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No. _____

Case #: 1029811

Court of Appeals No. 85665-1-I

**SUPREME COURT
OF THE STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE, Respondent,

v.

STATE OF WASHINGTON, POLLUTION CONTROL
HEARINGS BOARD, Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
Respondent,

and

BNSF RAILWAY COMPANY, THE NORTHWEST
SEAPORT ALLIANCE, PORT OF SEATTLE, PORT OF
TACOMA, PACIFIC MERCHANT SHIPPING
ASSOCIATION, and SSA TERMINALS, LLC, Petitioners.

PETITION FOR REVIEW

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I. INTRODUCTION

This case involves issues of public significance impacting industrial and municipal facilities throughout Washington. The case arises from the 2020 Industrial Stormwater General Permit (ISGP), a National Pollutant Discharge Elimination System (NPDES) general permit issued by the Washington Department of Ecology pursuant to the Clean Water Act (CWA) and the Washington Water Pollution Control Act (WPCA). The permit applies to approximately 1,200 industrial facilities across the state, nearly half of which are transportation facilities. Those transportation facilities include the Petitioners, who own or operate marine, intermodal, and rail facilities essential to the movement of goods and passengers throughout Washington and internationally.

Here, the Pollution Control Hearings Board (PCHB) granted summary judgment to the Petitioners, correctly holding that the ISGP's plain language does not expand coverage requirements at transportation facilities beyond the "industrial

activities” specified in EPA regulations – i.e. the permit does not cover areas where no industrial activity takes place. The PCHB’s interpretation of the permit’s scope was identical to that rendered by a federal court in a recent CWA enforcement action. *See Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, No. C-17-05016 BHS, 2020 WL 6445825, at *9-10 (W.D. Wash. Nov. 3, 2020) (not reported) (*APM Terminals*). But the Court of Appeals reversed, interpreting the ISGP to cover the *entire* footprint of a transportation facility, regardless of where industrial activities take place. In doing so, the court effectively read multiple citations to EPA’s regulation out of the permit, in conflict with state court decisions requiring that the permit be interpreted as a whole.

The court’s decision impacts not only ISGP transportation facilities, because the ISGP is one of 15 general permits issued and administered by Ecology. *All* entities operating pursuant to Ecology-issued general permits, including construction facilities, WSDOT, Sound Transit, counties and

municipalities, ports, fruit packing, animal feeding operations, and boatyards, will be impacted by the court's decision. In an issue of first impression in Washington courts, the court acted contrary to federal case law, holding that general permits should be interpreted as regulations subject to deference, rather than as contracts. Under the court's decision, interpretation of ambiguous language in *any* general permit will require that a court give deference to Ecology's after-the-fact subjective statements of intent. General permit permittees can no longer rely on permit language to determine the permit's conditions.

In short, this case presents critical issues of public transparency, general permit interpretation, and science-based stewardship. The Court of Appeals decision meets the RAP 13.4 criteria for review.

II. IDENTITY OF PETITIONERS

Petitioners are ISGP Permittees The Northwest Seaport Alliance, Port of Seattle, Port of Tacoma, BNSF Railway Company, SSA Terminals, LLC, and Pacific Merchant

Shipping Association (collectively, Permittees).

III. CITATION TO COURT OF APPEALS DECISION

The Permittees seek review of the Court of Appeals, Division I published decision, dated March 18, 2024, and attached as Appendix A reversing the PCHB's order granting summary judgment on Legal Issue 11.

IV. ISSUES PRESENTED FOR REVIEW

1. Where a court finds the language of an Ecology-issued NPDES general permit ambiguous, should the permit be interpreted like a contract, consistent with the routine practice of federal courts and the PCHB, or like a regulation, with deference given to Ecology's subjective statements of the permit's intent?
2. Does the plain language of the ISGP, with its multiple references to the definition of industrial activity in 40 C.F.R. § 122.26(b)(14)(i-xi), limit the scope of coverage at Permittees' transportation facilities to the industrial activities identified in 40 C.F.R. § 122.26(b)(14)(viii)?

V. STATEMENT OF THE CASE

A. The CWA and NPDES Permit Program.

The CWA, 33 U.S.C. § 1251-1388, prohibits the discharge of pollutants from a point source without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a). In 1973, the EPA delegated to Washington the responsibility for administering the NPDES permit program. RCW 90.48.260. Ecology also has state law authority to issue waste discharge permits under the WPCA, RCW Ch. 90.48.

Regulated entities may be required to operate under either an individual permit, specific to the permittee's discharges, or a general permit covering multiple dischargers in a designated category or geographic area. *See* 40 C.F.R. §§ 122.2, 122.28(a); WAC 173-220-020. The ISGP is a statewide NPDES general permit applying to approximately 1,200

industrial stormwater dischargers. CP 1036.¹ It is a state/federal permit issued under both the CWA and the WPCA. WAC 173-226-010; CP 731. NPDES permits must be reissued every five years. 40 C.F.R. § 122.46(a). The ISGP is one of 15 general permits issued by Ecology.

Individual and general permit issuance require a nearly identical public process. For each, Ecology must issue a draft permit with a “fact sheet” detailing the permit’s provisions and any material changes, give public notice, hold a 30-day comment period, and respond to comments. *See* WAC 173-220-050, 060, 070 (individual); WAC 173-226-110, 130, 140, 170 (general). The process may include public hearings. WAC 173-220-090, 100 (individual); WAC 137-226-150 (general). The administrative appeal process for individual and general permits is also identical: each type of permit may be appealed to the

¹ The ISGP is at CP 58-130. Relevant pages are attached as Appendix B.

PCHB. *See* WAC 173-220-225 (individual); WAC 173-226-190 (general).

Penalties for permit noncompliance range from financial penalties to permit revocation. 33 U.S.C. § 1342(b)(1)(C); 40 C.F.R. §§ 122.41(a), 122.64; RCW 90.48.144(3), 90.48.120. Federal permittees are also subject to CWA civil and criminal enforcement actions and third-party citizen suits seeking injunctive relief, attorney's fees, and civil penalties of up to \$66,712 per violation, per day. 33 U.S.C. §§ 1319, 1365; 40 C.F.R. § 19.4.

B. Permittee Transportation Facilities.

The Northwest Seaport Alliance (NWSA) is the marine cargo operating partnership of the Port of Seattle and Port of Tacoma. Together, the two ports constitute one of the largest container gateways in North America. CP 499. Under RCW Ch. 53 Washington ports are charged with creating jobs and growing the economy. *See* CP 2117; RCW 53.04.010. Ports prepare economic development programs designed to foster

trade, industrial development, critical infrastructure, imports/exports, tourism, local, state, and federal tax revenue, and entrepreneurial capacity. CP 2117. Ports advance this program by, in part, making long-term investments in critical infrastructure. Making major investments, such as reconstructing wharfs to treat stormwater, requires long-term planning and clear, foreseeable regulatory requirements. *Id.* Major changes in regulatory requirements challenges the ports' abilities to fulfill the legislature's intent.

BNSF Railway Company (BNSF) owns and operates rail yards and other rail facilities throughout Washington state, including 12 facilities covered by the ISGP. CP 2112.

SSA Terminals, LLC's subsidiaries operate four of the NWSA's marine cargo terminals. Pacific Merchant Shipping Association is an independent association representing owners and operators of marine terminals in Washington. Opinion at 11-12 n. 5.

C. Under 40 C.F.R. § 122.26(b)(14)(viii) NPDES Permits Regulating Stormwater from Transportation Facilities Apply to Only Those Portions of Facilities Where Industrial Activity Takes Place.

Recognizing the difficulties of regulating stormwater, Congress exempted from the NPDES program most point-source discharges composed entirely of stormwater. 33 U.S.C. § 1342(p)(1). Only certain stormwater discharges require an NPDES permit, including stormwater “associated with industrial activity.” 33 U.S.C. § 1342(p)(2).

EPA defined the phrase “stormwater discharge associated with industrial activity” as stormwater “directly related to manufacturing, processing or raw materials storage areas at an industrial plant” and excluded areas that are separate from the “plant lands” used for industrial activities. 33 U.S.C. § 1342(p)(4)(A); 40 C.F.R. § 122.26(b)(14).

EPA’s rule then identifies the 11 categories of regulated industrial activities including exemptions and clarifications. 40 C.F.R. § 122.26(b)(14)(i–xi). Category eight is “transportation

facilities” that have “vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.” 40 C.F.R. § 122.26(b)(14)(viii). The rule limits permit coverage at transportation facilities to only those portions where “industrial activity” takes place:

Only those portions of the [transportation] facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations or otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity.

Id. (emphasis added).

D. The ISGP’s Plain Language Limits Coverage of Transportation Facilities to Those Portions of Facilities Identified in 40 C.F.R. § 122.26(b)(14)(viii).

The ISGP begins with Special Condition S1 which describes who must apply for the permit. The first sentence says the ISGP applies to “*industrial activities*,” a defined term. CP 66. ISGP Appendix 2 defines the term “industrial activity” as “the 11 categories of industrial activities identified in 40 C.F.R. § 122.26(b)(14)(i-xi)” or “any *facility* conducting any activities

described in Table 1.” CP 120. The “industrial activity” definition describes Table 1 as “the 11 categories of industrial activities identified in 40 C.F.R. § 122.26(b)(14)(i-xi) in a different format.”:

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

CP 120. The “industrial activity” definition thus twice references the federal limiting regulation in 40 C.F.R. § 122.26(b)(14), which includes the language in 122.26(b)(14)(viii) specific to transportation facilities.

E. Procedural Background.

The Permittees and Puget Soundkeeper Alliance (PSA) appealed the 2020 ISGP to the PCHB in December 2019. The PCHB granted the Permittees’ motion for summary judgment on Issue 11, finding that the ISGP was unambiguous and that its

plain language does not expand coverage beyond those industrial activities specified in 40 C.F.R. § 122.26(b)(14)(viii). CP 3849-50. The Board did not reach Issue 12, regarding whether the purported expansion of the ISGP's scope of coverage was unreasonable or unlawful due to its failure to comply with procedural requirements for NPDES permitting, concluding that its ruling in the Permittees' favor on Issue 11 rendered Issue 12 moot. *Id.* All permittees subsequently settled the remaining issues with Ecology, and the PCHB issued an order of dismissal. CP 29.

On PSA's appeal, the court reversed the PCHB. First, the court agreed with the PCHB that the ISGP is unambiguous but disagreed with the Board's interpretation of the permit's language. Second, the court held that if the ISGP was ambiguous, it should be interpreted like a regulation, with deference given to Ecology's subjective interpretation of the permit. Opinion at 23. The court remanded to the PCHB with instructions to grant summary judgment on Legal Issue 11 in

favor of Ecology and PSA and reach the merits of Legal Issue

12. Opinion at 26.

The Court of Appeals decision is a final decision terminating review as to Issue 11, and the Permittees seek review in this Court pursuant to RAP 13.4.

VI. ARGUMENT

A. The Court of Appeals' Holding That General Permits Should Be Interpreted Like Regulations Presents an Issue of First Impression of Substantial Public Interest Impacting All Washington General Permit Permittees.

In holding that an ambiguous general permit should be interpreted like a regulation rather than a contract, the court misinterpreted federal case law and rendered a ruling that will have a substantial impact on the thousands of permittees operating statewide pursuant to Ecology-issued general permits.

The PCHB routinely interprets NPDES permits like contracts. *See Cedar Grove Composting, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 19-014c, 2021 WL 4432571, at *15 (July 7, 2021); *Kaiser Aluminum & Chem. Corp. v. Dep't of Ecology*, PCHB No. 97-126, 1997 WL 804283, at *4 (Nov.

21, 1997). But the issue of whether a general permit should be interpreted like a contract or a regulation is a matter of first impression in Washington courts. This Court regularly accepts review of such significant issues of first impression and should do so here. *See, e.g., State v. Taylor*, 193 Wn.2d 691, 693, 444 P.3d 1194 (2019); *Tabingo v. American Triumph LLC*, 188 Wn.2d 41, 391 P.3d 434 (2017).

Federal courts interpret NPDES permits “like any other contract.” *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles* (“L.A. County”), 725 F.3d 1194, 1204 (9th Cir. 2013); *See also Nw. Env’tl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995). “If the language of the permit, considered in light of the structure of the permit as a whole, ‘is plain and capable of legal construction, the language alone must determine the permit’s meaning.’” *L.A. County*, 725 F.3d at 1204-05 (quoting *Piney Run Pres. Ass’n v. City Comm’rs of Carroll Cnty., Md.*, 268 F.3d 255, 270 (4th Cir. 2001)).

Both the PCHB and a recent federal court decision, *APM Terminals*, relied upon *L.A. County* and interpreted the ISGP like a contract. In fact, before changing its position in the Court of Appeals, even PSA asserted that, as with all permits, “[t]he [ISGP] is interpreted like a contract.” CP 2546 at 15:3-7. *See also* CP 3651-52.

The Court of Appeals ignored *L.A. County*. Rather than following the practice of the federal courts and the PCHB, the court created a distinction between interpretation of general permits and individual permits, implying that federal courts only interpret *individual* permits like contracts. Opinion at 16-18. The court is incorrect. *L.A. County* itself involved a general permit: a municipal separate storm sewer system permit covering the county, a flood control district, and 84 municipalities. *L.A. County*, 725 F.3d at 1196, 1199.

Moreover, California federal district courts routinely cite *L.A. County* and interpret the California NPDES General Industrial Stormwater Permit like a contract. *See, e.g., San*

Diego Coastkeeper v. Pick-Your-Part Auto Wrecking, No. 22-CV-1693 TWR (DDL), 2023 WL 4879832, at *8 (S.D. Cal. July 31, 2023); *Friends of Outlet Creek v. Grist Creek Aggregates, LLC*, No. 16-cv-00431-JSW, 2018 WL 2573139, at *8 (N.D. Cal. April 23, 2018) (not reported); *Coastal Env'tl. Rights Found. v. American Recycling Int'l Inc.*, No. 17-cv-00425-BAS-JMA, 2017 WL 6270395, at *8 (S.D. Cal. Dec. 8, 2017) (not reported); *Wishtoyo Found. v. Magic Mountain LLC*, No. CV 12-05600 GAF-MANx, 2014 WL 12569364, at *3 (C.D. Cal. March 14, 2014) (not reported).

