

## Ecology Proposes Significant—And Legally Vulnerable—Changes to Washington’s Industrial Stormwater General Permit



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### Key Takeaways

- ◆ **What is Happening?** The Washington State Department of Ecology (Ecology) [published](#) for public comment its proposed 2025 Industrial Stormwater General Permit (ISGP), which authorizes the discharge of stormwater and certain conditionally authorized “non-stormwater” discharges, from industrial activities in the State of Washington, as well as the corresponding draft [Fact Sheet](#). A number of the proposed changes rest on questionable legal footing, including:
  - ◆ Expansion of regulatory control of transportation sector discharges beyond the stormwater from the limited areas regulated under the Clean Water Act (CWA)—transportation facility vehicle maintenance shops, equipment cleaning operations, and airport deicing operations—to require control of discharges from any/all material handling areas of the transportation facility. Ecology’s authority to do so is legally vulnerable.
  - ◆ Imposition of significant 6PPD-quinone sampling requirements on transportation and warehouse facilities.
  - ◆ Imposition of significant sampling requirements for Per and Polyfluorinated Substances (PFAS) on air transportation and waste management facilities.
  - ◆ Creation of procedural restrictions that threaten to foreclose qualified facilities from obtaining Conditional No Exposure (CNE) exemptions to ISGP coverage in a timely manner.
- ◆ **Who is Impacted?** Industrial facilities in Washington.
- ◆ **What Should I Do?** The proposed changes will affect many industrial facilities in Washington currently subject to the ISGP and those that may become subject to the ISGP in the near future. These facilities should consider submitting public comments by the **June 28, 2024 deadline**. Similarly, the proposed rules will affect current CNE holders, as well as operators hoping to qualify for CNE status in the near future. These parties should also consider submitting public comments.

Ecology's proposed 2025 ISGP contains several changes from the [current ISGP](#), which took effect in 2020 and expires on December 31, 2024. This alert provides a high-level overview of the proposed changes. Ecology's drafted [Fact Sheet](#) and [Focus Sheet](#) provide more detail on the proposed changes to the ISGP.

## Background

Section 301 of the CWA generally prohibits the discharge of a pollutant from a point source to a water of the United States without a National Pollutant Discharge Elimination System (NPDES) permit (or, in the case of dredged or fill material, a section 404 permit). 33 U.S.C. § 1311(a). Despite section 301's broad prohibition, federal CWA regulations only require stormwater discharges associated with specific categories of industrial activity set forth at 40 C.F.R. § 122.26(b)(14)(i)–(xi) to be covered under a NPDES permit. One such category is for the following subset of "transportation facilities":

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.

40 C.F.R. § 122.26(b)(14)(viii).

In Washington, EPA has authorized Ecology to administer the NPDES program. There are two types of NPDES permits: general and individual. Washington's ISGP allows many (but not all) industrial facilities within Washington requiring a NPDES permit to apply for coverage in lieu of applying for an individual NPDES permit. Once covered, the facilities must comply with all ISGP terms. The ISGP is a broadly applicable permit, and many—if not most— industrial sites in Washington are subject to its requirements.

## Significant Changes from the Current ISGP

The draft 2025 ISGP proposes several legally vulnerable changes to the 2020 ISGP, including the following:

- ◆ **Questionable scope of regulated transportation sector stormwater discharges.** The scope of transportation sector stormwater discharges regulated under the current ISGP (i.e., subject to the ISGP's various sampling, inspection, best management practices, and corrective action requirements) has been the subject of extensive litigation.
  - ◆ **Federal court:** The United States District Court for the Western District of Washington in *Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC*, No. C17-5016 BHS, 2020 WL 6445825 (W.D. Wash. Nov. 3, 2020)(on appeal at the Ninth Circuit Court of Appeals) held that the scope of transportation facility regulation under the 2020 ISGP is [limited to the scope of the federal CWA regulations](#), i.e., the ISGP permit requirements apply only to those portions of the transportation facility involved in the specific auxiliary operations identified in the federal regulations (or which otherwise fall into a federal CWA regulation "industrial activity" category) and not the entire transportation facility.
  - ◆ **State court:** The Washington Pollution Control Hearings Board (PCHB) in *Puget Soundkeeper Alliance v. Ecology*, P19-089c, at 18 (PCHB Mar. 23, 2021) followed an analysis similar to *APM Terminals* and concluded that the scope of the transportation sector's regulated industrial stormwater under the 2020 ISGP is limited to the same scope

