intent (NOI) process and initial Stormwater Pollution Prevention Plan (SWPPP) development. Since Ecology's permit is very different from the CGP, the compliance expectations (e.g., sampling and reporting) could be clarified to prevent confusion and ensure consistent expectations regionally.

**Response:**

Ecology cannot expedite the permitting process per WAC 173-226-130. Public notice requirements must be met before Ecology can issue permit coverage. Stormwater discharge from construction activity is not authorized until under permit coverage. If an operator proceeds with emergency construction work prior to obtaining the permit, the operator should function as though covered under the permit in regards to performing site inspections and monitoring, and developing an adequate Stormwater Pollution Prevention Plan (SWPPP), including implementation of proper Best Management Practices (BMPs). Every effort should be made to prevent stormwater from discharging off site or to a surface waterbody until permit coverage is obtained. If a discharge were to occur while the site remained unpermitted, the discharge should be sampled and results recorded in the site log book. Any discharges above 250 NTU should be reported to Ecology within 24 hours.

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# Construction-Support Activity

## Compliance concerns for construction-support areas

**Commenter:** Washington State Department of Transportation

**Comment:**

While the new language added to the definition for construction activity and the new definition for construction support activity appear consistent with the existing permit requirements, WSDOT would like to note these definitions relate to a long-standing topic of discussion between our agencies. WSDOT understands the permit authorizes specific discharges from support activities (provided appropriate controls are used), and uses contract specifications to require contractors to modify existing TESC plans to include off-site support areas they obtain outside of WSDOT's operational control. WSDOT continues to interpret off-site areas outside of our project right-of-way procured by contractors to be outside of our operational control, and as such, compliance concerns regarding these areas should be coordinated with the entity with operational control of those off-site areas.

**Response:**

The entity with operational control of all project areas, whether on- or off-site, should be the listed permittee. It is the responsibility of the permittee to maintain compliance with the permit for all areas covered under the permit. Ecology works directly with the permittee regarding any compliance concerns; however, ultimately the site owner can also be liable. In cases where a contractor is not listed as the permittee but has the day-to-day operational control, WSDOT would be responsible, as the permittee, for any non-compliance resulting from actions or inaction by the contractor. If WSDOT has concerns about liability of these areas and issues of non-compliance on behalf of the contractor, they should ensure permit coverage is transferred to the contractor.

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# Comments on Special Conditions

## S1 – Permit Coverage

### S1.B.1.a – Operators Required to Seek Coverage Under this General Permit

**Commenter:** Seattle Department of Transportation

**Comment**:

Please provide clarification on the threshold for requiring a CSGP. The section states that construction activity requires permit coverage if it results in 1-acre or more of ground disturbance and discharges stormwater to surface waters of the State. Seattle DOT was required to obtain a permit for a project that although has more than 1-acre of ground disturbance, only 0.25 acre of the project discharged to surface waters of the State, with the remaining area draining to the combined sewer system which discharges to a treatment plant operated by King County.

**Response:**

The CSWGP is a combined NPDES and State Waste Discharge General Permit. This combination allows Ecology to regulate discharges to waters of the state, including groundwater. 40 CFR 122.26 requires operators of construction activity with land disturbance greater than 1 acre, to obtain permit coverage in order to discharge stormwater to waters of the state (this does not include routine maintenance). The need to obtain permit coverage is based on the total disturbed acreage, not just the acreage contributing to a surface water discharge. If there is any potential for a project site that disturbs one acre or more to discharge to a receiving surface water, the general permit is required. Short-term, less than 5-acre sites may qualify for an exemption from permit coverage if they meet the conditions for Erosivity Waiver (S1.F). Many permitted sites discharge to a combination of groundwater, surface water, sanitary or combined sewers. If stormwater from a site does not have the potential to enter surface waters of the state under any condition (e.g. *all discharges* are sent to combined sewer), permit coverage is not required.