Rather than acknowledging *L.A. County*, the Court of Appeals relied entirely on *Alaska Community Action on Toxics v. Aurora Energy Services* 765 F.3d 1169 (9th Cir. 2014), which involved interpretation of the Multi-Sector Industrial Stormwater Permit issued by EPA rather than a state-issued general permit such as the ISGP.² Although the case held that

² EPA administers the NPDES program in Alaska.

the EPA permit should be interpreted like a regulation, it contained no discussion of extrinsic evidence, agency intent, or agency deference. *Id.* at 1172-73. Nor did it suggest that general permits should be interpreted any differently from individual permits.

In fact, there is no substantive difference between the procedures used by Ecology to issue general and individual permits that would warrant analyzing general permits like regulations and individual permits like contracts. Although the Court of Appeals pointed to state rules providing for public process and administrative appeals for general permits (Opinion at 5, 17-18), it failed to acknowledge virtually equivalent regulations governing the issuance and appeal of individual permits. *See supra* at 6-7.³

³ The primary differences are that Ecology must issue a preliminary determination that it intends to issue a general permit (WAC 173-226-060) and prepare an economic impact analysis on draft general permits covering small businesses (WAC 173-226-120).

Nor is there support for the notion that Ecology's issuance of individual permits contains an element of negotiation lacking with general permits. For each type of permit, the permittees' ability to "negotiate" the permit's terms is largely limited to commenting on the draft permit. See WAC 173-220-050(2), (5) (individual); WAC 173-226-130(3)(d), 173-226-170 (general).

ITT Rayonier, Inc. v. Dep't of Ecology, 91 Wn.2d 682, 586 P.2d 1155 (1978) does not hold otherwise. See Opinion at 17. That 46-year-old case involved an individual permit issued just two years after the CWA was enacted and while EPA was promulgating new effluent guidelines. *ITT Rayonier*, 91 Wn.2d at 683-85. Ecology and the permittee negotiated an "unusual" footnote stating that the permit would be modified to be consistent with the EPA guidelines once they were issued. *Id.* at 684-85, 693. This Court determined that the footnote was ambiguous and that, consistent with interpretation of contracts,

the intent of both the agency and permittee was relevant to its interpretation. *Id.* at 686-87.

The *ITT Rayonier* court rested its eventual decision in favor of the permittee on its conclusion that EPA's failure to meet the timetables for guideline issuance excused the permittee from the permit's compliance schedule because the permittee (just like the ISGP permittees) needed "to know what the final standards are before it commits millions of dollars to plant design and construction to meet them." *Id.* at 691, 693-94. *ITT Rayonier* does not stand for the proposition that general permits should be interpreted like regulations, or that interpretation of an ambiguous general permit should be based solely on Ecology's statements of subjective intent.

Whether a general permit is interpreted as a contract or a regulation only makes a difference if the language of the permit is ambiguous. Opinion at 15. Under contract law principles, if the permit's language is ambiguous, the court may turn to extrinsic evidence to interpret its terms, including evidence

evinced the permitting authority's interpretation of the permit. *L.A. County*, 725 F.3d at 1205, 1207. But a court does not defer to a state permitting agency's interpretation, particularly concerning its interpretation of federal laws. *Id.* at 1208. To the contrary, "[t]he subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

The Court of Appeals nevertheless concluded that the permit should be treated as a regulation and "great weight" given to Ecology's subjective claim of the permit's scope. But an agency's interpretation of a regulation is not entitled to deference unless the agency shows its interpretation was "adopted and applied . . . as a matter of agency policy." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). *See also Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) (an agency cannot merely "bootstrap a legal argument into the place of agency

interpretation”). Here, Ecology cannot point to any clearly articulated official agency policy supporting its interpretation of the ISGP. In reflexively giving “great weight” to Ecology’s argument, Opinion at 25, the Court of Appeals acted contrary to *Cowiche Canyon and Sleasman*.

Rather than interpreting the ISGP like a contract and looking at the totality of extrinsic evidence, the Court of Appeals relied only upon statements over the past 10 years as evidencing Ecology’s purported intent to expand the permit’s scope of coverage in 2009. *See* Opinion at 8-9, 23-24. These include a FAQ document (which by law cannot amend a permit’s terms) and a private *post hoc* letter. *Id.* In doing so, the court ignored abundant evidence that after issuing the 2010 ISGP, Ecology explained *in writing* that it was regulating only those portions of transportation facilities identified by EPA as engaged in industrial activity (CP 3211) (adopting EPA’s “only those portions” language) and identified no change to Table 1 relevant to transportation facilities in the Fact Sheets that are

required by law to identify significant changes. *See, e.g.*, 3571-73, 1041-48 (no reference to expansion in coverage in 2010 or 2020 Fact Sheets); CP 1814, 1840 (no reference in summaries of major changes). Ecology’s last change to Table 1 relative to transportation facilities made Table 1 “consistent with . . . 40 C.F.R. § 122.26(b)(14)(viii).” *Copper Dev. Assoc., Inc. v. State of Washington*, PCHB Nos. 09-135 through 09-141, Order on Summ. J., 2011 WL 62915, *4 (Jan. 5, 2011).

The Court of Appeals opinion would have a widespread impact upon every holder of a general permit statewide. General permits include, among others, boatyards, bridge and ferry terminals, concentrated animal feeding operations, construction stormwater, fresh fruit packers, municipal stormwater, and wastewater treatment plants.⁴ General permits thus apply across varied industries, all critical to Washington’s

⁴ *See* Ecology website at <https://ecology.wa.gov/Water-Shorelines/Water-quality/Water-quality-permits/Water-Quality-general-permits> (last visited April 17, 2024).

economy, and with each reissuance, are subject to interpretation and appeal. Under the court's decision, any interpretation of ambiguous language in a general permit will require that a court give reflexive deference to Ecology's post-hoc interpretation, regardless of the language used and regardless of all available extrinsic evidence.

General permit permittees need certainty. In many cases, they must plan years ahead to design, install, and finance construction. Rather than allowing permittees to rely on the language of their permit, the court's opinion effectively requires that each permittee sift through years – in this case 10 years – worth of ancillary documents, some of which could only be obtained through a public records request, to guess at how agency staff might interpret a permit. This encourages Ecology to issue vague general permits, allowing it to shift its “interpretation” of those permits at will or in a disparate case-by-case manner, avoiding regulations requiring clear notice to permittees (and EPA) of a permit's terms.

B. The Court of Appeals Interpretation of the Plain Language of the ISGP Conflicts with State Cases and Presents an Issue of Substantial Public Interest Affecting All ISGP Transportation Facility Permittees.

The Court of Appeals, the PCHB, the *APM Terminals* court and all parties to this appeal agree that the ISGP language at issue is unambiguous.⁵ Whether interpreted like a contract or a regulation, the well-established rules of interpretation of unambiguous language determine meaning only from the language employed. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (2010). Courts give effect to all the contract's provisions. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). Similarly, when interpreting a regulation, if the plain

⁵ The Court of Appeals mistakenly stated that the *APM Terminals* court found the ISGP ambiguous. Opinion at 23 n. 11. In fact, the *APM Terminals* court held the permit contained “clear, unambiguous language establishing that the ISGP relies on the federal regulations and its ‘only those portions’ exclusionary definition as applied to transportation facilities.” *APM Terminals*, 2020 WL 6445825, at *10.

language is clear on its face, its meaning is to be derived from the language alone. *D.W. Close Co, Inc. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 126, 177 P.3d 143 (2008).

Importantly, all provisions must be read in harmony and construed so no portion is rendered meaningless or superfluous. *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015).

The Court of Appeals interpretation of the ISGP is inconsistent with these fundamental rules. First, the court rendered meaningless the definition's two separate express references to 40 C.F.R. § 122.26(b)(14)(i-xi), erroneously stating that because the "industrial activities" definition does not specifically state that it is "incorporating by reference" 40 C.F.R. § 122.26(b)(14)(i-xi), including its limiting "only those portions" language, the entire regulation must somehow be read out of the definition. Opinion at 21-22.

To the contrary, reference and citation to the regulation itself, as occurred here, is legally sufficient: when a contract or regulation references another regulation "the precepts and terms

to which reference is made are to be considered and treated as if they were incorporated into and made a part of the referring act, just as completely as if they had been explicitly written therein.” *Knowles v. Holly*, 82 Wn.2d 694, 700-01, 513 P.2d 18 (1973).

The court’s interpretation also creates internal conflict within the industrial activity definition. Under the court’s reading of the definition there would be no reason to incorporate EPA’s definition in the first sentence or explain its format in the last sentence. The definition’s last sentence clarifies that the difference between Table 1 and the federal regulation is a question of “format,” not substance.

Finally, the court focused on the second phrase of the “industrial activity” definition in isolation. It concluding that the phrase—“any *facility* conducting any activities described in Table 1”—expands the permit scope to reach “the entire footprint of a transportation facility” because it uses the term “facility,” and that ISGP definition of “facility” includes the

phrase “land and appurtenances.” Opinion at 20-21. The ISGP definition of “facility”, however, is wholly circular, because it states that a facility is an establishment “subject to regulation under this permit” and cites to Condition S1. Condition S1 then directs the reader back to the definition of “industrial activities”, with its two express references to 40 C.F.R. § 122.26(b)(14)(i)-(xi).

The purpose of the second phrase—“any *facility* conducting any activities described in Table 1”—is not to regulate non-industrial areas that are separate from industrial areas. Its purpose is to include as industrial activity certain specific activity codes, like Marine Construction (CP 68), not identified in 40 C.F.R. § 122.26(b)(14)(i)-(xi). This does not regulate the “entire footprint” of transportation facilities.

Moreover, the ISGP’s “facility” definition is identical to that of EPA’s regulation, which includes precisely the same “land and appurtenances” language. 40 C.F.R. 122.2. The use

of the term “facility” thus does not expand the permit’s scope beyond the federal regulation.

The court’s interpretation of the permit’s scope is of substantial public interest. The Permittees alone represent almost 30 different marine and rail facilities. CP 905. These facilities are vital to the state’s economy and have been identified by the state legislature as “of statewide significance” given their role in international and interstate trade and impact on the state’s economic development. RCW 47.06.140(1); .070. Beyond the Permittees’ facilities, the court’s decision also applies state-wide to every public port and each of the 400 to 600 ISGP transportation facilities subject to the permit. CP 1036.

These facilities will now face new unplanned and unfunded costs to monitor, inspect, and implement ISGP requirements on the “entire footprint of the transportation facility.” CP 2001-002. Every stormwater discharge from the Ports of Seattle and Tacoma not regulated by the ISGP—

including on wharfs—is already regulated under the Phase I Municipal Stormwater Permit.⁶ That iterative permit takes “many facts and circumstances that attend MS4s into account.” *Puget Soundkeeper Alliance v. Wash. Dep’t of Ecology*, 28 Wash.App.2d 1007, 2023 WL 5713819, *17, *rev. den’d*, 2 Wn.3d 1014 (not reported). By contrast, NWSA staff estimated (as of 2020) that if the ISGP was interpreted to apply to the entirety of NWSA container facilities (supplanting Phase I NPDES Permit coverage) it could cost an additional \$100 million or \$1.1 million per acre to install catchment and treatment systems for NWSA’s piers alone. CP 2115. NWSA invested over \$44 million in marine terminal stormwater treatment systems in the Seattle and Tacoma harbors between 2010 and 2020. CP 2115.

⁶ Department of Ecology – MS4 Phase I General Permit, Condition S6.E.7, <https://fortress.wa.gov/ecy/ezshare/wq/permits/MuniPh1Mod-2021FinalModPermit.pdf>.

The court’s expanded interpretation of the ISGP might also substantially increase the areas and activities subject to permit coverage at rail yards. CP 2112. Potentially affected rail “facilities” include roughly 3200 miles of Washington rail lines tied to a vehicle maintenance yard but used to support passenger and freight service (e.g., WSDOT, Sound Transit, Amtrak, and short-line railroads).⁷ In so doing, the court’s decision creates ambiguity for areas compliant with state and federal water quality laws through municipal stormwater permits issued to counties, cities, and ports. These include discharges from cruise terminals and passenger rail lines that are non-industrial and separated from areas considered industrial by EPA.

⁷ See Washington State Rail Plan at 8, available on the Washington Department of Transportation website at <https://wsdot.wa.gov/construction-planning/statewide-plans/freight-plans/2019-washington-state-rail-plan> (last accessed on April 16, 2024). Relevant excerpts are attached to this brief at Appendix C. Permittees ask this Court to take judicial notice of this publicly available document formally issued by Washington DOT. See *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

In addition, the Court of Appeals decision could mean reduced funds available for environmental programs with measurable environmental benefits, including programs focused on reducing greenhouse gas and diesel particular emissions, supporting habitat for salmon and orca recovery, and remediating legacy contamination. CP 2116. A decline in rail service due to higher costs may shift freight traffic to trucks, increasing social costs of trucking including greenhouse gas emissions.⁸

Finally, the court’s decision could have significant financial, operational, safety, and economic development impacts. Washington’s economy “depends heavily” on goods imported by container and “[w]orking with freight and rail stakeholders . . . helps Washington stay nationally and internationally competitive.”⁹ Permittees cannot identify any

⁸ *Supra* note 10 at 33.

⁹ *Supra* note 10 at 34.

other states where ports operating under industrial stormwater general permits are subject to stormwater regulation requirements beyond the scope identified in EPA's regulation, potentially hampering NWSA's economic competitiveness with other domestic ports. CP 2117. And the private entities responsible for funding rail infrastructure in Washington will certainly factor the costs of operating into decisions about supporting existing and future rail service.

This decision affects the movement of goods, every sector of Washington's economy, and scientifically based environmental priorities. It warrants this Court's review.

VII. CONCLUSION

For the foregoing reasons, Permittees respectfully request that the Supreme Court grant this petition for review, reverse the Court of Appeals final decision as to PCHB Legal Issue 11, and affirm the PCHB decision.

This document contains 4,871 words, excluding the parts of the document exempted by RAP 18.17(b) and RAP 18.17(c), and complies with the word limit of RAP 18.17(c)(10).

Respectfully submitted this 17th day of April 2024.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following parties via email:

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Dated at Seattle, Washington, this 17th day of April 2024.

s/Susan Barragan
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VIII. APPENDICES

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,

Appellant,

v.

