

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

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

August 14, 2020

Noel Tamboer
Washington Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

Re: Puget Soundkeeper Alliance's comments on draft Construction Stormwater General Permit

Dear Noel Tamboer:

These comments on the Department of Ecology's 2020 draft Construction Stormwater General Permit ("CSGP") are submitted on behalf of Puget Soundkeeper Alliance (Soundkeeper). Soundkeeper is a water quality focused grassroots community organization founded in 1984. Soundkeeper's mission is to protect and preserve the waters of Puget Sound. Representing over 3,000 members, supporters, volunteers and activists, Soundkeeper works to meaningfully decrease pollutants reaching the Sound by actively monitoring Puget Sound water quality, enforcing clean water laws, improving policies and regulations, preventing pollution and cleaning up waterways. Soundkeeper is profoundly concerned with the health of the Puget Sound and surrounding waterways.

The CSGP is an important general permit intended to ensure that construction sites across the state implement essential controls on stormwater runoff to protect water quality from potentially serious impacts. Soundkeeper commends Ecology for its efforts to timely reissue the CSGP, and for attempts to ensure that the water quality protection and AKART statutory mandates are implemented. Soundkeeper generally supports Ecology's determination to reissue the CSGP with only minor changes. Soundkeeper urges Ecology to clarify and strengthen portions of the permit as discussed in these comments.

Comment 1

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.?

Comment 2

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).

Comment 3

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.

Comment 4

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?

Comment 5

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?

Comment 6

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.

Comment 7

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.

Comment 8

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.

Sincerely,

SMITH & LOWNEY, PLLC

By: s/Richard A. Smith
Richard A. Smith