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## S2 – Application Requirements

### S2.A.1.c. Submitting the NOI

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition S2.A.1.c asserts that "[t]he operator must submit the NOI at least 60 days before discharging stormwater from construction activities …." Soundkeeper contends that a period of at least sixty days from application to discharge is essential to allow those concerned about the potential impacts of a proposed construction activity to evaluate those impacts and construction plans, and to either object to Ecology or file an appeal of permit coverage with the Pollution Control Hearings Board before construction discharges commence. However, Soundkeeper is concerned and somewhat confused by the timeline for permit coverage, which seems not to ensure that the NOI is submitted at least 60 days before discharge. S2.A.1.c, in its clause specifying the time of commencement of permit coverage, states that "coverage under the general permit will

automatically commence on the 31st day following receipt by Ecology of a completed NOI." Condition S2.B specifies that the NOI must be submitted before the start of the public notice period. The public notice period can be completed in approximately 38 days (2 publications in 8 days followed by a 30-day public comment period. Under this regime it seems that the 31-day timeline for automatic effectiveness of the permit may be completed before the 30-day comment period, nevermind 60 days after submission of the NOI. Is this correct? If so, why does the permit not ensure that public notice processes and the intended 60 days pass before CSGP coverage is automatically granted? If not, can you explain the steps and timing of the application process and how it assures that there will be no discharge until 60 days after NOI submission, and clarify S2.A.1.c?

**Response:**

The language revisions in S2.A.1.c were not intended to shorten the timeline before coverage is granted, but to clarify when the public notice should be posted in relation to submittal of the Notice of Intent (NOI). The requirement of an operator to submit the NOI at least 60 days prior to the discharge of stormwater from construction activity does not mean those concerned about potential impacts of a proposed construction activity have 60 days to evaluate the project, nor does it mean Ecology won't issue a permit before 60 days has elapsed. Rather, it was intended to allow adequate time for the typical general permit administration, public notice, and issuance process to be completed prior to the discharge commencing. The public notice requirement for an application for coverage under the CSWGP is limited to the time-period specified in WAC 173-226-130(5). The NOI submission is legally complete following the date of the second public notice, however, Ecology will not issue coverage to the applicant any sooner than the 31st day following this notice to allow a full 30 days for public comments and/or public hearing requests to be submitted to Ecology prior to issuing coverage.

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## S.2.A.1.d – Demonstrably Equivalent BMPs

**Commenter:** Phil Fortunato, ECO-3

**Comment:**

I think this minor change would make it clearer.

*If an applicant intends to use a Best Management Practice (BMP) selected on the basis of Special Condition S9.C.4 that is not on the approved ~~(~~"demonstrably equivalent" BMPs~~),~~ list, the applicant must notify Ecology of its selection as part of the NOI. In the event the applicant selects BMPs after submission of the NOI, it must provide notice of the selection of an equivalent BMP to Ecology at least 60 days before intended use of the equivalent BMP.*

**Response:**

Ecology has considered the suggested language but has decided not to revise the permit. There is not a specific list of BMPs that have been approved for use, but selected BMPs must be consistent with the BMP guidance provided in the Stormwater Management Manuals for Eastern and Western Washington. Any BMP not included in the manuals must be reviewed and approved by Ecology for equivalency, prior to use.

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## S2.A.1.e – Application Requirements for Contaminated Sites

**Commenter:** Washington State Department of Transportation

**Comment:**

WSDOT continues to interpret our Temporary Erosion and Sediment Control (TESC) plan and Spill Prevention Control and Countermeasures (SPCC) plan (used in conjunction) as equivalent to the Stormwater Pollution Prevention Plan (SWPPP). Therefore, it creates confusion to list them as different documents.

***Recommendation:*** Delete example iii as TESC and SPCC plans are WSDOT specific plans intended to be equivalent to the SWPPP, and referencing them is redundant with iv and adds confusion to a general permit.

**Response:**

Ecology has considered the comment and suggested revision and has agreed to delete the TESC example, since most operators under the permit address erosion and sediment control within their SWPPP. Keep in mind this list is not exhaustive and is not meant to be treated as a checklist. Ecology feels that resolution of this issue might also be accomplished by examining internal NOI review processes and clarifying that each site may have access to, and have prepared, different types of information in regards to onsite contamination and proper management. It is the responsibility of the regional permit manager to decide if the documentation regarding onsite contamination is sufficient to determine applicability of coverage under the general permit, regardless of the format in which the supplementary information is provided.