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS
BOARD,

Respondent,

and

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent below,

and

BNSF RAILWAY COMPANY, THE
NORTHWEST SEAPORT ALLIANCE,
PORT OF SEATTLE, PORT OF
TACOMA, PACIFIC MERCHANT
SHIPPING ASSOCIATION, and SSA
TERMINALS, LLC,

Respondents.

No. 85665-1-I

DIVISION ONE

PUBLISHED OPINION

MANN, J. — “Stormwater runoff is one of the most significant sources of water pollution in the nation, at times ‘comparable to, if not greater than, contamination from industrial and sewage sources.’”¹ The Washington Department of Ecology is charged by

¹ Env't Def. Ctr., Inc. v. U.S. Env't Prot. Agency, 344 F.3d 832, 840-41 (9th Cir. 2003).

statute with implementing both the federal Clean Water Act of 1977 (CWA), 33 U.S.C. §§ 1251-1389, and Washington’s “Water Pollution Control Act” (WPCA), ch. 90.48 RCW. This appeal concerns Ecology’s issuance of the 2020 Industrial Stormwater General Permit (2020 permit) under the National Pollutant Discharge Elimination System (NPDES) and state discharge permit program. Consistent with prior iterations of the same permit, Ecology maintains that under the 2020 permit “transportation facilities” that have “vehicle maintenance shops, equipment cleaning operations, or airport deicing operations” must obtain coverage under the 2020 permit. And for facilities that must obtain coverage, the permit requirements apply to the entire facility—not limited portions.

Several parties appealed the 2020 permit raising a multitude of issues. The Pollution Control Hearings Board (PCHB) granted summary judgment on legal issue 11 in favor of industry appellants and declared legal issue 12 moot as a result. The PCHB concluded, as a matter of law, that the 2020 permit was unambiguous and only applied to limited portions of the covered transportation facilities. Puget Soundkeeper Alliance (PSA) appeals the PCHB’s order granting summary judgment and argues that the permit applies to the entire transportation facility.² We agree.

We reverse and set aside the PCHB’s order on legal issues 11 and 12. We remand to the PCHB to, consistent with this opinion, grant summary judgment on legal issue 11 in favor of Ecology and PSA, and reach the merits of legal issue 12.

² Ecology was the respondent before the PCHB below and submitted a brief as a respondent in this appeal in favor of reversing the PCHB’s order.

I

A

The objective of the federal CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA set a national goal to eliminate the discharge of pollutants into the Nation’s waters by 1985. 33 U.S.C. § 1251(a)(1). The CWA also recognized the role of the states in controlling water pollution: “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b). Consistent with this policy, the CWA explicitly authorizes states to regulate water pollution more stringently than required by the CWA. 33 U.S.C. § 1370.

The CWA prohibits the discharge of any pollutant from a point source to navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1362(12). The NPDES program is the permitting program through which individuals, corporations, and governments obtain the required permits before discharging pollution from any point source into the navigable waters of the United States. 33 U.S.C. § 1342; Decker v. Nw. Env’t Def. Ctr., 568 U.S. 597, 602, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013). The Environmental Protection Agency (EPA) sets the base requirements for the NPDES program and is authorized to delegate administration of the program to a state upon a state’s request and submission that it has adequate authority to carry out the program. 33 U.S.C. § 1342(b). The CWA makes clear that EPA’s mandates and standards are a floor, not a ceiling:

Except as expressly provided in this chapter, nothing in this chapter shall . . . preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, . . . or standard of performance is in effect under this chapter, such State . . . may not adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, . . . or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, . . . or standard of performance under this chapter.

33 U.S.C. § 1370; see also 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution.”).

EPA authorized Ecology to administer the NPDES program in Washington in 1974. See Discharge of Pollutants to Navigable Waters, 39 Fed. Reg. 26,061 (July 16, 1974). The Washington Legislature has designated Ecology as the state water pollution control agency for all purposes under the CWA. RCW 90.48.260.

Ecology also administers the WPCA. The WPCA declares it is the public policy of the state to:

maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish, and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state.

RCW 90.48.010. The legislature also declared a public policy of “working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers” to protect water quality. RCW 90.48.010.

RCW 90.48.020 broadly defines “pollution” to include any contamination of state waters that “will or is likely to create a nuisance or render such waters harmful . . . to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish, or other aquatic life.” RCW 90.48.080 prohibits all discharges of any “matter that shall cause or tend to cause pollution. Under RCW 90.48.160, a discharge permit is required by “[a]ny person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material” into any water of the state.”

B

There are generally two types of NPDES permits: individual and general. See Nat. Res. Def. Council v. U.S. Env’t Prot. Agency, 279 F.3d 1180, 1183 (9th Cir. 2002). Individual NPDES permits authorize a specific entity to discharge pollutants at a specific location or locations. WAC 173-220-030(12). Individual NPDES permits are issued after an informal agency adjudication process. See 40 C.F.R. § 122.21. In contrast, general NPDES permits are issued for an entire class of potential dischargers in a given geographical location. General permits may be appropriate when the dischargers in a geographic area are relatively homogenous—such as stormwater dischargers. 40 C.F.R. § 122.28; WAC 173-226-030(13). General permits are issued pursuant to an administrative rulemaking process, including public notice, public hearing, and an administrative appeal process. WAC 173-226-130 to -180. Once a general permit is issued, it is up to the facility to apply for coverage under the general permit. WAC 173-226-200.

General NPDES permits, like the 2020 permit at issue, are designed to satisfy the requirements of both the federal CWA and the state WPCA. WAC 173-226-010.

C

Stormwater pollution is a major concern for the states. As recognized by the Ninth Circuit over twenty years ago, “[s]tormwater runoff is one of the most significant sources of water pollution in the nation, at times ‘comparable to, if not greater than, contamination from industrial and sewage sources.’” Env’t Def. Ctr., Inc. v. U.S. Env’t Prot. Agency, 344 F.3d 832, 840-41 (9th Cir. 2003). As acknowledged by the PCHB:

Stormwater is the leading contributor to water quality pollution in urban waterways. Common pollutants in stormwater include lead, zinc, cadmium, copper, chromium, arsenic, bacterial/viral agents, oil & grease, organic toxins, sediments, nutrients, heat, and oxygen-demanding organics. Municipal stormwater also causes hydrologic impacts, because the quantity and peak flows of runoff are increased by the large impervious surfaces in urban areas. Stormwater discharges degrade water bodies and, consequently, impact human health, salmon habitat, drinking water, and the shellfish industry.

Puget Soundkeeper All. v. Dep’t of Ecology, No. 07-21, at 11-12 (Wash. Pollution Control Hr’gs Bd. Apr. 2, 2008) [<https://perma.cc/W66H-DTBL>].

EPA initially exempted stormwater discharges from the CWA’s requirements. Defs. of Wildlife v. Browner, 191 F.3d 1159, 1163, amended and reh’g denied, 197 F.3d 1035 (9th Cir. 1999); see former 40 C.F.R. § 125.4 (1973). The Court of Appeals for the District of Columbia, however, invalidated this exemption. Nat. Res. Def. Council, Inc. v. Costle, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

Subsequently, EPA issued regulations governing stormwater discharges and those rules were challenged at the administrative level and in the courts. Defs. of Wildlife, 191 F.3d at 1163. In 1987, Congress passed the Water Quality Act, amending the CWA so

that stormwater discharges associated with industrial activity are not exempt from permit requirements. 33 U.S.C. § 1342(p)(2); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

EPA's regulations broadly define "storm water discharge associated with industrial activity" to include discharges from a wide variety of pollution generating areas and activities, including, but not limited to:

[I]mmediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; . . . shipping and receiving areas; . . . storage areas (including tank farms) for raw materials, and intermediate and final products; . . . storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product.

40 C.F.R. § 122.26(b)(14).

EPA's regulation then identifies the "categories of facilities . . . considered to be engaging in 'industrial activity' for the purposes of paragraph (b)(14)." These are the categories of facilities, identified by Standard Industrial Classifications (SIC) that are required to obtain a NPDES permit to authorize stormwater discharges. Transportation facilities are identified in 40 C.F.R. § 122.26(b)(14)(viii) (or "category 8"), and are required to obtain a NPDES permit if they have "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations."

EPA's regulation continues, however, and limits the requirement for NPDES permits to specific portions of the transportation facility:

Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations . . . are associated with industrial activity.

40 C.F.R. § 122.26(b)(14)(viii).³

D

Ecology regulates certain stormwater discharges from industrial activities under a general NPDES permit under WAC 173-226. The statewide industrial stormwater general permit is meant to comply with both the WPCA and the CWA. WAC 173-226-010.

In preparation for issuing the 2010 version of the industrial stormwater general permit (2010 permit), Ecology's permit team recognized that there was a question over coverage at category 8 transportation facilities: whether the 2010 permit would apply to the entire site, or be limited to just the vehicle maintenance areas consistent with the federal regulation's limiting language. This issue was discussed with Ecology's permit management team who decided that such coverage was a matter of site-specific implementation. In other words, once permit coverage is required at a transportation facility, the permit applies to all discharges from industrial activity which may vary from site to site as opposed to regulating "only those portions" of the facility like the limiting language in 40 C.F.R. § 122.26(b)(14)(viii).

³ In its brief, Ecology offers one example of the effect of the limiting language in 40 C.F.R. § 122.26(b)(14)(viii):

For example, at the Port of Tacoma's West Sitcum Terminal, 'five enormous ship-to-shore cranes load and unload large shipping containers from docked vessels.' If these loading and unloading activities took place at any facility other than a transportation facility they would clearly be associated with industrial activity under 40 C.F.R. § 122.26(b)(14) because loading and unloading areas are included in the definition of stormwater discharge associated with industrial activity. However, when these same activities take place at a transportation facility, they are not associated with industrial activity under EPA's regulations.

In response to Ecology's draft 2010 permit, commenters, including appellant BNSF Railway Company, asked that Ecology include in the body of the permit the "only those portions" limiting language. Ecology responded that it had decided not to include the limiting language. Similarly, in Ecology's 2010 "Frequently Asked Questions" document it explained that once a transportation facility required a permit, the permit applied to the entire facility:

Q11: My transportation facility has a vehicle maintenance shop and therefore requires permit coverage. Does the permit apply to the entire footprint of the facility, or just to the area where we conduct vehicle maintenance activity?

A11: Once a transportation facility has permit coverage, the permit conditions for sampling, inspection and stormwater management practices are required in all areas of industrial activity—rather than only those areas where vehicle maintenance, equipment cleaning and airport de-icing occur.

On July 27, 2010, Washington Ports (including the Ports of Vancouver, Longview, and Olympia) wrote to Ecology's director raising concerns with Ecology's implementation and enforcement of the 2010 permit. The Ports raised their concern that Ecology's permit manager told the Ports that "a vehicle maintenance facility triggers Industrial Permit coverage and monitoring of all port property (as opposed to coverage and monitoring of the discrete maintenance facility)." Ecology responded and confirmed that "[o]nce a facility has permit coverage, the Permit's sampling, inspection, and stormwater management practices are required in all areas of industrial activity—rather than only those areas where vehicle maintenance, equipment cleaning, and airport deicing occur." Ecology recommended that "Ports take the necessary steps to implement the Permit requirement on all areas of industrial activity as soon as possible."

E

Ecology issued the 2020 version of the industrial stormwater general permit (2020 permit) on November 20, 2019.⁴ The 2020 permit is consistent with the 2010 and 2015 permits. The 2020 permit applies to “facilities conducting industrial activities that discharge stormwater” to surface waters. (Emphasis added.) Specifically, it requires that facilities “engaged in any industrial activities in Table 1 shall apply for coverage if stormwater from the facility discharges to a surface waterbody.”

Table 1 includes transportation facilities:

Transportation facilities which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations:

- Railroad Transportation
- Transit and Ground Passenger Transportation
- Truck Transportation
- Postal Service
- Water Transportation
- Air Transportation
- Petroleum Bulk Stations and Terminals

As with the 2010 permit, the Table 1 list of transportation facilities does not include the limiting language in 40 C.F.R. § 122.26(b)(14)(viii).

The 2020 permit defines a “Facility” as follows:

Facility means any establishment (including land or appurtenances thereto) that is subject to regulation under this permit.

⁴ The 2020 ISGP became effective on January 1, 2020, and expires on December 31, 2024.

The 2020 permit defines “Industrial Activity” to include three different categories:

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

During the public comment period for the 2020 permit, commenters including respondents Northwest Seaport Alliance, Port of Tacoma, BNSF, and Port of Seattle, requested clarifying language to limit applicability of the permit consistent with the “only those portions of the facility,” as used in 40 C.F.R. § 122.26(b)(14)(vii). Consistent with its interpretation of the 2010 permit, Ecology again declined:

Ecology made this change for the 2009 [Industrial Stormwater General Permit (ISGP)]. [Discharge Monitoring Report (DMR)] data from all transportation categories collected since 2009 demonstrates that activity on those sites beyond vehicle maintenance shops, equipment cleaning operations, and airport deicing operations is a significant contributor of pollutants leaving the site at concentrations that may reasonably be expected to cause a violation of water quality standards. Ecology will continue to regulate the entire portion of these facilities. Ecology has considered the comments and chosen not to make the suggested change to draft permit.

F

On December 19, 2019, PSA appealed the 2020 permit to the PCHB. The next day, the following industrial organizations also appealed the 2020 permit: BNSF Railway Company, the Northwest Seaport Alliance, Port of Seattle, Port of Tacoma, Pacific Merchant Shipping Association, and SSA Terminals, LLC (together, industry).⁵ By

⁵ BNSF Railway Company operates rail yards and railroad facilities throughout Washington State. Northwest Seaport Alliance, Port of Tacoma, and Port of Seattle own or lease facilities in Washington that are subject to the ISGP and together the Ports of Tacoma and Seattle are one of the largest container complexes in North America. Pacific Merchant Shipping Association is an independent association which

agreement of the parties, the PCHB consolidated the appeals. The parties identified 32 legal issues in a joint issue list.

The Port of Seattle, Port of Tacoma, Northwest Seaport Alliance, and BNSF Railway Company jointly moved for summary judgment on legal issues 11 and 12 which asked:

11. Does the ISGP extend or expand the coverage for transportation facilities beyond stormwater associated with “vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under” 40 C.F.R. 122.26(b)(14)(i)-(vii), or (ix)-(xi)?

