Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Agriculture & Natural Resources Committee

ESSB 6415

Brief Description: Concerning the conditioning of industrial and construction storm water general discharge permits.

Sponsors: Senate Committee on Natural Resources, Energy & Water (originally sponsored by Senators Morton, Doumit, Hewitt, Hargrove, Honeyford, T. Sheldon, Hale, Murray and Stevens).

Brief Summary of Engrossed Substitute Bill

- Specifies standards for industrial and construction storm water general discharge permits.
- Establishes conditions for imposing numeric effluent limitations in these permits.
- Establishes presumption of compliance with state water quality standards in certain circumstances.
- Requires implementation of an inspection program for these permits.

Hearing Date: 2/24/04

Staff: Caroleen Dineen (786-7156).

Background:

The federal Clean Water Act (CWA) sets a national goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters and to eliminate pollutant discharges into navigable waters. The CWA sets effluent limitations for discharges of pollutants. "Pollutant" is defined in the CWA to include a variety of materials that may be discharged into water through human activities, construction or industrial processes, or other methods.

Washington law requires all pollution dischargers to use all known, available, and reasonable methods of waste water treatment before discharge to prevent pollution. The Washington Department of Ecology (DOE) is delegated federal CWA authority by the United States Environmental Protection Agency (EPA). The DOE also is the agency authorized by state law to implement state water quality programs.

The CWA requires states to adopt standards to protect fish and other aquatic life and to protect humans using water for recreation, drinking water, and fish. These water quality standards are rules that specify the desired water quality to be achieved or maintained and protect existing water quality from degradation. Washington's water quality standards consist of designated uses, criteria necessary to protect those uses, and the Antidegradation Policy, which establishes procedures for regulating an activity that might affect a particular water body.

Section 303(d) of the federal CWA requires states to prepare a list every two years of the specific water bodies that do not meet the state water quality standards (the "303(d) list"). The DOE must develop water cleanup plans for all water bodies included on the 303(d) list. A water cleanup plan (known as a "total maximum daily load" or "TMDL") includes a technical assessment of the impaired water body, an analysis of the amount that pollution needs to be reduced to meet water quality standards, an implementation plan to control pollution from various sources, and a monitoring plan to assess effectiveness.

Discharge Permits

The CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. "Point sources" are defined generally as discernable, discrete, and confined conveyances from which pollutant discharges can or do occur. NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters.

A wastewater discharge permit places limits on the quantity and concentrations of contaminants that may be discharged. Permits may require wastewater treatment or impose operating or other conditions, including monitoring, reporting, and spill prevention planning. NPDES permits are valid for five years but may be renewed.

In addition to its NPDES permit responsibilities, the DOE administers a state program for discharge of pollutants to state waters. State permits are required for anyone who discharges waste materials from a commercial or industrial operation to ground or to publicly-owned treatment plants. State permits are also required for municipalities that discharge to ground.

The DOE issues both individual permits (covering single, specific activities or facilities) and general permits (covering a category of similar dischargers) in the state and NPDES permit programs. Activities covered by NPDES permits include construction activities, industrial operations, stormwater discharges, and application of aquatic pesticides.

The DOE establishes annual fees to collect expenses for issuing and administering state and NPDES discharge permits. Fees must be based on factors relating to the complexity of permit issuance and compliance. Fees must be established to fully recover but not exceed the program expenses, including permit processing, monitoring, compliance, evaluation, inspection, and program overhead costs.

Stormwater Permits

The federal CWA was amended in 1987 to classify stormwater discharges from certain industries and municipalities as point sources of pollution requiring NPDES permits. The EPA stormwater regulations implementing this federal law requirement established two phases for the stormwater permit program: Phase I and Phase II. Phase I stormwater NPDES permits were issued to cover stormwater discharges from eleven categories of industrial activities, construction sites involving

more five or more acres, and municipalities with a population greater than 100,000. Phase II permits are required for stormwater discharges from construction sites disturbing between one and five acres and for municipalities not meeting the Phase I population threshold if they are located in census defined urbanized areas or meet certain requirements.

The DOE first issued an industrial stormwater general discharge permit in 1992. This permit was reissued in 1995 and 2000. The 2000 permit was appealed to the Pollution Control Hearings Board (PCHB) and, to settle that litigation, the permit was revoked.

In 2002 the DOE issued a new industrial stormwater general discharge permit. Several environmental organizations, the Boeing Company, Snohomish County, and the Association of Washington Business were parties to the appeal of the 2002 permit to the PCHB. Eleven appeal issues were identified, including the role and effect of the DOE's 2001 Stormwater Management Manual for Western Washington, permit modification provisions, compliance schedules, mixing zones, monitoring and reporting, and permit fees. The PCHB did not address the permit fee issue, and six of the appeal issues were settled by the parties prior to the PCHB's final decision.

