HOUSE BILL REPORT
ESSB 6415

As Passed House:
March 9, 2004

Title: An act relating to conditioning industrial and construction storm water general discharge permits.

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

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

Brief History:
Floor Activity:
Passed House: 3/9/04, 95-1.

Brief Summary of Engrossed Substitute Bill

- Specifies standards for issuance of general storm water discharge permits for industrial and construction activities.
- Establishes requirements for imposing numeric effluent limitations and a deadline for compliance with numeric effluent limitations under certain conditions.
- Establishes presumption of compliance with state water quality standards if specified requirements are satisfied.
- Requires implementation of an inspection and compliance program for these permits.
- Requires reports to appropriate legislative committees.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority/Minority Report: None.

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:

Requirements are specified for issuance of general storm water discharge permits for industrial and construction activities.

Effluent Limitations

Pollutant specific, water quality-based effluent limitations must be included in construction and industrial storm water permits if there is a reasonable potential to cause or contribute to an excursion of a state water quality standard. Technology and water quality-based 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 and compliance with water quality standards in construction and industrial storm water general discharge permits. However, the DOE must use numeric effluent limitations in these permits 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 dilution of the storm water in the receiving water.

Sampling

Receiving water sampling must not be a requirement of an industrial or storm water general permit except to the extent it can be conducted without endangering the health and safety of the persons conducting the sampling.

Impaired Waters

The DOE must modify the industrial storm water general permit to require compliance by May 1, 2009, with appropriately derived numeric water quality-based effluent limitations for existing discharges to water bodies on the 303(d) list. By September 1, 2008, the DOE must

provide a report to the appropriate legislative committees regarding implementation of these numeric limits. The DOE's report must identify the number of dischargers to water bodies on the 303(d) list and provide an assessment of anticipated compliance with the numeric limits.

Water Quality Standards

Construction and industrial storm water discharges must not cause or have the reasonable potential to cause or contribute to a violation of an applicable 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 may 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 and in a report timely submitted to the DOE. If violations remain or recur, the DOE may terminate the general permit and issue an alternative general permit or an individual permit.

Compliance with these provisions does not preclude any enforcement activity authorized by the CWA for the underlying violation.

Adaptive Management

Construction and industrial storm water general discharge permits must include an enforceable adaptive management mechanism. The adaptive management mechanism must include appropriate monitoring, evaluation, and reporting. The minimum adaptive management elements are:

an adaptive management indicator, such as monitoring benchmarks;monitoring;review of and revisions to the storm water pollution prevention plan;documentation of remedial actions taken; andreporting to the DOE.
These permits also must include the timing and mechanisms for implementation of treatment best management practices.

Mixing Zones

The DOE may allow mixing zones only in compliance with and after making determinations mandated by applicable laws and regulations.

Presumption of Compliance

Compliance with state water quality standards must be presumed when the permittee is:

- in full compliance with permit conditions for planning, sampling, monitoring, reporting, and recordkeeping conditions; and
- fully implementing storm water management best management practices contained in DOE-approved storm water technical manuals – or practices that are demonstrably equivalent to practices in those manuals – including proper selection, implementation, and maintenance of appropriate best management practices for on-site pollution control.

"Demonstrably equivalent" in this requirement means the technical basis for selection of all storm water best management practices are documented within a storm water pollution prevention plan identifying the: (1) methods and reasons for choosing the selected practices; (2) expected pollutant removal performance; (3) technical basis supporting performance claims for the selected practices (including available existing data regarding field performance); (4) assessment of the practices' compliance with state water quality standards; and (5) assessment of the selected practices' satisfaction of applicable federal technology-based treatment requirements and state requirements to use all known, available, and reasonable methods of prevention, control, and treatment.

The presumption of compliance with water quality standards applies unless discharge monitoring data or other site-specific information demonstrates that a discharge causes or contributes to violation of water quality standards.

Permit Monitoring Requirements Study

The DOE must study and evaluate how monitoring requirements can be improved to determine the effectiveness of storm water best management practices and compliance with state water quality standards. The DOE must consult with monitoring, storm water management, and water quality experts when conducting this study and must conduct field work to evaluate the practicality and usefulness of alternative monitoring proposals when necessary. The DOE must evaluate monitoring requirements that are necessary for determining compliance or noncompliance with state water quality standards and evaluate the feasibility of including these requirements in future permits.

The DOE must report to the appropriate legislative committees regarding methods to improve the effectiveness of permit monitoring requirements in construction and industrial storm water general permits. This report must be submitted no later than December 31, 2006.

Inspection and Compliance Program

The DOE must initiate an inspection and compliance program for all industrial and construction storm water general permittees by January 1, 2005. The inspection and compliance program must include:

- provision of compliance assistance;
- survey for evidence of permit violations;
- identification of corrective actions for actual or imminent discharges violating water quality standards;
- monitoring of the development and implementation of storm water pollution prevention plans and storm water monitoring plans;
- identification of dischargers who would benefit from compliance assistance programs; and

collection and analysis of discharge and receiving water samples whenever practicable and when deemed appropriate by the DOE and other evaluation of discharges to determine potential for causing or contributing to water quality standards violations.

Permittees must be prioritized for inspection based on development of criteria including factors such as compliance history, monitoring results in relationship to permit benchmarks, and discharges to impaired waters. The DOE's inspections must be conducted without prior notice to permittees whenever practicable.

The DOE must conduct follow-up inspections to ensure corrective and other actions identified in initial inspections are being implemented. The DOE must take additional actions as necessary to ensure compliance with state and federal water quality requirements. All permittees must be inspected once within two years of the initiation of the inspection and compliance program, and each permittee must be inspected at least once during each future permit cycle.

The inspection and compliance program provisions do not limit the DOE's enforcement discretion.

Permit Fees

The DOE must establish permit fees for construction and industrial storm water general discharge permits as necessary to fund the permit requirements and inspection and compliance provisions. When calculating appropriate fee amounts, the DOE must consider differences between large and small businesses and the economic impacts caused by permit fees on those businesses. Fees must be adopted according to Administrative Procedure Act requiremetns.

The DOE must include in its biennial discharge fees progress report a derailed accounting regarding the method used to establish permit fees, the amount of permit fees collected, and permit fee expenditures. This accounting must include data on inspections conducted and staff hired to implement the permit requirements and inspection and compliance program provisions.

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 water quality, the environment, 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 recognize challenges and restrictions associated with discharges into water bodies listed as impaired under the CWA. Legislative declarations recognize the effectiveness of general permits and the need for a fully funded inspection and technical assistance program for industrial and construction storm water discharge permits.

Severability

Any provision of the permit requirements and inspection and compliance program provisions that is 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.

Testimony For: None.

Testimony Against: None.

Persons Testifying: None.

Persons Signed In To Testify But Not Testifying: None.