12. Is the purported expansion of the ISGP’s scope of coverage for transportation facilities beyond the definition of discharge associated with industrial activity unreasonable or unlawful by failing to comply with the procedural requirements of NPDES permitting under federal and state law?

SSA Terminals, LLC and Pacific Merchant Shipping Association joined the motion.⁶

Regarding legal issue 11 and the scope of coverage, industry argued that Ecology never made a determination to expand the scope of coverage of the 2020 permit and that the permit does not regulate the entire facility. Industry argued that the 2020 permit is not ambiguous and thus Ecology’s interpretation is not entitled to deference.

The PCHB concluded as a matter of law that by its plain language, the 2020 permit applies only to those areas of transportation facilities where vehicle maintenance activity, equipment cleaning operations, or airport deicing operations occur as defined in

represents owners and operators of marine terminals in Washington. SSA Terminals, LLC operates multiple marine terminals in Washington.

⁶ SSA Terminals, LLC and Pacific Merchant Shipping Association also filed a motion for summary judgment on issues 11 and 12 but it was not considered by the PCHB because it was untimely filed.

40 C.F.R. § 122.26(b)(14)(viii); in other words, the 2020 permit does not cover the entire transportation facilities. The PCHB granted industry appellants' motion for summary judgment on issue 11, declared issue 12 moot, and dismissed issues 11 and 12. On March 28, 2022, the PCHB dismissed the case.⁷

PSA petitioned Thurston County Superior Court for judicial review of the PCHB's order under the Washington Administrative Procedure Act (APA), ch. 34.05 RCW. By agreement of the parties, the case was transferred to this court for direct review under RCW 34.05.518.

III

A

The APA governs review of PCHB orders. Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004). If the agency decision was on summary judgment, "the reviewing court must overlay the [APA] standard of review with the summary judgment standard." Verizon Nw., Inc. v. Emp. Sec. Dep't, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). Accordingly, facts in the record are reviewed de novo and are viewed in the light most favorable to the nonmoving party. Verizon, 164 Wn.2d at 916. Summary judgment is appropriate only where the undisputed material facts entitle the moving party to judgment as a matter of law. Verizon, 164 Wn.2d at 916. "The burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

⁷ PSA and Ecology notified the PCHB that they had reached a tentative agreement on all of PSA's issues and did not expect to proceed to hearing. Industry entered into a settlement agreement with Ecology and the parties agreed to the dismissal of the remaining legal issues.

“Review is confined to the record before the Board.” Snohomish County v. Pollution Control Hr’gs Bd., 187 Wn.2d 346, 357, 386 P.3d 1064 (2016). An agency’s legal determinations are reviewed under the “error of law” standard, which allows this court to substitute its view of the law for the agency’s. Puget Soundkeeper All. v. Pollution Control Hr’gs Bd., 189 Wn. App. 127, 136, 356 P.3d 753 (2015). Under this standard, questions of law and the agency’s application of the law are reviewed de novo. Port of Seattle, 151 Wn.2d at 588. Rulings made on summary judgment are also reviewed de novo. Snohomish County, 187 Wn.2d at 357.

Relief may be granted based on any of the grounds listed in RCW 34.05.570. Relevant here, this court shall grant relief if it determines that (1) the PCHB has erroneously interpreted or applied the law or (2) the agency has not decided all the issues requiring resolution by the agency. RCW 34.05.570(3)(d), (f).

Because Ecology and PCHB disagree on the interpretation of the 2020 permit, it is important to note the roles assigned to each agency. In the 1970s, the legislature removed certain adjudicatory functions from Ecology and gave them to the PCHB. Ch. 43.21B RCW. The PCHB is a quasi-judicial body that provides uniform and independent review of Ecology action. RCW 43.21B.010, 110. Ecology retains rulemaking, interpretive, and enforcement functions as the agency charged with administration of water quality statutes and rules. Port of Seattle, 151 Wn.2d at 591-92. Accordingly, it is appropriate to defer to Ecology’s interpretation of its own regulations and that interpretation is afforded great weight. Port of Seattle, 151 Wn.2d at 593.

B

We first address whether a general NPDES permit is reviewed as a contract or regulation. Citing the Fourth Circuit opinion in Piney Run Preservation Ass'n v. County Commissioners, 268 F.3d 255, 269-70 (4th Cir. 2001), the PCHB stated that “[f]ederal courts have held that NPDES permits are treated like any other contract. If the language of the permit is plain and capable of legal construction, the language alone must determine the permit’s meaning.” Puget Soundkeeper All. v. Dep’t of Ecology, No. 19-089c, at 9 (Wash. Pollution Control Hr’gs Bd. Mar. 23, 2021) [<https://perma.cc/5MAJ-BAQM>]. Similarly, the PCHB stated that “Washington law also provides that permits are interpreted in the same manner as statutes and contracts: extrinsic evidence is not relevant where the terms stated in the permit are unambiguous, and may not be used to contradict or vary these terms.” Puget Soundkeeper All., No. 19-089c, at 10 (citing Kaiser Alum. & Chem. Corp. v. Dep’t of Ecology, PCHB No. 97-126 (Wash. Pollution Control Hr’gs Bd. Nov. 21, 1997) [<https://perma.cc/P7VV-GGS8>]). We agree with the PCHB that where the terms of an NPDES permit, whether an individual permit or general permit, are unambiguous, the plain language of the permit controls. But if the plain language is ambiguous, whether the permit is reviewed as contract or regulation makes a difference.

If a permit is reviewed as a contract and its terms are ambiguous, we determine its meaning as a matter of law using general rules of construction applicable to statutes, contracts, and other writings. In re Marriage of Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981). We “consider ‘the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract,

the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.” Paradise Orchards Gen. P’ship v. Fearing, 122 Wn. App. 507, 516, 94 P.3d 372 (2004) (quoting Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). Extrinsic evidence could be considered “to help the fact finder interpret a contract term and determine the contracting parties’ intent,” but not “to show intention independent of the contract.” Brogan & Anensen LLC v. Lamphiear, 165 Wn.2d 773, 775-76, 202 P.3d 960 (2009). “[T]he subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” Brogan, 165 Wn.2d at 776.

But if a permit is reviewed as a regulation or statute and its terms are ambiguous, courts give “great weight” to the agency’s interpretation of an ambiguous statute “which falls within the agency’s expertise,” provided that interpretation does not conflict with the statute’s language or underlying intent.” Puget Soundkeeper All., 189 Wn. App. at 136-37 (quoting Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep’t of Ecology, 146 Wn.2d 778, 790, 51 P.3d 744 (2002)). The same deference is given to an agency’s interpretation of its own regulations. “Because Ecology is the agency designated by the legislature to regulate the State’s water resources, . . . this court has held that it is Ecology’s interpretation of relevant statutes and regulations that is entitled to great weight.” Port of Seattle, 151 Wn.2d at 593.

The PCHB is correct that some federal courts have reviewed individual NPDES permits as contracts. For example, in Nw. Env’t Advocs. v. City of Portland, 56 F.3d 979 (9th Cir. 1995), the court reviewed the City of Portland’s individual NPDES permit and whether it covered discharges from combined sewer overflows. The court did not

analyze whether the permit was more akin to a regulation or contract, but simply stated, without citation, that “we review the district court’s interpretation of the [NPDES permit] as we would the interpretation of a contract or other legal document.” Nw. Env’t Advocs., 56 F.3d at 982.⁸ Because an individual NPDES permit can be the product of negotiation between the agency and discharger, treating such a permit like a contract may be appropriate.

Our Supreme Court considered an ambiguous individual NPDES permit in ITT Rayonier, Inc. v. Dep’t of Ecology, 91 Wn.2d 682, 586 P.2d 1155 (1978). The court explained:

We agree that the permit itself is ambiguous. However, it was error here for the PCHB to look only to DOE’s intent to resolve this ambiguity. Although the general rule may be that construction of administrative orders depends only upon the intent or purpose of the issuing agency, . . . under the circumstances here that rule does not apply. Because the portion of the permit at issue here—footnote f—was the product of negotiation and agreement between the parties, the intent of both parties, and not just the agency, is relevant. The footnote provision is in the nature of a consent decree or a negotiated settlement, and contract principles of construction are properly applied.

ITT Rayonier, 91 Wn.2d at 686-87 (internal citations omitted).

But in contrast, a general NPDES permit is not the product of a negotiation between the agency and an individual discharger. A general NPDES permit covers a number of similar dischargers in a wide geographic area. And, as discussed above, it is the product of an administrative rulemaking process, including public notice, public

⁸ Similarly, in Piney Run Preservation, the Fourth Circuit considered an individual NPDES permit issued for a county’s wastewater facility and interpreted the permit as a contract, without citing any analysis. 268 F.3d at 269.

hearing, and an administrative appeal process. WAC 173-226-130 to -180. Individual discharges can opt into coverage under the permit, but do not negotiate its terms. WAC 173-226-200.

In Alaska Community Action on Toxics v. Aurora Energy Services, LLC, 765 F.3d 1169 (9th Cir. 2014), the Ninth Circuit considered whether a discharger's nonstormwater discharge of coal was covered by a general NPDES permit. The court explained that general NPDES permits are interpreted as a regulation because they are issued according to an administrative rulemaking process. 765 F.3d at 1172 (citing Nat. Res. Def. Council v. U.S. E.P.A., 279 F.3d 1180 (9th Cir. 2002); OFF. OF WATER ENF'T & PERMITS, U.S. ENV'T PROT. AGENCY, EN-336, GENERAL PERMIT PROGRAM GUIDANCE 11 (Feb. 1988) ("general permits are rulemakings"), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100FD8U.PDF?Dockey=P100FD8U.PDF> [<https://perma.cc/AFV3-3EHM>]).

We agree with Alaska Cmty. Action. General NPDES permits—like the 2020 ISGP—are issued according to rulemaking procedures, have broad applicability, and therefore should be interpreted as a regulation. 765 F.3d at 1172.

VI

We turn next to the terms of the 2020 permit. The PCHB concluded that the 2020 permit was unambiguous and did not apply to transportation facilities beyond stormwater associated with "vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, [or] airport deicing operations." PSA and Ecology agree that the 2020 permit is unambiguous but, contrary to the PCHB's interpretation, argue that because the permit

does not include the limiting language in 40 C.F.R. § 122.26(b)(14)(viii), the permit applies to the entire transportation facility. We agree with PSA and Ecology.

When interpreting agency regulations, courts apply the same principles used to construe statutes. Puget Soundkeeper All. v. Dep't of Ecology, 191 Wn.2d 631, 644, 424 P.3d 1173 (2018). The “fundamental objective” of statutory interpretation is to “ascertain and carry out the Legislature’s intent.” State v. Valdiglesias LaValle, 2 Wn.3d 310, 317-18, 535 P.3d 856 (2023) (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). If a statute’s meaning is plain on its face, courts will give effect to that meaning as an expression of legislative intent. Valdiglesias LaValle, 2 Wn.3d at 318. “If the statute is susceptible to more than one reasonable interpretation after this inquiry, it is ambiguous.” Valdiglesias LaValle, 2 Wn.3d at 318. A regulation is not ambiguous merely because another interpretation is possible. Valdiglesias LaValle, 2 Wn.3d at 318.

To determine the “plain meaning” of a statute, courts look to the text, the context of the statute, related statutory provisions, and the statutory scheme as a whole. Valdiglesias LaValle, 2 Wn.3d at 318. Interpretations must give meaning to every word in the statute or regulation. Wash. Cedar & Supply Co., Inc. v. Dep't of Lab. & Indus., 137 Wn. App. 592, 599, 154 P.3d 287 (2007). Undefined terms are given their plain and ordinary meaning unless a contrary legislative intent is indicated. Valdiglesias LaValle, 2 Wn.3d at 318. Courts “employ traditional rules of grammar in discerning the plain language of the statute.” Valdiglesias LaValle, 2 Wn.3d at 318 (quoting State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010)). “Our goal is to achieve a harmonious total statutory scheme to avoid conflicts between different provisions.”

Wash. Cedar & Supply, 137 Wn. App. 592 (citing Lee Cook Trucking & Logging v. Dep't of Lab. & Indus., 109 Wn. App. 471, 481, 36 P.3d 558 (2001)).

Looking first to the plain language of the 2020 permit, it provides that the permit “applies to facilities conducting industrial activities.” The permit defines industrial activity to include three different categories:

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

The first category of industrial activities requires permit coverage for any facility considered to engage in industrial activity under the federal regulation. Transportation facilities are covered under category 8. 40 C.F.R. § 122.26(b)(14)(viii). As discussed above the federal language limits the scope of coverage to “only those portions” of the facility that conduct vehicle maintenance, equipment cleaning, or airport operations.

The second category of industrial activities require permit coverage for “any facility conducting any activity described in Table 1.” “Facility” means “any establishment (including land or appurtenances thereto) that is subject to regulation under this permit.” Table 1 includes transportation facilities that conduct vehicle maintenance, equipment cleaning, or airport deicing operation. Reading these two provisions together, it is plain that the second category requires coverage for the land and appurtenances at any transportation facility that conducts vehicle maintenance, equipment cleaning, or airport deicing operations—that is, the entire footprint of the transportation facility. A facility may be subject to coverage under the permit because it

belongs to one of the “categories” of facilities listed in the C.F.R. or, because the facility—including its land and appurtenances—conducts one of the “activities” described in Table 1 which does not specifically limit transportation facility industrial activity to any one area of the facility.⁹

The PCHB’s interpretation rendered the second category for the definition of “industrial activities” superfluous by concluding that, like the first category, it was limited by the “only those portions” language found in the federal regulation. To reach this conclusion the PCHB ignored the expansive “any facility” language in the second category, and then read the “only those portions” language into the definition’s clause, even though those words do not exist anywhere in the 2020 permit. The PCHB erred in inserting words that did not exist into the permit’s definition, which had the effect of also rendering the second category superfluous. Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (a court must not add words to a statute and must construe statutes such that all of the language is given effect, and no portion is rendered meaningless or superfluous).