With respect to the remaining issues, the PCHB by summary judgement invalidated the 2002 permit's compliance schedule and mixing zone provisions. The PCHB also invalidated various provisions authorizing the DOE to modify permit requirements under certain circumstances without a public permit modification process. In its final decision (August 2003), the PCHB remanded the permit to the DOE to address:

- sampling of the first fall storm event;
- monitoring requirements for receiving waters for any mixing zones; and
- reduction of the benchmark copper value (used to assess stormwater samples taken according to permit requirements) for waters in which stormwater is a limiting factor for salmon recovery and for waters listed as impaired for copper on the 303(d) list.

The PCHB's decision was appealed to the Thurston County Superior Court by the Department of Ecology and the Association of Washington Business and to King County Superior Court by the environmental organizations. Appeal issues include monitoring requirements, compliance schedules, mixing zones, the copper benchmark, and sampling.

Summary of Bill:

Standards are specified for issuance of general NPDES stormwater discharge permits for industrial and construction activities.

Effluent Limitations

The DOE must include effluent limitations in construction and industrial storm water permits as required under the CWA and its implementing regulations if there is reasonable potential to cause or contribute to an "excursion of a state water quality standard." Effluent limitations may be expressed as numeric limits, narrative limits, or a combination of numeric and narrative limits. Generally, the DOE must use narrative effluent limitations requiring the implementation of best management practices in construction and industrial NPDES storm water general permits. The DOE may use numeric effluent limitations only when the discharges are subject to:

- numeric limits established in federally adopted, industry-specific effluent guidelines;

- state developed, industry-specific, performance-based numeric limits;
- numeric limits based on a completed TMDL or other pollution control measures; or
- a DOE determination that the covered discharges have a reasonable potential to cause or contribute to violation of state water quality standards and that effluent limitations based on nonnumeric best management practices are not effective in achieving compliance with state water quality standards.

When making determinations regarding reasonable potential to cause pollution and ineffectiveness of best management practices, the DOE must use procedures accounting for existing controls on point and nonpoint pollution sources, variability of the pollutant in storm water runoff, and any dilution of the storm water in the receiving water.

Presumption of Compliance

Compliance with state water quality standards must be presumed, unless site-specific information demonstrates otherwise, when the permittee is:

- in compliance with permit conditions for planning, sampling, monitoring, reporting, and recordkeeping; and
- following storm water management practices (or practices demonstrably equivalent to practices in the DOE-approved storm water technical manuals), including proper selection, implementation, and maintenance of appropriate best management practices for on-site pollution control.

Impaired Waters

Existing discharges to receiving waters on the 303(d) list must be conditioned on an interim effluent discharge limit based on compliance with all permit requirements, including implementation of best management practices for a 10-year period or until a TMDL is adopted.

Water Quality Standards

Permittees must not cause or have the reasonable potential to cause or contribute to a violation of a state water quality standard. When an authorized permit discharge is later found to cause or have the reasonable potential to cause or contribute to a violation, the DOE must notify the permittee. Once notified, the permittee must take all necessary actions to ensure future discharges do not cause or contribute to the violation of the water quality standard. The permittee also must document those actions in its storm water pollution prevention plan.

Inspection

The DOE must initiate an inspection program of all industrial and construction general permittees by January 1, 2005. Purposes of the inspection program include:

- providing technical assistance;
- surveying for evidence of permit violations;
- identifying corrective actions for actual or imminent discharges violating water quality standards;
- monitoring development and implementation of storm water pollution prevention plans; and
- identifying dischargers who would benefit from technical assistance programs.

Permittees must be prioritized for inspection based on development of criteria that include factors such as historical compliance history (including submission of discharge monitoring reports), monitoring results in relationship to permit benchmarks, and discharges to impaired waters.

The DOE must conduct follow-up inspections to ensure corrective and other actions identified in initial inspections are being implemented. Additional inspections are to be conducted as necessary to ensure compliance with state and federal water quality requirements, but all permittees are to be inspected once within two years of the initiation of the inspection program.

Sampling

Receiving water sampling must not be a requirement of an industrial or storm water general permit unless it can be conducted without endangering the health and safety of the permittee and its employees.

Legislative Findings and Intent

Legislative findings recognize the environmental and public health benefits of the CWA's permit program and state water pollution control laws. Legislative findings also recognize the danger to public health and industries dependent on clean water from failure to prevent and control pollution discharges. In addition, legislative findings recognize the CWA's permit requirements for industries and construction and the DOE's use of general permits for these types of discharges. Legislative encouragement of an adaptive management approach to permitting to the extent allowed under state and federal law is specified. In addition, legislative findings cite the need for flexibility in compliance with state and federal requirements and for a fully funded inspection and technical assistance program for industrial and construction storm water permits.

Severability

Any provision determined to be in conflict with the CWA is void.

Expiration

These provisions expire January 1, 2015.

Appropriation: None.

Fiscal Note: Available for original bill. Requested for engrossed substitute on February 20, 2004.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.