confirmed in *APM Terminals*. The PCHB's decision, however, was subsequently reversed by Division I of the Washington State Court of Appeals in *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 545 P.3d 333, 344 (2024). In reversing the PCHB, the Washington State Court of Appeals held that for transportation facilities with coverage under the 2020 ISGP, the "2020 permit applies to all areas of industrial activity at covered transportation facilities, not just the limited areas specified in [the federal CWA] regulation". The court, however, remanded the case back to the PCHB to decide whether Ecology's purported expansion was unreasonable or unlawful by failing to comply with procedural requirements for NPDES permitting under federal and state law. *Id.* at 347–48.

The proposed 2025 ISGP is on track for a similar, heavily litigated fate. The draft permit expressly purports to regulate transportation sector stormwater discharges associated with any material handling areas—not just stormwater discharges associated with vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. In seeking to expand the scope of regulated stormwater beyond federal regulation scope, Ecology purports to rely on Chapter 90.48 RCW and its Brief to the Washington State Court of Appeals in *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, No. 57711-9-II (May 16, 2023). This legal foundation, however, is questionable at best.

- ◆ **Addition of transportation and warehouse sampling requirement for 6PPD-quinone.** The draft 2025 ISGP proposes a 6PPD-quinone sampling requirement for Railroad Transportation, Transit and Ground Passenger Transportation, Truck Transportation, Postal Service, Water Transportation, Air Transportation, Petroleum Bulk Stations and Terminals, and Warehousing and Storage Facilities. The proposed sampling requirement is "report only." Under the current proposal, beginning January 1, 2028, facilities would need to perform quarterly 6PPD-quinone sampling and report the results to Ecology. Facilities that meet the "small business" definition would be exempt from this requirement. Ecology posits that the reported sampling data will allow Ecology to characterize 6PPD-quinone in stormwater discharges from these sectors, assess the effectiveness of BMPs and other permit requirements to reduce 6PPD-quinone, and possibly identify certain discharges and sites for further investigation.
- ◆ **Addition of air transportation and waste management sampling requirement for Per and Polyfluorinated Substances (PFAS).** The draft 2025 ISGP proposes a PFAS sampling requirement for air transportation and waste management facilities. Ecology has determined that these two sectors have the potential for PFAS exposure and stormwater contamination. The draft permit proposes quarterly PFAS sampling of stormwater discharges, including those which are discharged or infiltrated to groundwater. The sampling requirement is "report only," and is intended to allow Ecology to characterize PFAS in stormwater discharges from these sectors, assess the effectiveness of BMPs and other permit requirements to reduce PFAS discharges, and assist in identifying certain discharges or sites for further investigation and corrective action. While limited to certain sectors, Ecology may seek to extend these requirements to additional sectors in future ISGPs.
- ◆ **Conditional No Exposure Exemption.** The draft 2025 ISGP makes obtaining a conditional CNE exemption more onerous by eliminating automatic CNE approvals. CNEs are an approved option out of full permit requirements, and the costs and exposure resulting from ISGP coverage. Historically in Washington, unless Ecology expressly denied a proper and complete CNE application within 90 days, it was approved. Many, if not all, CNEs currently in effect in Washington were approved in this way. The draft 2025 ISGP, however, seeks to eliminate automatic approval and instead requires express Ecology approval. This proposed change is concerning given the extensive

Ecology backlogs and the lack of any requirement for Ecology to process CNEs within a certain timeframe. As a result, facilities that qualify for a CNE will be required to obtain full ISGP coverage, and comply with onerous permit requirements, while waiting for Ecology to approve their proper CNE requests—if at all.

## Public Comment

The draft 2025 ISGP and its associated fact sheet with supporting documentation is available for public comment through June 28, 2024. Ecology will also hold workshops and hearings on June 20, 2024 at 5:30 p.m. ([register here](#)) and June 24, 2024 at 9:30 a.m. ([register here](#)). Owners and operators of industrial facilities impacted by the proposed changes may want to consider submitting public comments, verbally or written. For more information on or assistance with the public commenting process, please contact the authors.

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