The PCHB also concluded that the last sentence of the permit’s definition of industrial activities—“Table 1 lists the 11 categories of industrial activities identified in 40 C.F.R. 122.26(b)(14)(i-xi) in a different format”—should be read into the second category of facilities. But doing so still reads language into the definition and renders the second category superfluous with the first category. A reasonable interpretation of

⁹ “Categories” are defined as any of several fundamental and distinct classes to which entities belong. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/category> (last visited March 18, 2024). “Activities” are defined as behavior or actions of a particular kind. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/activities> (last visited March 18, 2024).

the last sentence is that the categories of facilities—transportation facilities, recycling facilities, etc.—are part of, or included, in Table 1, but in a different general makeup or arrangement. This clarification makes sense given the inconsistency between the number of federal categories of facilities (11) and the number of activities described in Table 1 (32). The definition does not say that Table 1 “incorporates” or is “identical to” the federal categories of facilities. From other provisions in the 2020 permit, it is clear that Ecology explicitly incorporates by reference when it wants to.

Reading the permit according to Ecology’s interpretation gives effect to each of the three categories of industrial activities in the definition while also harmonizing the last sentence with the terms so as not to add or remove language.¹⁰ Read together, if a transportation facility requires coverage under the 2020 permit because it conducts vehicle maintenance, equipment cleaning, or airport deicing operations, coverage under the permit applies to the entire transportation facility, not just limited areas.

¹⁰ While not necessary for our conclusion, it appears Ecology has also determined that the third category of industrial activities also applies. In the Fact Sheet for the 2020 permit, Ecology “determined that stormwater discharges may cause a violation of water quality standards for a variety of pollutant parameters.” During public comment for the 2020 Permit, owners and operators of transportation facilities commented on Ecology’s decision to continue its expanded scope of coverage. The owners and operators asked that Ecology clarify and limit the scope of coverage by adding the limiting language from category 8. Ecology declined to make the suggested change and then explained its determination that stormwater discharges from transportation facilities are significant contributors of pollutants at concentrations that were expected to cause a violation of water quality standard:

DMR data from all transportation categories collected since 2009 demonstrates that activity on these sites beyond vehicle maintenance shops, equipment cleaning operations, and airport deicing operations is a significant contributor of pollutants leaving the site at concentrations that may reasonably be expected to cause a violation of water quality standards. Ecology will continue to regulate the entire portion of these facilities. Ecology has considered the comments and chosen not to make the suggested change to [the] draft permit.

VII

But even if we decided the 2020 permit terms are ambiguous, our conclusion remains the same: the 2020 ISGP applies to entire transportation facilities.¹¹ Courts give “great weight” to the agency’s interpretation of an ambiguous statute “which falls within the agency’s expertise,” provided that interpretation does not conflict with the statute’s language or underlying intent.” Puget Soundkeeper All., 189 Wn. App. at 136-37 (quoting Pub. Util. Dist. No. 1, 146 Wn.2d at 790). The same deference is given to an agency’s interpretation of its own regulations. Port of Seattle, 151 Wn.2d at 593. As discussed earlier, we interpret general NPDES permits as we would a regulation.

The record reflects that since 2010 Ecology has interpreted the ISGP to cover entire transportation facilities that have vehicle maintenance, equipment cleaning, or airport deicing without limiting industrial activity to only certain areas. For example, in response to an inquiry from several ports as to scope, Ecology clarified that once a facility has permit coverage, the permit’s sampling, inspection, and stormwater management practices are required in all areas of industrial activity. An Ecology

¹¹ We recognize that two different U.S. Federal District Courts have found extent of coverage for transportation facilities in the 2010 and 2020 permits ambiguous. We are mindful, however, that a regulation is not ambiguous merely because another interpretation is possible. Valdiglesias LaValle, 2 Wn.3d at 318.

In Puget Soundkeeper Alliance v. BNSF Railway Co., No. C09-1087-JCC, 2011 WL 13233168, at *1-2 (W.D. Wash. Apr. 11, 2011) (court order), the court interpreted the 2010 Permit, which it had determined to be ambiguous, as it would a regulation and thus relied on Ecology’s interpretation that the omission was “a significant policy question and that the intent was to expand the geographical scope of permit coverage.” The court concluded that discovery was relevant to portions of the facility beyond those areas where vehicle maintenance and equipment cleaning occur and granted the plaintiff’s motion. BNSF Ry. Co., 2011 WL 13233168, at *2.

In Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC, No. C17-05016 BHS, 2020 WL 6445825, at *10 (W.D. Wash. Nov. 3, 2020) (court order), the court determined the plain language of the 2020 permit incorporates the federal regulation and the “only those portions” limiting definition. Accordingly, the court rejected Ecology’s interpretation and granted the Port of Tacoma’s motion that the “clear language of the ISGP” included the limiting language. APM Terminals, 2020 WL 6445825 at *10.

supervisor confirmed that in 2009 the Water Quality Program management team discussed the expansion beyond what the federal regulation required and that the omission of the “only those portions” language was intentional.

Ecology restated this interpretation again in issuing the 2020 permit. In response to public comments on the draft 2020 permit, Ecology explained that based on data since 2009 the activity on transportation facilities beyond the vehicle maintenance shops is a significant contributor of pollutants at concentrations that may be reasonably expected to cause violation of water quality standards. Such a determination brings those facilities under coverage of the ISGP—regardless of the federal categories or Table 1—according to the ISGP’s definition of industrial activity.

In 2009, Ecology made a policy decision to omit the limiting language from Table 1 so as to apply permit requirements to all areas of transportation facilities where industrial activity occurs. Additionally, the determination that activity at such facilities is a significant contributor of pollutants supports Ecology’s interpretation. The scope of coverage at transportation facilities was explained to the public when the 2010 permit was proposed and Ecology’s interpretation has remained consistent in the last two versions of the ISGP.

Washington’s general permit program was established to be applicable to “the discharge of pollutants, wastes, and other materials to waters of the state” and designed to satisfy the requirements of both the CWA and the WPCA. WAC 173-226-010. The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. 33 U.S.C. § 1251. The purpose of the WPCA is to maintain the highest possible standards to insure the purity of all waters of Washington

and, to that end, require the use of all known and available methods by industry to prevent and control water pollution. RCW 90.48.010. Because Ecology's interpretation does not conflict with the permit's language nor the underlying purpose of the CWA and the state's WPCA, Ecology's interpretation of its own permit is entitled to great weight.

Thus, even if the permit is ambiguous, we interpret it to mean that if a transportation facility requires coverage under the 2020 permit because it conducts vehicle maintenance, equipment cleaning, or airport deicing operations, coverage under the permit applies to the entire transportation facility, not just limited areas.

We conclude that the PCHB erred as a matter of law. We reverse the PCHB's order on summary judgment on legal issue 11 and instead hold that the 2020 permit applies to all areas of industrial activity at covered transportation facilities, not just the limited areas specified in EPA's regulation.

VIII

Because the PCHB granted summary judgment in favor of industry on legal issue 11, the PCHB concluded legal issue 12 was moot. PSA does not assign error to PCHB's ruling on legal issue 12 and instead argues that if this court reaches the issue, it should find that Ecology's actions were reasonable and supported by substantial evidence. Conversely, industry asks us to remand to the PCHB for full consideration of legal issue 12. Industry relies on a recent decision by Division Three of this court, Burbank Irrigation District #4 v. Department of Ecology, 27 Wn. App. 2d 760, 534 P.3d 833 (2023). We agree with industry.

Under the APA, this court may grant relief if the agency has not decided all issues requiring resolution by the agency. RCW 34.05.570(3)(f). Courts have

interpreted this avenue of relief to require, as a threshold matter, that the agency decide an issue before this court can reach the merits of the issue on appeal. Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 156 Wn. App. 743, 775, 235 P.3d 812 (2010). For this reason, we do not address the merits of PSA's argument on legal issue 12 because the PCHB did not decide it.

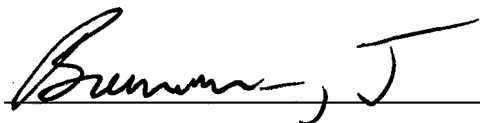
Legal issue 12 asks whether the omission of limiting language in industrial activity for transportation facilities in Table 1 and the resulting expansion of coverage was unreasonable or unlawful by failing to comply with procedural requirements. Because we disagree with the PCHB's interpretation of the 2020 permit, the question presented by legal issue 12 remains unresolved and is no longer moot. "Where an issue is not decided but remains relevant to the challenged action, the appropriate remedy is to remand for the agency to exercise its judgment and make a decision." Burbank Irrigation, 534 P.3d at 845 (quoting Suquamish Tribe, 156 Wn. App. at 778).


We reverse and set aside the PCHB's order on legal issues 11 and 12. We remand to the PCHB to, consistent with this opinion, grant summary judgment on legal issue 11 in favor of Ecology and PSA, and reach the merits of legal issue 12.¹²

Reversed and remanded.

WE CONCUR:







¹² RCW 34.05.574.

Appendix B

Issuance Date: November 20, 2019
Effective Date: January 1, 2020
Expiration Date: December 31, 2024

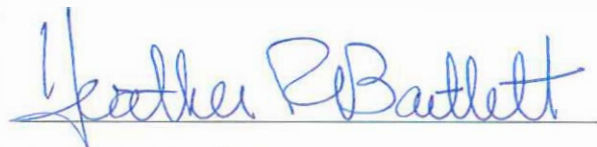
INDUSTRIAL STORMWATER GENERAL PERMIT

A National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General
Permit for Stormwater Discharges Associated With
Industrial Activities

State of Washington
Department of Ecology
Olympia, Washington 98504-7600

In compliance with the provisions of
The State of Washington Water Pollution Control Law
Chapter 90.48 Revised Code of Washington
and
The Federal Water Pollution Control Act
(The Clean Water Act)
Title 33 United States Code, Section 1251 et seq.

Until this permit expires, is modified or revoked, Permittees that have properly obtained
coverage under this general permit are authorized to discharge in accordance with the special
and general conditions which follow.



Heather R. Bartlett
Water Quality Program Manager
Washington State Department of Ecology

SPECIAL CONDITIONS

S1. PERMIT COVERAGE

A. Facilities Required to Seek Coverage Under This General Permit

This statewide permit applies to **facilities** conducting **industrial activities** that discharge **stormwater** to a surface waterbody or to a **storm sewer** system that drains to a surface waterbody. Beginning on the effective date of this permit and lasting through its expiration date, the Permittee is authorized to discharge stormwater and conditionally approved non-stormwater **discharges to waters of the State**. All discharges and activities authorized by this permit shall be consistent with the terms and conditions of this permit.

The permit requires coverage for private entities, state, and **local government** facilities, and includes **existing facilities** and **new facilities**. Facilities conducting industrial activities listed in Table 1 or referenced in S1.A.3 shall apply for coverage under this permit or apply for a Conditional No Exposure exemption, if eligible (Condition S1.F). The **Department of Ecology (Ecology)** may also require permit coverage for any facility on a case-by-case basis in order to protect waters of the State (Condition S1.B).

1. Facilities engaged in any industrial activities in Table 1 shall apply for coverage if stormwater from the facility discharges to a surface waterbody, or to a storm sewer system that discharges to a surface waterbody. The **North American Industry Classification System (NAICS)** groups generally, but not always, associated with these activities are listed in Table 1.

Table 1: Activities Requiring Permit Coverage and the Associated NAICS Groups

Industrial Activities	NAICS Groups
Metal Ore Mining	2122xx
Coal Mining	2121xx
Oil and Gas Extraction	2111xx
Nonmetallic Mineral Mining and Quarrying, except Fuels (except facilities covered under the Sand and Gravel General Permit)	2123xx
Food, Beverage, and Tobacco Manufacturing	311xxx-312xxx
Textile and Textile Products Mills	313xxx-314xxx
Apparel Manufacturing	315xxx
Wood Products Manufacturing	321xxx, 113310 ^a
Furniture and Related Product Manufacturing	337xxx
Paper Manufacturing	322xxx
Printing and Related Support Activities	323xxx, 5111xx

Industrial Activities	NAICS Groups
Chemicals Manufacturing (including Compost Facilities)	325xxx
Petroleum and Coal Products Manufacturing (except facilities covered under the Sand and Gravel General Permit)	324xxx
Plastics and Rubber Products Manufacturing	326xxx
Leather and Allied Product Manufacturing	316xxx
Nonmetallic Mineral Product Manufacturing (except covered under the Sand and Gravel General Permit)	327xxx
Primary Metal Manufacturing	331xxx
Fabricated Metal Product Manufacturing	332xxx
Machinery Manufacturing	333xxx
Computer and Electronic Product Manufacturing	334xxx
Electrical Equipment, Appliance, and Component Manufacturing	335xxx
Transportation Equipment Manufacturing (except NPDES regulated boatyards)	336xxx
Miscellaneous Manufacturing	339xxx
Warehousing and Storage	493xxx, 531130
Recycling facilities involved in the recycling of materials, including but not limited to, metal scrap yards, battery reclaimers, salvage yards, auto recyclers, and automobile junkyards.	42314x and 42393x
Steam Electric Power Generation (Not covered under 40 CFR § 423)	N/A
Waste Management and Remediation Services, including, but not limited to, landfills, transfer stations, open dumps, and land application sites, except as described in S1.C.6 or C.7.	562xxx
Hazardous waste treatment, storage, and disposal (TSD) facilities, and recycling facilities regulated under Chapter 173-303 WAC.	562211
Treatment works treating domestic sewage, or any other sewage sludge, or wastewater treatment device or system, used in the storage, recycling, and reclamation of municipal or domestic sewage (including land dedicated to the disposal of sewage sludge that are located within the confines of the facility) with the design flow capacity of 1 million gallons per day (MGD) or more, or required to have a pretreatment program under 40 CFR §403.	22132x
Transportation facilities which have vehicle maintenance activity, equipment cleaning operations, or airport deicing operations: <ul style="list-style-type: none"> • Railroad Transportation • Transit and Ground Passenger Transportation • Truck Transportation • Postal Service 	
	482xxx, 488210
	485xxx, 488490, 487110
	484xxx
491xxx	

Industrial Activities	NAICS Groups
<ul style="list-style-type: none"> Water Transportation 	483xxx, 487210, 4883xx, 532411
<ul style="list-style-type: none"> Air Transportation 	481xxx, 487990
<ul style="list-style-type: none"> Petroleum Bulk Stations and Terminals 	4247xx
Construction, Transportation, Mining, and Forestry Machinery and Equipment Rental and Leasing	53241x
Marine Construction	ECY003

^a Facilities in this category that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)-(3) are considered industrial activity. This does not include the actual harvesting of timber.