**Revision:**

i. List or table of all known contaminants with laboratory test results showing concentration and depth,

ii. Map with sample locations,

~~iii. Temporary Erosion and Sediment Control (TESC) plans,~~

~~iv~~iii. Related portions of the Stormwater Pollution Prevention Plan (SWPPP) that address the management of contaminated and potentially contaminated construction stormwater and dewatering water,

~~v~~iv. Dewatering plan and/or dewatering contingency plan.

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## S2.A.2 – Transfer of Coverage Form

**Commenter:** Washington State Department of Transportation

**Comment:**

WSDOT interprets the new language, (*When a current discharger (Permittee) transfers a portion of a permitted site, the current discharger must also indicate the remaining permitted acreage after the transfer*), as referring to the existing Transfer of Coverage (TOC) form and does not identify a separate notification process. In addition, this new language does not appear related to bullet ii and may warrant its own bullet (i.e., iii).

***Recommendation:*** If our interpretation of this new language is incorrect, please clarify the expectation. Designate this new language with a separate bullet if appropriate.

**Response:**

Though this language is not new (previously Section G9), WSDOT's interpretation is correct in that it does not identify a separate notification process. When a portion of a site is transferred via a partial transfer, the acreage remaining under the original operators control should be included on the transfer form. This is not directly related to bullet ii but is a standalone statement as it was in the previous permit version.

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### S2.B – Public Notice

**Commenter:** Washington State Department of Transportation

**Comment:**

The new language, (…*must be run after the NOI has been submitted*…) suggests the public notice must occur after a Permittee selects the "submit" button in the eNOI system. However, there is a difference between the NOI being submitted and the NOI being considered complete by Ecology, and this distinction can be particularly confusing on projects with existing contamination or discharges to impaired waters when supplemental documentation is required during the NOI process. The fact sheet provides a general definition for "completed application" but does not provide insight for interpreting the expectation of the new language. This comment is related to comment 6 and 10.

***Recommendation:*** If the expectation is to publish the public notice after the Permittee selects "submit" in the eNOI system, then no clarification is needed. However, if the expectation is to publish the public notice after the NOI is considered complete (i.e., after supplemental documentation is reviewed and accepted by Ecology), please clarify this expectation in the permit and fact sheet.

**Response:**

There has been no change to this timeline. The revised language was intended to clarify when the public notice should be posted in relation to submittal, rather than completion, of the NOI. WSDOT's interpretation that after the Permittee selects "submit" in the eNOI system, then the initial public notice can be posted, is correct. Administratively, a NOI is not considered complete until at least the close of the public comment period.

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## S3 – Compliance with Standards

### S3.A – Discharges must not cause or contribute to a violation of standards

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition S3.A states that "[d]ischarges must not cause or contribute to a violation of [applicable water quality standards]. Discharges not in compliance with these standards are not authorized." On page 29, the draft fact sheet clarifies that "[t]his section requires that discharges associated

with construction activity are subject to all applicable state water quality and sediment management standards. Discharges that are not in compliance with these standards are not authorized by the permit and are subject to enforcement action." Thus it seems that Ecology sensibly intends that discharges causing or contributing to violation of water quality standards in receiving waters should be subject to enforcement for permit violation, consistent with the design and intention of the NPDES permit program and its statutory mandates. Soundkeeper is concerned, however, that the language of S3.A, quoted above, could be found inadequate to allow enforcement, particularly in a citizen suit in federal district court, of the intended prohibitory permit condition due to its curious and uncertain phrasing. Specifically, Soundkeeper requests that the permit language be changed to state "[d]ischarges not in compliance with these standards *violate this condition of the permit*", rather than "are not authorized." *Non-authorization* by a permit may not be the same as *violation* of a permit.

This suggested language change would also bring Condition S.3.A. into harmony with Condition G1:

> All discharges and activities authorized by this general permit must be consistent with the terms and conditions of this general permit. *Any discharge of any pollutant more frequent than or at a level in excess of that identified and authorized by the general permit must constitute a violation of the terms and conditions of this permit*. (italics added).

**Response:**

Ecology agrees that discharges causing or contributing to a violation of water quality standards are a violation of the permit. Additionally, any discharges not authorized by the permit are a violation of the permit. We have considered the suggested revision and decided to revise the language in accordance with our other general permits in order to clarify this section.

**Revision:**

Discharges must not cause or contribute to a violation of surface water quality standards (Chapter 173-201A WAC), ground water quality standards (Chapter 173-200 WAC), sediment management standards (Chapter 173-204 WAC), and human health-based criteria in the Federal water quality criteria applicable to Washington. (40 CFR Part 131.45) Discharges <u>that are</u> not in compliance with these standards are ~~not authorized~~ <u>prohibited.</u>

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## S3.C – Presumptive Approach

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition S3.C asserts Ecology's presumption that "a Permittee complies with water quality standards unless discharge monitoring data or other site-specific information demonstrates that a discharge causes or contributes to a violation of water quality standards when the Permittee complies with [all permit conditions and implements required BMPs.]" Soundkeeper does not understand the basis, intent, or function of this asserted presumption, and requests that it be deleted from the permit.

The draft fact sheet (at p. 13) asserts that Ecology's "presumptive approach" is consistent with 40 CFR 122.44(k)(3) which allows permits to rely on BMPs to control pollutants when it is infeasible to derive appropriate numeric effluent limits." Soundkeeper does not see how this regulatory provision justifies the "presumptive approach." Water quality standards objectively describe the chemical, biological, and physical qualities of receiving waters necessary to meet statutory goals of water quality. Compliance with these standards, comprising narrative and numeric criteria and anti-degradation protections, can only be measured or determined by objective means related to the actual quality of the water. Therefore federal regulations require water quality-based effluent limitations in NPDES permits to be numeric (i.e., objective) unless it is infeasible (i.e., not possible or practicable because of scientific uncertainty) to do so. In such case, 40 CFR 122.44(k)(3) allows the use of narrative best management practice requirements in lieu of numeric effluent limitations. This concession does not support or warrant a presumption that compliance with such narrative limitations ensures or equates to non-violation of objective water quality standards. The mandate to avoid discharges that objectively violate water quality standards should not be conflated with the entirely distinct mandate to implement AKART.

Indeed, WAC 173-201A-510(3)(b) specifies a regime for implementing water quality-based effluent limitations for stormwater discharges that is inconsistent with Ecology's asserted "presumptive approach":

> Best management practices shall be applied so that when all appropriate combinations of individual best management practices are utilized, violation of water quality criteria shall be prevented**. If a discharger is applying all best management practices appropriate or required by [Ecology] and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, selected or approved by the department, to achieve compliance with water quality criteria. Best management practices established in permits, orders, rules, or directives of the department shall be reviewed and modified, as appropriate, so as to achieve compliance with water quality criteria.**

In other words, implementation of BMPs is to be reviewed against objective performance (i.e., quality of discharge) to see whether additional or improved BMPs are needed to objectively comply with water quality criteria. Implementation of BMPs required by Ecology is *not* entitled to a presumption of compliance with water quality standards.

Aside from its lack of factual basis and regulatory support, Soundkeeper does not understand the purpose or intended function of the S3.C statement of presumption. Please explain.

**Response:**

Pages 15, 16, 17 and 18 of the Fact Sheet further explain the rationale behind the presumptive approach. *Associated Gen. Contractors of Wash. v. Ecology*, PCHB Nos. 05-157, 05-158, and 05-159 (2007) affirms the use of numeric benchmarks as an indication of potential violation of water quality standards. The CSWGP continues to require compliance with a narrative water quality-based effluent limitation that utilizes stormwater sampling to assess BMP/SWPPP performance against numeric benchmarks which, if exceeded, require corrective actions within prescribed timeframes. The Pollution Control Hearings Board has affirmed that this BMP-based framework for stormwater general permits is consistent with state and federal law.

The CSWGP also 1) requires compliance with numeric water quality-based effluent limits for discharges to impaired waterbodies (303(d) listed, Category 5 listings for turbidity, fine sediment, phosphorus and pH), 2) requires compliance with TMDLs, and 3) specifically prohibits discharges that violate water quality standards for surface and groundwater, sediment management standards and human health-based criteria. Separate from these conditions, Ecology requires preparation and implementation of an adequate SWPPP and has adopted and added to EPA's list of prohibited discharges to help ensure compliance with state AKART requirements (40 CFR § 450.21).