- Any facility that has an existing **National Pollutant Discharge Elimination System (NPDES)** permit which does not address all stormwater discharges associated with industrial activity [40 CFR §122.26(b)(14)] shall obtain permit coverage.
- Any **inactive facility** which is listed under **40 CFR §122.26(b)(14)** where **significant materials** remain onsite and are exposed to stormwater shall obtain permit coverage.

B. Significant Contributors of Pollutants

Ecology may require a facility to obtain coverage under this permit if Ecology determines the facility:

- Is a **significant contributor of pollutants** to waters of the State, including **groundwater**;
- May reasonably be expected to cause a violation of any **water quality standard**; or
- Conducts industrial activity, or has a NAICS code, with stormwater characteristics similar to any industrial activity or NAICS code listed in [Table 1](#) in S1.A.1.

C. Facilities Not Required to Obtain Coverage

Ecology does not require the types of facilities listed below to obtain coverage under this permit, unless determined to be a significant contributor of pollutants.

- Industrial facilities that submit an **application** and qualify for a Conditional “No Exposure” Exemption. (Condition S1.F)
- Industrial 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 sewage authority.
- Industrial facilities that discharge stormwater only to groundwater (e.g., on-site infiltration) with no discharge to **surface waters of the State** under any condition, provided the facility doesn’t meet the requirements of S1.B.1.
- Office buildings and/or administrative parking lots from which stormwater does not commingle with stormwater from areas associated with industrial activity.

5. Any discharge that is in compliance with the instructions of an on-scene-coordinator pursuant to 40 CFR § 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR § 153.10(e) (Pollution by Oil and Hazardous Substances), in accordance with 40 CFR § 122.3(d).
6. Any **land application site** used for the beneficial use of industrial or municipal wastewater for agricultural activities or when applied for landscaping purposes at agronomic rates.
7. Any farmland, domestic garden, or land used for sludge management where domestic sewage sludge (biosolids) is beneficially reused (nutrient builder or soil conditioner) and which is not physically located in the confines of domestic sewage treatment works, or areas that are in compliance with Section 405 (Disposal of Sewage Sludge) of the **Clean Water Act (CWA)**.
8. Any inactive coal mining operation if:
 - a. The performance bond issued to the facility by the appropriate Surface Mining Control and Reclamation Act (SMCRA) authority has been released from applicable state or federal reclamation requirements after December 17, 1990.
 - b. The mine does not have a discharge of stormwater that comes in contact with any overburden, raw material, intermediate products, finished products, byproducts, or waste products located on the site of the facility.
9. Closed **landfills** that are capped and stabilized, in compliance with Chapter 173-304 WAC, and in which no significant materials or industrial **pollutants** remain exposed to stormwater. Permittee's with existing coverage may submit a **Notice of Termination** in accordance with Special Condition S13.A.1.

D. Facilities Excluded from Coverage

Ecology will not cover the following facilities or activities under this permit:

1. If any part of a facility, in the categories listed below, has a stormwater discharge subject to stormwater Effluent Limitations Guidelines, New Source Performance Standards (NSPS) Under 40 CFR subchapter N, or Toxic Pollutant Effluent Standards under 40 CFR subchapter D §129; the operator of the facility must apply for an individual NPDES permit or seek coverage under an industry-specific **general permit** for those stormwater discharges.

Below is a list of categories of industries specified in 40 CFR subchapter N for which at least one subpart includes stormwater effluent limitations guidelines or NSPS. Industries included in this list should review the [subchapter N guidelines](#) to determine if they are subject to a stormwater effluent limitation guideline for activities which they perform at their site.

40 CFR 411 Cement manufacturing	40 CFR 423 Steam electric power generating
40 CFR 412 Feedlots	40 CFR 434 Coal mining
40 CFR 418 Fertilizer manufacturing	40 CFR 436 Mineral mining and processing
40 CFR 419 Petroleum refining	40 CFR 440 Ore mining and dressing
40 CFR 422 Phosphate manufacturing	40 CFR 443 Paving and roofing materials (tars & asphalt)
40 CFR 449.11(a) Airports with more than 10,000 annual jet departures	

- viii. Roofs or other surfaces composed of materials that may be mobilized by stormwater (e.g., galvanized roofs, galvanized fences).
- c. The inventory of materials shall list:
 - i. The types of materials handled at the site that potentially may be exposed to precipitation or runoff and could result in stormwater pollution.
 - ii. A short narrative for each material describing the potential of the pollutant to be present in stormwater discharges. The Permittee shall update this narrative when data become available to verify the presence or absence of these pollutants.
 - iii. A narrative description of any potential sources of pollutants from past activities, materials and spills that were previously handled, treated, stored, or disposed of in a manner to allow ongoing exposure to stormwater. Include the method and location of on-site storage or disposal. List significant spills and significant leaks of toxic or hazardous pollutants.
- 3. The SWPPP shall identify specific individuals by name or by title within the organization (pollution prevention team) whose responsibilities include: SWPPP development, implementation, maintenance, and modification.
 - 4. Best Management Practices (BMPs)
 - a. General BMP Requirements

The Permittee shall describe each BMP selected to eliminate or reduce the potential to contaminate stormwater and prevent violations of water quality standards. The SWPPP must explain in detail how and where the selected BMPs will be implemented.
 - b. The Permittee shall include each of the following mandatory BMPs in the SWPPP and implement the BMPs. The Permittee may omit individual BMPs if site conditions render the BMP unnecessary or infeasible and the Permittee provides alternative and equally effective BMPs. The Permittee must justify each BMP omission in the SWPPP.
 - i. **Operational Source Control BMPs**
 - 1) The SWPPP shall include the Operational **Source Control BMPs** listed as “applicable” in Ecology’s SWMMs, or other guidance documents or manuals approved in accordance with S3.A.3.c.
 - 2) **Good Housekeeping:** The SWPPP shall include BMPs that define ongoing maintenance and cleanup, as appropriate, of areas which may contribute pollutants to stormwater discharges. The SWPPP shall include the schedule/frequency for completing each housekeeping task, based upon industrial activity, sampling results and observations made during inspections. The Permittee shall:
 - a) Vacuum paved surfaces with a vacuum sweeper (or a sweeper with a vacuum attachment) to remove accumulated pollutants a minimum of once per quarter.
 - b) Identify and control all on-site sources of dust to minimize stormwater contamination from the deposition of dust on areas exposed to precipitation.

- c) Inspect and maintain bag houses monthly to prevent the escape of dust from the system. Immediately remove any accumulated dust at the base of exterior bag houses.
 - d) Keep all dumpsters under cover or fit with a storm resistant lid that must remain closed when not in use. (Tarps are not considered storm resistant.)
- 3) **Preventive Maintenance:** The SWPPP shall include BMPs to inspect and maintain the stormwater drainage, source controls, treatment systems (if any), and plant equipment and systems that could fail and result in contamination of stormwater. The SWPPP shall include the schedule/frequency for completing each maintenance task. The Permittee must:
- a) Clean catch basins when the depth of debris reaches 60% of the sump depth. In addition, the Permittee must keep the debris surface at least 6 inches below the outlet pipe.
 - b) Maintain ponds, tanks/vaults, catch basins, swales, filters, oil/water separators, drains, and other stormwater drainage/treatment facilities in accordance with the maintenance standards set forth in the applicable Stormwater Management Manual, other guidance documents or manuals approved in accordance with S3.A.3.c, demonstrably **equivalent BMPs** per S3.A.3.d, or an O&M Manual submitted to Ecology in accordance with S8.D.
 - c) Inspect all equipment and vehicles during monthly site inspections for leaking fluids such as oil, antifreeze, etc. Take leaking equipment and vehicles out of service or prevent leaks from spilling on the ground until repaired.
 - d) Clean up spills and leaks immediately (e.g., using absorbents, vacuuming, etc.) to prevent the discharge of pollutants.
- 4) **Spill Prevention and Emergency Cleanup Plan (SPECP):** The SWPPP shall include a SPECP that includes BMPs to prevent spills that can contaminate stormwater. The SPECP shall specify BMPs for material handling procedures, storage requirements, cleanup equipment and procedures, and spill logs, as appropriate. The Permittee shall:
- a) Store all hazardous substances, petroleum/oil liquids, and other chemical solid or liquid materials that have potential to contaminate stormwater on an impervious surface that is surrounded with a containment berm or dike that is capable of containing 10% of the total enclosed tank volume or 110% of the volume contained in the largest tank, whichever is greater, or use double-walled tanks.
 - b) Prevent precipitation from accumulating in containment areas with a roof or equivalent structure or include a plan on how it will manage and dispose of accumulated water if a containment area cover is not practical.

3rd Quarter = July, August, and September

4th Quarter = October, November, and December

- b. Permittees shall sample the stormwater discharge from the **first fall storm event** each year. First fall storm event means the first time on or after September 1st of each year that precipitation occurs and results in a stormwater discharge from a facility.
 - c. Permittees shall collect samples within the first 12 hours of stormwater discharge events. If it is not possible to collect a sample within the first 12 hours of a stormwater discharge event, the Permittee must collect the sample as soon as practicable after the first 12 hours, and keep documentation with the sampling records (Condition S4.B.3) explaining why they could not collect samples within the first 12 hours; or if it is unknown (e.g., discharge was occurring during start of regular business hours).
 - d. The Permittee shall obtain **representative samples**, which may be a single grab sample, a time-proportional sample, or a flow-proportional sample.
 - e. Permittees need not sample outside of **regular business hours**, during **unsafe conditions**, or during quarters where there is no discharge, but shall submit a Discharge Monitoring Report each reporting period (Condition S9.A).
 - f. Permittees monitoring more than once per quarter shall **average** all of the monitoring results for each parameter (except pH and visible oil sheen) and compare the average value to the **benchmark** value. However, if Permittees collect more than one sample during a 24-hour period, they must first calculate the **daily average** of the individual grab sample results collected during that 24-hour period; then use the daily average to calculate a quarterly average.
2. Sample Location(s)
 - a. The Permittee shall designate sampling location(s) at the point(s) where it discharges stormwater associated with industrial activity off-site.
 - b. The Permittee is not required to sample on-site discharges to ground (e.g., infiltration) or sanitary sewer discharges, unless specifically required by Ecology (Condition G12).
 - c. Ecology may require sampling points located in areas where unsafe conditions prevent regular sampling be moved to areas where regular sampling can occur.
 - d. The Permittee shall notify Ecology of any changes or updates to sample locations, discharge points, and/or outfalls by submitting an "Industrial Stormwater General Permit Discharge/Sample Point Update Form" to Ecology. The Permittee may be required to provide additional information to Ecology prior to changing sampling locations.
 3. Substantially Identical Discharge Points
 - a. The Permittee shall sample each distinct point of discharge off-site except as otherwise exempt from monitoring as a **substantially identical discharge point** per S3.B.5.b. If applicable, the Permittee is only required to monitor applicable parameters at one of the substantially identical discharge points.

The Permittee shall notify Ecology of any changes or updates to sample locations, discharge points, and/or outfalls by submitting an ["Industrial Stormwater General Permit Discharge/Sample Point Update Form"](#) to Ecology.

6. Where a TMDL for a parameter present in the Permittee's discharge specifically precludes or prohibits discharges of stormwater associated with industrial activity, the Permittee is not eligible for coverage under this permit.

S7. INSPECTIONS

A. Inspection Frequency and Personnel

1. The Permittee shall conduct and document visual inspections of the site each month.
2. The Permittee shall ensure that inspections are conducted by qualified personnel.

B. Inspection Components

Each inspection shall include:

1. Observations made at stormwater sampling locations and areas where stormwater associated with industrial activity is discharged off-site; or discharged to waters of the State, or to a storm sewer system that drains to waters of the State.
2. Observations for the presence of floating materials, visible oil sheen, discoloration, turbidity, odor, etc. in the stormwater discharge(s).
3. Observations for the presence of illicit discharges such as domestic wastewater, noncontact cooling water, or process wastewater (including leachate).
 - a. If an illicit discharge is discovered, the Permittee shall notify Ecology within seven days.
 - b. The Permittee shall eliminate the illicit discharge within 30 days.
4. A verification that the descriptions of potential pollutant sources required under this permit are accurate.
5. A verification that the site map in the SWPPP reflects current conditions.
6. An assessment of all BMPs that have been implemented, noting all of the following:
 - a. Effectiveness of BMPs inspected.
 - b. Locations of BMPs that need maintenance.
 - c. Reason maintenance is needed and a schedule for maintenance.
 - d. Locations where additional or different BMPs are needed and the rationale for the additional or different BMPs.

C. Inspection Results

1. The Permittee shall record the results of each inspection in an inspection report or checklist and keep the records on-site, as part of the SWPPP, for Ecology review.
The Permittee shall ensure each inspection report documents the observations, verifications and assessments required in S7.B and includes:
 - a. Time and date of the inspection
 - b. Locations inspected

including the proper selection, implementation, and maintenance of all applicable and appropriate best management practices for on-site pollution control.

- C. Prior to the discharge of stormwater and non-stormwater to waters of the State, the Permittee shall apply all known and reasonable methods of prevention, control, and treatment (AKART). To comply with this condition, the Permittee shall prepare and implement an adequate SWPPP, with all applicable and appropriate BMPs, including the BMPs necessary to meet the standards identified in Condition S10.A, and shall install and maintain the BMPs in accordance with the SWPPP, applicable SWMMs, and the terms and conditions of this permit.

S11. PERMIT FEES

- A. The Permittee shall pay permit fees assessed by Ecology and established in Chapter 173-224 WAC.
- B. Ecology will continue to assess permit fees until it terminates a permit in accordance with Special Condition S13 or revoked in accordance with General Condition G5.

S12. SOLID AND LIQUID WASTE MANAGEMENT

The Permittee shall not allow solid waste material or *leachate* to cause violations of the State Surface Water Quality Standards (Chapter 173-201A WAC), the Groundwater Quality Standards (Chapter 173-200 WAC) or the Sediment Management Standards (Chapter 173-204 WAC).

S13. NOTICE OF TERMINATION (NOT)

A. Conditions for a NOT

Ecology may approve a Notice of Termination (NOT) request when the Permittee meets one or more of the following conditions and Ecology determines that the discharges from the facility are no longer required to be covered under this permit:

1. All permitted stormwater discharges associated with industrial activity that are authorized by this permit cease because the industrial activity has ceased, and no significant materials or industrial pollutants remain exposed to stormwater.
2. The party that is responsible for permit coverage (signatory to application) sells or otherwise legally transfers responsibility for the industrial activity.
3. All stormwater discharges associated with industrial activity are prevented because the stormwater is redirected to a sanitary sewer, or discharged to ground (e.g., infiltration).

B. Procedure for Obtaining Termination

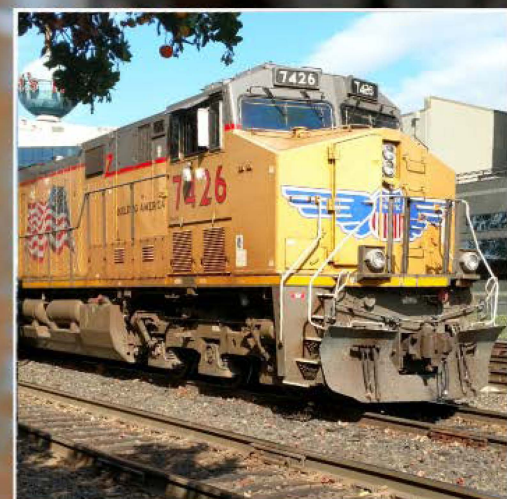
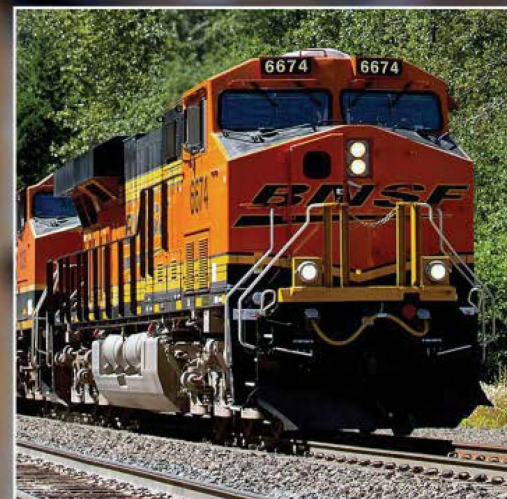
1. The Permittee shall apply for a NOT on a form specified by Ecology ([NOT Form](#)).
2. The Permittee seeking permit coverage termination shall sign the NOT in accordance with Condition G2 of this permit.
3. The Permittee shall submit the completed NOT form to Ecology through the WQWebPortal.

Appendix C



WASHINGTON STATE RAIL PLAN

2019-2040



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CHAPTER 1

INTRODUCTION

1.1 Background and context

Rail is an integral part of the statewide multimodal transportation system that keeps people and businesses moving. Serving freight and passengers, the rail system provides efficient transportation critical to maintaining our economy, environment and quality of life. The Washington State Rail Plan comes during a time of change for rail transportation in the state, with the rail transportation system facing important near and long-term challenges that include:

- Addressing issues related to the December 2017 Amtrak Cascades derailment at DuPont, WA
- Meeting the increasing demand for passenger and freight rail services in Washington in partnership with private rail carriers that own much of the network over which passenger and freight trains operate
- Developing more efficient and effective connections between rail and other modes of transportation
- Ensuring the sustainability of Washington's public and private short line railroads that face infrastructure investment needs in order to preserve these important services to communities

The Washington State Rail Plan is a single, integrated plan for both passenger and freight rail and is the planning foundation for future actions. To address rail system challenges and identify opportunities for improvement, the Washington State Department of Transportation's (WSDOT) plan describes the rail system and the state's interest in it, identifies potential actions to improve the rail system, and recommends strategies consistent with Washington's transportation policy goals of economic vitality, preservation, safety, mobility, environment, and stewardship.

It's important to note that planning documents such as this represent a snapshot in the continuous improvement of the rail system in Washington. For example, deliberations, obligations and the needs of the state's rail program in response to the December 2017 Amtrak Cascades derailment, passage of I-976, and transportation impacts resulting from potential dam breaching on the Columbia Snake River Navigation System are still being assessed as this plan is being written. Also, the COVID-19 pandemic may have effects on the rail system that are not fully understood yet.

The Washington State Rail Plan is a single, integrated plan for both passenger and freight rail

NOTE: These issues could have significant implications to the state's rail system and WSDOT may need to perform a technical update as appropriate prior to the next five-year plan update cycle.

CHAPTER 2

RAIL SYSTEM OVERVIEW

Washington’s rail system is a central part of a multimodal transportation strategy that provides choices, supports broad-based economic growth and offers an environmentally efficient transportation option. The rail network is categorized into freight services and passenger services. This categorical division is reflected throughout the structure of this document. Yet, both freight and passenger services share much of the same infrastructure and operate as an integrated rail system.

This chapter provides an overview of the rail system in Washington. It describes rail infrastructure and services, the institutional structure that governs rail, and funding programs administered by the state in the last ten years. Additional detail on the rail system and the issues associated with each element can be found in Chapters 3, 4, 5 and in the Appendices.

2.1 Rail system elements

The rail system is part of a larger transportation network that includes many other transportation modes (active transportation, aviation, pipelines, public roads, public transportation, and waterways) to move people and goods. Rail can play different roles in these trips by serving as the primary mode of transportation, providing only a single leg of the journey, or acting as a mode that expands transportation choice and provides resilience.

Likewise, the rail system is composed of different parts, or elements, each with a specific role and purpose. This system connects communities within Washington to each other and to other communities throughout North America and the world.

The rail system in Washington consists of both freight and passenger rail elements. The freight rail system consists of an expansive network of main lines, branch lines, yards and terminals. The passenger rail system consists of long distance, intercity and commuter rail services operating mostly on freight rail lines. Exhibit 2-1 shows the rail system by owner in Washington, and Exhibit 2-2 shows the passenger rail services in the state.

Washington also has other rail systems that are either physically or operationally isolated from the national rail network, including some types of rail transit and tourist-oriented rail operations. These rail systems are not addressed in this plan.

The Rail System in Washington state includes two Class I and twenty-seven Class III (short line) railroads that operate on approximately 3,200 route miles composed of:

- Class I = 1,900 miles
- Class III = 1,300 miles

Exhibit 2-1: Washington state rail system by owner



Owner						
— BNSF Railway	— City of Tacoma	— Genesee and Wyoming	— Port of Benton	— Port of Pend Oreille	— Sound Transit	— Union Pacific Railroad (UP)
— BNSF/UP	— City of Woodinville	— Mount Vernon Terminal Railway	— Port of Chehalis	— Port of Royal Slope	— Spokane County	— WSDOT
— Ballard Terminal Railroad	— Clark County	— OmniTrax	— Port of Columbia	— Rainier Rail	— US Department of Energy	— Watco
— City of Seattle	— Columbia Basin Railroad	— Patriot Rail	— Port of Longview	— Snohomish County	— US Navy	— Yakima County

2.5 Roles and responsibilities

Privately-owned railroads

The rail system differs from the roadway, transit, aviation and water transportation systems in Washington. Unlike other modes of transportation that are generally owned and maintained at public expense and accessible to any licensed operator, rail carriers not only move the freight, they commonly also own, maintain and control the physical infrastructure. Each railroad functions as an integrated business, including marketing and pricing services, operating and dispatching trains, maintaining assets, and allocating capital for rolling stock and infrastructure.

The public sector's role in the rail system must be balanced with the needs and goals of the private railroad industry. Though the railroads work with the public sector to operate passenger rail service and to help plan necessary freight projects, it is nevertheless the responsibility of each railroad to make decisions about capital investments and maintenance spending. Railroads maintain their infrastructure assets to meet safety standards and to avoid expensive reconstruction. Railroads also must consider which expansions of capacity will provide the most benefit to their business.

The public sector interacts with private freight railroads in multiple ways. In general, overlap between public policy and private railroad decision-making occurs in five areas: publicly-sponsored and publicly-owned assets, taxation, grade crossings, rail safety and economic incentives.

Federal agencies

Federal Railroad Administration

The Federal Railroad Administration (FRA) promotes safe, reliable, and efficient rail transportation to move people and goods. With the responsibility of ensuring railroad safety throughout the nation, the FRA employs safety inspectors to monitor railroad compliance with federally mandated safety standards including track maintenance, inspection standards and operating practices. FRA actively manages rail policy development and investment. This includes providing oversight and guidance in support of rail planning projects, as well as awarding and administering grants that fund safety, state of good repair, and capacity improvement projects. The FRA conducts research and development tests to evaluate projects in support of its safety mission and to enhance the railroad system as a national transportation resource. Public education campaigns on highway-rail grade crossing safety and the danger of trespassing on rail property are also administered by FRA.

Federal Transit Administration

The Federal Transit Administration (FTA) provides financial and technical assistance to state and local public transit service providers, including commuter railroads. FTA awards and oversees formula-based and competitive federal grant programs, distributing funding to state and local transit providers to assist them in developing transit systems, or to improve, maintain, and operate existing systems. FTA also provides federal oversight of transit safety, in coordination with the states. FTA grantees, public transportation providers, are responsible for managing their transit programs in accordance with federal requirements.

Surface Transportation Board

The Surface Transportation Board (STB) is the successor agency to the Interstate Commerce Commission. It is an economic regulatory agency that has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments). The STB is an independent agency, although it is administratively affiliated with the Department of Transportation.

3.3 Class I railroads

The two Class I freight railroads that operate in Washington are BNSF Railway and the Union Pacific Railroad. Together, they own 60% of the rail infrastructure by mileage and carry millions of carloads of commodities each year. These two railroads are responsible for moving the vast majority of freight handled by rail into, out of, within and through Washington.

State role and interest

BNSF and UP are important to Washington by virtue of the volume of freight traffic hauled, the rail infrastructure that serves freight (and passenger) rail traffic in the state, the economic impact of these two Class I railroads and the benefits they provide to the economy. The two railroads connect short line railroads to the national rail network, and host most of the passenger rail service.

A well-functioning rail system provides considerable benefits to Washington's economy. For example, availability of reliable rail service can make Washington ports more competitive for discretionary cargo – cargo that could easily be routed to ports outside of Washington.

Rail is typically more cost-efficient at carrying bulk loads and intermodal freight distances of approximately 500 miles or more. By weight, the rail share of freight shipment in Washington state is about 13%, and the multiple modes share (including rail intermodal shipment) is about 6%, while truck share of total freight shipment is roughly 65%.¹² A decline in rail service or service limitations on key infrastructure may shift freight traffic to trucks for high-value goods that are typical of the manufacturing and retail sectors. This would negatively affect the state's economy. Taxpayers would bear the costs for increased wear and tear and congestion on Washington's roadways and those increased costs could lead to rising prices or loss of trade and industry. Overall, the federal Government Accountability Office (GAO) has estimated the per-ton-mile social costs of trucking are six times greater than for rail.¹³ These costs include collisions and pollution.

Rail is very energy-efficient. In 2017, U.S. freight railroads moved a ton of freight an average of 479 miles per gallon of fuel.¹⁴ This efficiency allowed railroads to move nearly 10% of the freight tonnage in the U.S.¹⁵ while accounting for only 2% of U.S. transportation greenhouse gas emissions in 2017.¹⁶ To the extent that freight can be shifted from trucks to rail, Washington state can benefit from reduced greenhouse gas emissions related to energy consumption.

Existing and future conditions

The physical condition of railroads can be measured by two metrics:

- Percent of railroad system that can be operated at 25 mph or above
- Percent of railroad system capable of handling 286,000-pound rail cars

BNSF and UP are capable of handling 286,000 pound rail cars over all of their main routes in Washington. Almost all of the BNSF and UP mainlines can be operated at 25 mph or above. The BNSF corridors which accommodate Amtrak Cascades and Amtrak long distance services support higher operating speeds for freight trains up to 60 mph.

Issues and needs

Higher freight rail volumes

The freight volume forecasts indicate that some Class I rail corridors in Washington could see volumes that exceed current capacity. Maintaining reliable service while moving additional volume could require changes. Unless rail system infrastructure is enhanced, this future growth could overwhelm rail system capacity due to shortcomings, such as passenger/freight conflicts, height limitations on rail tunnels and bridges, inadequate siding lengths or bridge capacity. (Please see section 5.3, which provides 2040 rail system capacity analysis results for varying future scenarios.)

Rail capacity is not static. The volume of traffic a railroad can handle depends not only on infrastructure, but also on the railroad's operating strategies, traffic mix, use of technology and many other business decisions. The privately-owned Class I railroads (BNSF and Union Pacific) manage their operations and capital investments to meet changes in traffic volumes on their network.

The actions the railroads take to meet freight rail demand can have public benefits. Working with freight and rail stakeholders to ensure rail service is comparable or better than its modal competitors helps Washington stay nationally and internationally competitive. Since people have other options for personal travel or shipping goods, a well-functioning rail system will protect and grow rail's mode share. For example, maintaining and improving reliable rail service could help Washington ports compete for discretionary cargo. Additionally, the increased movement of manufactured and retail products by rail helps minimize congestion on the state's highways, providing additional positive benefits to the state economy. Taxpayers could benefit from the decreased wear and tear on Washington's roadways and efficiencies in rail service could lead to lower prices and increased industrial business opportunities. The potential public benefits of increased freight movement by rail can be increased with careful land use planning, such as concentrating warehouses near rail intermodal facilities.

Capacity along the state's three east-west rail corridors have long been key to the competitive position of Washington's ports as well as the region's freight shippers and short lines. Improvements such as the implementation of directional running over Stampede Pass and the construction of additional sidings and sections of second main track between Vancouver and Spokane by BNSF has deferred the immediate need for more extensive action. However, ensuring the availability of adequate east-west capacity is vital to the future of rail service in Washington if volumes grow in the future.

5.2 Multimodal connectivity for freight rail

Connections from rail to other modes of transportation are important for freight rail. Reliable and efficient access to the rail system throughout the state increases attractiveness of Washington ports and helps make Washington's goods more competitive in the global market. There are several types of rail transfer facilities, each suited for a different purpose.