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# S4 – Monitoring Requirements, Benchmarks, and Reporting Triggers

## S4.B.2 and S.4.B.4 – Quality of Stormwater Discharges

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Conditions S4.B.2. and S4.B.4.g.iv. purport to require improvement, maintenance, or repair of BMPs where "necessary" "to improve the quality of stormwater discharges." This is vague, unworkable, and unenforceable. What does it mean that a BMP change is "necessary… to improve the quality of stormwater discharges"? Is the requirement triggered only if a benchmark value is exceeded? Is the requirement triggered if the BMP change would result in a small marginal improvement in discharge quality? Is a BMP change required if it would substantially improve discharge quality but the suspect construction activity is nearly complete?

**Response:**

If a discharge exceeds a permit benchmark, permittees must take action (i.e. adaptively manage the project) to bring the discharge into compliance. A repeated discharge in exceedance of benchmarks after failed attempts to correct would be a violation of the terms and conditions of this permit. The requirements in S4.B.2 and S4.B.4.iv are part of the weekly inspection component and should, at the very least, be triggered when permit benchmarks are exceeded. Ecology does not assume that a discharge in exceedance of permit benchmarks will automatically violate water quality standards and therefore enforcement may not be warranted. Maintenance of BMPs is necessary when they are not functioning as designed or properly installed. The permit requires staff knowledgeable in the principles of erosion and sediment control to complete inspections and should therefore be able to determine the necessity of improvement, maintenance, or repair. If numeric effluent limits are exceeded, this is a permit violation and thus immediately enforceable.

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## S4.C – Turbidity/Transparency Sampling Requirements

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition S4.C and Table 3 specify monitoring requirements and exempt sites that disturb less than 1 acre from weekly sampling requirements. Soundkeeper objects to this exemption as substantially weakening the permit's water quality protections from discharges from these sites. The weekly turbidity/transparency monitoring requirement couples with the benchmarks and adaptive management requirements to form a crucial part of the CSGP's ability to ensure that

construction stormwater discharges are properly managed to avoid water quality harm. What portion of permitted sites overall are less than one acre and so exempt from sampling under this provision? On what basis does Ecology presume that discharges from these smaller construction sites are either unlikely to exceed turbidity benchmarks or adversely affect water quality? Does Ecology for some reason believe that BMPs implemented at smaller sites do not need to be held to objective measures of effectiveness based on discharge quality? The permit already allows sites less than 5 acres to substitute inexpensive and simple transparency tube monitoring for turbidity sample analysis. This is an easy, cheap, and quick monitoring method – is it considered too burdensome for less than 1 acre sites in comparison to potential environmental protection afforded by monitoring? On what basis?

**Response:**

Federal Phase I and II stormwater regulations require permit coverage for industrial activity (construction sites with greater than 5 acres of land disturbance) and small construction sites, respectively. Small construction activity is defined in 40 CFR 122.26 as construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Permit coverage is typically only *required* for less-than-one acre sites which are part of a larger common plan of development one acre or greater (S1.B.1.a), or when Ecology determines the site is a significant contributor of pollutants (S1.B.1.b). On a case by case basis, individual <1 acre construction sites may be required to perform stormwater sampling per Condition G12; whether they are part of a 1+ acre common plan of development or sale, or were required to obtain permit coverage as a significant contributor of pollutants per S1.B.1.b.

Ecology has determined that discharges from <1 acre sites (that have not been deemed significant contributors of pollutants) are adequately controlled by the other aspects of permit compliance, including but not limited to BMPs, inspections, and visual monitoring of stormwater discharges; the PCHB affirmed this approach in *Associated Gen. Contractors of Wash. v. Ecology*, PCHB Nos. 05-157, 05-158, and 05-159 (2007). During the previous permit cycle, only about 4.5% of permittees indicated they were disturbing <1 acre of soil.

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## S4.C.5.b.iii – Background Turbidity

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition S4.C.5.b.iii. refers to "background turbidity" without providing any definition or guidance on how or where to measure or determine "background turbidity." Such guidance seems essential, and Ecology should provide instruction and, at least, a definition of "background turbidity." The language used in Condition S8.C.2. may be adequate for this purpose if incorporated for S4.C.b.iii.