An example of an intermodal freight movement is a container that is imported on a ship and then transferred to a truck and then transferred to a railcar. Intermodal container terminals provide for connectivity to other modes such as trucking and shipping. These terminals typically move 40-foot containers but also move containers of various sizes, including 53-foot containers that serve North America exclusively. Ships carrying international and domestic containers can be loaded directly onto railcars at on-dock intermodal facilities within NWSA terminals at Port of Seattle and Port of Tacoma, or containers can be drayed by trucks and then loaded onto railcars at near-dock or off-dock facilities. BNSF has three commercial intermodal yards: Seattle, South Seattle, and Spokane. Union Pacific has two commercial intermodal container yards: Argo in Seattle and TacSim in Fife.

Bulk transfer facilities are used for transloading bulk goods between rail and other modes, typically highway and water, and facilitate transferring the commodity from one mode specific vehicle to another. Grain elevators are an example.

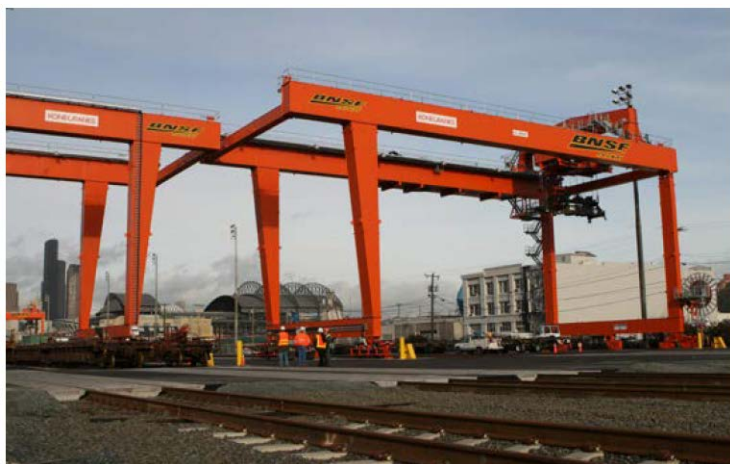
Specialized yards are used for automobile loading/unloading facilities and other commodities that require special handling. Automobile facilities are located in Spokane, Tacoma, Kent, and Tukwila.

Transload terminals transfer carload freight between rail cars and trucks. Some facilities offer storage services for customers. BNSF and Union Pacific partner with the operators of these facilities to offer affiliated networks of transload terminals. Common commodities that move through these facilities include lumber and bulk goods (dry or liquid), such as plastic pellets and vegetable oil.

State role and interest

Terminals and yards facilitate the movement of freight by providing essential functions in support of other carriers. As one example, intermodal terminals are key links in supply chains that use Washington's ports. They serve as the primary means of providing access to the U.S. interior. Intermodal terminals are especially important for Washington as they support the Puget Sound region's growing intermodal container trade. In Washington, rail intermodal traffic accounted for 18 million tons, or 15% of total freight commodity flow in 2016. Terminals are also important for the movement of Washington agricultural products and other freight, allowing shippers not located on a rail line to access the rail system.

Maintaining the supply of suitable industrial lands around rail terminals is important to encourage future industrial and rail growth.



Electrically-powered intermodal cranes at Seattle (BNSF photo)

Issues and needs

Land use

Maintaining the supply of suitable industrial lands around rail terminals is important to encourage future industrial and rail growth. Industrial access to freight railways is critical for many industries to remain competitive. These industries often supply family-wage jobs to areas where economic growth can be scarce.

Railroads and cities have grown symbiotically in the western United States since the industrial revolution with rail-centric industry and passenger rail being a principal driver in westward expansion. This trend resulted in population centers surrounding rail facilities. As urbanization brings more people into cities, gentrification and housing shortages increase pressure to redevelop rail-dependent industrial areas. When this happens, industrial land values can increase to a point where the land may be more valuable for residential developments than manufacturing or distribution facilities. Additionally, many obsolete rail-served industrial facilities are not economically feasible to be redeveloped for modern industry. Local governments face a dilemma of whether or not to hold onto industrial areas for future use or rezone them to increase tax revenues. However, if these industrial areas are rezoned for residential uses, new conflicts may develop between new residents and the adjacent railroad.

Land use is also an important consideration for the location of rail customers who use trucks to access the rail system. With the increasing volume of shipments entering the rail system using trucks instead of being directly loaded on rail cars, the number of trucks traveling to rail intermodal and transload terminals on regional highways has increased, adding to congestion.

Washington ports

Railroads have an important role as Washington ports adapt to a changing maritime industry. These changes include changing trade economics (primarily due to tariffs), competition from other ports, the trend towards larger ships, and the growing practice of transloading containers.

A prosperous Washington economy depends heavily on goods imported by container through marine and land-side transportation infrastructure and the ability to economically export products. In addition to supporting jobs in trade and logistics sectors, container imports benefit manufacturers and agricultural producers that export through the ports by spreading total port capital and operations costs across a wider area. Two-thirds of the U.S. population lives east of the Mississippi River, and up to 70% of containers imported through the Ports of Seattle and Tacoma in the past decade were destined for the Midwest and eastern seaboard.

Larger vessels using the Panama Canal and a shift in manufacturing from China to other nations has changed the economics for some shippers moving freight to the central and eastern parts of the United States, with total annual tonnage increasing 22% between 2016 and 2017. This increase reflects bulk and containerized freight that once passed through ports on the West Coast and traveled across the country by rail. Much of that freight now is passing through ports closer to where it is destined.

Expansion of ports in British Columbia has increased the number of containers moving by rail through Canada to locations in the eastern half of the United States. In 1995, Seattle and Tacoma combined had five times the market share of the Ports of Prince Rupert, British Columbia and Metro Vancouver, British Columbia combined. Now they are nearly equal.² The Port of Prince Rupert, developed as part of the Canadian government's national

² Washington State Freight Trends & Policy Recommendations. http://www.fmsib.wa.gov/fac/20140602-FINALComplete%20Folio_for%20printer5-7-14.pdf

Appendix D

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of the United States. In making this designation the Director shall consider the following factors:

- (i) The location and quality of the receiving waters of the United States;
- (ii) The holding, feeding, and production capacities of the facility;
- (iii) The quantity and nature of the pollutants reaching waters of the United States; and
- (iv) Other relevant factors.

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

[48 FR 14153, Apr. 1, 1983, as amended at 65 FR 30907, May 15, 2000]

§ 122.25 Aquaculture projects (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Discharges into aquaculture projects, as defined in this section, are subject to the NPDES permit program through section 318 of CWA, and in accordance with 40 CFR part 125, subpart B.

(b) *Definitions.* (1) *Aquaculture project* means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.

(2) *Designated project area* means the portions of the waters of the United States within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan or operation (including, but not limited to, physical confinement) which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* (1) Prior to October 1, 1994, discharges composed en-

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tirely of storm water shall not be required to obtain a NPDES permit except:

- (i) A discharge with respect to which a permit has been issued prior to February 4, 1987;
- (ii) A discharge associated with industrial activity (see § 122.26(a)(4));
- (iii) A discharge from a large municipal separate storm sewer system;
- (iv) A discharge from a medium municipal separate storm sewer system;
- (v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

- (A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.
- (B) The size of the discharge;
- (C) The quantity and nature of the pollutants discharged to waters of the United States; and
- (D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

- (i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste

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products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

NOTE TO PARAGRAPH (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) *Large and medium municipal separate storm sewer systems.* (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer

which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4) (i), (ii), and (iii) or (b)(7) (i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by

the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) *Discharges through large and medium municipal separate storm sewer systems.* In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) *Other municipal separate storm sewers.* The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) *Non-municipal separate storm sewers.* For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal

separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) *Combined sewer systems.* Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of §122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to §122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge,

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or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see §124.52(c) of this chapter).

(b) *Definitions.* (1) *Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) *Illicit discharge* means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) *Incorporated place* means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) *Large municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in

paragraph (b)(4) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(4) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b)(4) (i), (ii), (iii) of this section.

(5) *Major municipal separate storm sewer outfall* (or "major outfall") means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) *Major outfall* means a major municipal separate storm sewer outfall.

(7) *Medium municipal separate storm sewer system* means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7) (i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7) (i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7) (i), (ii), (iii) of this section.

(8) *Municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) *Outfall* means a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) *Overburden* means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) *Runoff coefficient* means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) *Significant materials* includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

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(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are con-

sidered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)-(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(1) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

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

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the dis-

turbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25;

(15) *Storm water discharge associated with small construction activity* means the discharge of storm water from:

(i) 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. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, *Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE)*, pages 21-64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained at EPA's Water Docket, 1200 Pennsylvania Avenue NW, Washington, DC 20460. For information on the availability of this material at National Archives and Records Administration, call 202-741-6030, or go to: http://www.archives.gov/federal_register/

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code of federal regulations/ibr locations.html. An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a “total maximum daily load” (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will

take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(C) As of December 21, 2025 or an EPA-approved alternative date (*see* 40 CFR 127.24(e) or (f)), all certifications submitted in compliance with paragraphs (b)(15)(i)(A) and (B) of this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), §122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

EXHIBIT 1 TO § 122.26(b)(15)—SUMMARY OF COVERAGE OF “STORM WATER DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY” UNDER THE NPDES STORM WATER PROGRAM

Automatic Designation: Required Nationwide Coverage.	<ul style="list-style-type: none"> • Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres. • Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (<i>see</i> § 122.26(b)(15)(i).)
Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.	<ul style="list-style-type: none"> • Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (<i>see</i> § 122.26(b)(15)(ii).)
Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority..	Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (<i>see</i> § 122.26(b)(15)(i).)

(16) *Small municipal separate storm sewer system* means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or

other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State

law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) *Small MS4* means a small municipal separate storm sewer system.

(18) *Municipal separate storm sewer system* means all separate storm sewers that are defined as “large” or “medium” or “small” municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) *MS4* means a municipal separate storm sewer system.

(20) *Uncontrolled sanitary landfill* means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runoff or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) *Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity*--(1) *Individual application*. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit or any discharge of storm water which the Director is evaluating for designation (see § 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm

sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)–(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-

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structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with §122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD₅, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under §122.21(g)(7)(vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the du-

ration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of §122.21 (g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in §122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of §122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of §122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

(A) The location (including a map) and the nature of the construction activity;

(B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;

(C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;

(D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;

(E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and

(F) The name of the receiving water.

(iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:

(A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 117.21 or 40 CFR 302.6 at anytime since November 16, 1987; or

(B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to 40 CFR 110.6 at any time since November 16, 1987; or

(C) Contributes to a violation of a water quality standard.

(iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.

(v) Applicants shall provide such other information the Director may reasonably require under §122.21(g)(13) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) *Application requirements for large and medium municipal separate storm*

sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) *Part 1.* Part 1 of the application shall consist of;

(i) *General information.* The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) *Legal authority.* A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) *Source identification.* (A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

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(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

(5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and

(6) The identification of publicly owned parks, recreational areas, and other open lands.

(iv) *Discharge characterization.* (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.

(B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.

(C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:

(1) Assessed and reported in section 305(b) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;

(2) Listed under section 304(1)(1)(A)(i), section 304(1)(1)(A)(ii), or section 304(1)(1)(B) of the CWA that is not expected to meet water quality standards or water quality goals;

(3) Listed in State Nonpoint Source Assessments required by section 319(a) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);

(4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under section 314(a) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);

(5) Areas of concern of the Great Lakes identified by the International Joint Commission;

(6) Designated estuaries under the National Estuary Program under section 320 of the CWA;

(7) Recognized by the applicant as highly valued or sensitive waters;

(8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and

(9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) *Field screening.* Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description

of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

(1) A grid system consisting of perpendicular north-south and east-west lines spaced $\frac{1}{4}$ mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;

(2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;

(3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;

(4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;

(5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;

(6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced $\frac{1}{4}$ mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) *Characterization plan.* Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph

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(d)(1)(iv)(C) of this section) to the extent practicable.

(v) *Management programs.* (A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) *Fiscal resources.* (A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) *Part 2.* Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) *Source identification.* The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(I) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) *Characterization data.* When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with 40 CFR 122.21(g)(7) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as

representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at §122.21(g)(7) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii)(A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

- Total suspended solids (TSS)
- Total dissolved solids (TDS)
- COD
- BOD₅
- Oil and grease
- Fecal coliform
- Fecal streptococcus
- pH
- Total Kjeldahl nitrogen
- Nitrate plus nitrite
- Dissolved phosphorus
- Total ammonia plus organic nitrogen
- Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under §122.21(c)(7)) for BOD₅, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed

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basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide addi-

tional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing

drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and

recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD₅, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the

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result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) *Fiscal analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) *Application deadlines.* Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) *Storm water discharges associated with industrial activity.* (i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application

made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) *Part 1.* (A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) *Part 2.* (A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) *Rejected facilities.* (A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)-(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see §124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

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(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see §122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under §122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under §122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under §123.35(d)(3) (see §122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under §122.32(a)(2) (see §122.33(c)(2)).

(f) *Petitions.* (1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) *Conditional exclusion for "no exposure" of industrial activities and materials to storm water.* Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to

rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) *Qualification.* To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to §122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years. As of December 21, 2025 or an EPA-approved alternative date (see 40 CFR 127.24(e) or (f)), all certifications submitted in compliance with this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), §122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(iv) Allow the Director to inspect the facility to determine compliance with the “no exposure” conditions;

(v) Allow the Director to make any “no exposure” inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of “no exposure” to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) *Industrial materials and activities not requiring storm resistant shelter.* To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak (“Sealed” means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) *Limitations.* (i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be “no exposure” discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for un-permitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) *Certification.* The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

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(i) The legal name, address and phone number of the discharger (see §122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

(B) Materials or residuals on the ground or in storm water inlets from spills/leaks;

(C) Materials or products from past industrial activity;

(D) Material handling equipment (except adequately maintained vehicles);

(E) Materials or products during loading/unloading or transporting activities;

(F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);

(G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;

(H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;

(I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);

(J) Application or disposal of process wastewater (unless otherwise permitted); and

(K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All "no exposure" certifications must include the following certification statement, and be signed in accordance with the signatory requirements of §122.22: "I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of "no exposure" and obtaining an exclusion from NPDES storm water permitting; and

that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

[55 FR 48068, Nov. 16, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §122.26, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§122.27 Silvicultural activities (applicable to State NPDES programs, see §123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which

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