**Response:**

Ecology agrees with the incorporation of the language in S8.C.2 into S4.C.b.iii. and will revise the permit accordingly.

**Revision:**

c) The Permittee has demonstrated compliance with the water quality standard for turbidity:

1) No more than 5 NTUs over background turbidity, if background is less than 50 NTUs, or

2) No more than 10% over background turbidity, if background is 50 NTUs or greater; or

**Note background turbidity in the receiving water must be measured immediately upstream (upgradient) or outside the area of influence of the discharge.

d) The discharge stops or is eliminated.

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# S8 – Discharges to 303(d) or TMDL Waterbodies

## S8.B.3 – Coverage Eligibility

**Commenter:** Washington State Department of Transportation

**Comment:**

WSDOT is unclear on how and when the applicant is made aware Ecology has made an, "affirmative determination that the discharge will not cause or contribute to the existing impairment or exceed the TMDL." It is WSDOT's understanding that Ecology reviews supplemental documentation requested during the NOI process to make this affirmative determination and this is conveyed to the applicant indirectly by way of permit issuance. However, it is unclear if this affirmative determination affects the public notice timeline requirements in S2.B (comment 5).

***Recommendation:*** Please add clarification to S2.B if Ecology's *affirmative determination* is an important determination prior to publishing the public notice.

**Response:**

The determination does not affect public notice timeline requirements. WSDOT is correct that the permittee is indirectly notified of this affirmative determination by way of obtaining permit coverage. If Ecology were to conclude that a site is not eligible for coverage under the general permit, the applicant would be notified in writing.

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# S9 – Stormwater Pollution Prevention Plan

## S9.D.5.d, e, and f – Soil covering timelines and applicability to stockpiles

**Commenter:** Washington State Department of Transportation

**Comment:**

It is WSDOT's understanding that the soil covering timelines in S9.D.5.d for exposed and unworked soils is applicable to stockpiles. Further, it is WSDOT's understanding that if stockpiles are being worked and in compliance with S9.D.5.e and f, that stockpiles do not need to be covered at the end of every day.

***Recommendation:*** Please clarify that S9.D.5.d is applicable to stockpiles or clarify stockpile covering expectations in S9.D.5.f.

**Response:**

WSDOT's interpretation that timelines in S9.D.5.d should be followed for soil stockpiles, is correct. Stockpiles which are being worked and are otherwise in compliance with S9.D.5 do not need to be covered at the end of each day but should be stabilized when appropriate per S9.D.5.e. See BMP for Topsoiling/Composting in the Stormwater Management Manuals for Washington for additional guidance.

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### S9.D.9.b – Control Pollutants

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Soundkeeper is pleased that the required SWPPP includes requirements for covering, containing, and protecting from vandalism "all chemicals, liquid products, petroleum products, and other materials that have the potential to pose a threat to human health or the environment." Condition S9.D.9.b. Soundkeeper suggests that the permit should also require permittees to report to Ecology the presence or storage of hazardous chemicals at the site, including the relevant material safety data sheets, to allow Ecology to access this information in event of accident, catastrophic event, or other potential release at regulated sites.

**Response:**

Ecology agrees that this section of the permit could be more specific regarding the presence or storage of hazardous materials on-site and will revise the permit accordingly. There is additional guidance regarding hazardous chemical storage included in the Stormwater Management Manuals.

**Revision:**

b. Provide cover, containment, and protection from vandalism for all chemicals, liquid products, petroleum products, and other materials that have the potential to pose a threat to human health or the environment. Minimize storage of hazardous materials on-site. Safety Data Sheets (SDS) should be supplied for all materials stored. Chemicals should be kept in their original labeled containers. On-site fueling tanks must include secondary containment. Secondary containment means placing tanks or containers within an impervious structure capable of containing 110% of the volume of the largest tank within the containment structure. Double-walled tanks do not require additional secondary containment.

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## Comments on General Conditions

### G11 – Other Requirements of 40 CFR

**Commenter:** Puget Soundkeeper Alliance

**Comment:**

Condition G11. Includes an impermissible new second sentence purporting to limit the incorporation into the permit of "all other requirements of 40 CFR 122.41 and 122.42" to "requirements established on or before the date this permit was issued." This violates the 40 CFR

122.4(a) prohibition on issuance of an NPDES permit that does not provide for compliance with regulations promulgated under the CWA, and the 40 CFR 123.25(a)(12) and (13) requirements for Ecology to implement provisions 40 CFR 122.41 and 122.42, without limitation based on permit issuance date.

**Response:**

Ecology agrees with the removal of the proposed sentence addition. It was not the intent of the statement to prevent compliance with regulations promulgated under the CWA and understand how this could be interpreted inconsistently or incorrectly.

**Revision:**

All other requirements of 40 CFR 122.41 and 122.42 are incorporated in this permit by reference. ~~The permittee is subject to requirements established on or before the date this permit was issued.~~

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# Comments on Appendices

## Appendix A – Definitions

### Final Stabilization

**Commenter:** Washington State Department of Transportation

**Comment:**

The subjective nature and variable natural conditions of establishing "permanent vegetative cover" in the definition of final stabilization can lead to challenges during Notice of Termination (NOT) procedures. As stated in WSDOT's comment letter for the draft SWMMs, our Standard Specifications for 8-02.3(9)E Protection and Care of Seeded Areas have been updated to improve contract enforcement of this expectation. While WSDOT appreciates recent updates made to Ecology's Stormwater Management Manuals to provide more measurable performance expectations that are easier to enforce contractually, we believe this expectation could be further improved to prevent NOT challenges.

Recommendation: To help ensure stakeholders are aware of the new percentage vegetative cover performance expectations in the SWMMs, please consider editing the new language in the definition for final stabilization to state, "See the applicable Stormwater Management Manual for more information on vegetative cover expectations (BMP C120) and equivalent permanent stabilization measures."

WSDOT also recommends Ecology incorporate language clarifying how percent cover will be evaluated during the NOT site inspection. WSDOT proposes adjacent areas with established vegetation under similar conditions be considered in the determination of what is feasible in revegetated areas; this will accommodate factors such as:

- Patchy coverage may represent natural conditions (even with topsoil amendments).
- Vegetation may be absent in shaded area.

- Root mass should be considered vegetative cover because it provides erosion and sediment control benefits.

**Response:**

Ecology agrees with the additional language clarifying that vegetative cover expectations are also included in the Stormwater Management Manuals and will revise the permit accordingly. Since the manuals and CSWGP are updated on different timelines and since specific BMP numbers are subject to change and can vary between regional manuals, we have decided not to include the direct reference to the BMP number. Ecology agrees that consistent expectations for Notice of Termination (NOT) approval are important and will explore the best way to achieve this through continued education of field staff.

**Revision:**

***Final Stabilization*** (same as fully stabilized or full stabilization) means the completion of all soil disturbing activities at the site and the establishment of a permanent vegetative cover, or equivalent permanent stabilization measures (such as pavement, riprap, gabions, or geotextiles) which will prevent erosion. See the applicable Stormwater Management Manual for more information on vegetative cover expectations and equivalent permanent stabilization measures.

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## Numeric Effluent Limit

**Commenter:** Washington State Department of Transportation

**Comment:**

The term *numeric effluent limit* is used throughout the permit, in the definition for benchmark, and is an important definition for understanding compliance expectations.

***Recommendation:*** Add a definition for numeric effluent limit.

**Response:**

Section 502(1) of the Clean Water Act defines effluent limitation as *any restriction established by a state or the Administration on the quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance*. This is stated in the permit Fact Sheet in the Proposed Permit Limits section. This and subsequent sections of the Fact Sheet discuss numeric/narrative, technological, and water quality based effluent limits, the differences between them, and where they apply in the permit.

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# Comments on the Fact Sheet

**Commenter:** State of Washington Department of Transportation

**Comment:**

The fact sheet states, “the permit application must also include a certification that the public notice requirements have been met”, which conflicts with the expectation to publish public notice after the NOI has been submitted (see comment 5).

***Recommendation:*** Please reconcile and clarify the public notice and certification timelines and expectations in the permit and fact sheet.

**Response:**

Ecology agrees that the language in the fact sheet may add to confusion in regards to public notice and permit coverage timelines. This should indicate that public notice requirements will be met, rather than have already been.

**Revision:**

*“the permit application must also include a certification that the public notice requirements ~~have been~~ will be met.”*

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