

Washington Public Ports Association

Industrial Stormwater General Permit – Appeal and Litigation Update

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Federal coverage requirements

Congress
required
NPDES
permits
only for
stormwater
that is

“associated with industrial activity,” 33 U.S.C. §
1342(p)(2)(B);

discharges from separate storm sewer systems, 33 U.S.C. §
1342(p)(2)(C),(D),

or discharges which EPA or an authorized State determine
contribute to a violation of water quality standards or are
a significant contributor of pollutants to waters of the U.S,
33 U.S.C. § 1342(p)(2)(E).

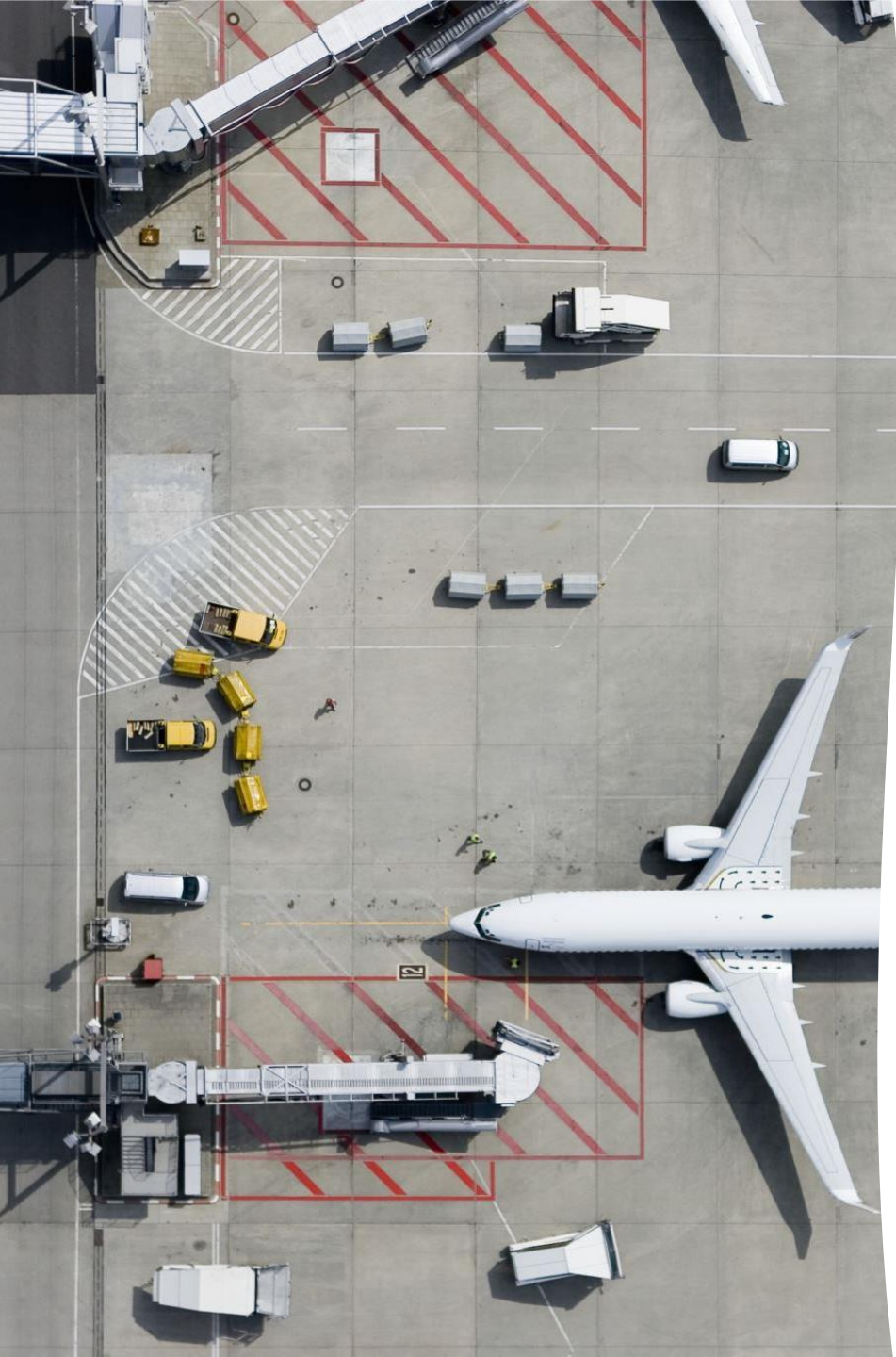


EPA stormwater discharges associated with industrial activity

From a conveyance collecting stormwater “directly related to manufacturing, processing or raw materials storage areas at an industrial plant. . . .

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 storage and maintenance of material handling equipment; . . . ; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; 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 following categories of facilities are considered to be engaging in ‘industrial activity’”



Transportation coverage: SIC and triggering activities

SIC 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.

Transportation Sectors



40: Line-haul railroad, switching and terminals



41: Local and Suburban Transit and Interurban Highway Passenger Transportation



42: Motor Freight (with exceptions)



43: USPS



44: Water Transportation



45: Air Transportation



5171: Petroleum Bulk Stations & Terminals

Coverage limited to portions & specific material handling

“[O]nly those **portions** of the facility that are either involved in vehicle maintenance (**including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication**), equipment cleaning 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)

EPA’s 2021 MSGP: “Material handling” for water transportation is the handling of paint, solvent & fuel.



Early Listening Session for the Industrial Stormwater General Permit

Matthew Tietjen, Host & Tech Support

Travis Porter, Permit Writer

Potential Changes to Sectors

Transportation Category – Removing maintenance activity, equipment cleaning operations, and airport deicing requirement for coverage and applying permit coverage to all facilities classified as transportation facility wide

- *No triggering activity required: vehicle maintenance, equipment cleaning or deicing).*
- *Coverage essentially facility-wide.*

Ecology's "industrial activity"

Ecology's position to the PCHB:

Covered areas: immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-product used or created by the facility, material handling, shipping, receiving, loading, unloading, transportation, conveyance, storage.

Container handling involves "[m]aterial handling, shipping, receiving, loading, unloading, transportation, conveyance."

Federally enforceable: "transportation facilities are significant contributors of pollutants."

Expanded Coverage

- Local trucking of food, timber, steel (SIC 4212, 4214)
- Ground transportation (SIC 4119), transit lines & commuter rail service (SIC 411)
- Water transportation; marinas; towing and tugboats; marine loading; associated docks, piers and terminals (SIC 44)
- Airports, air courier services (SIC 45)
- Petroleum bulk stations and terminals (SIC 5171)
- Rail transportation (488xxx)

Related Pending Litigation Matters



Puget Soundkeeper Alliance v. APMT and Port of Tacoma

- APMT abandoned after PSA suit.
- Port built Ecology-approved treatment under Agreed Order.
- Ecology filed amicus supporting PSA.
- PSA appealed.
- Ninth Circuit ruling expected Q4 2023.

Related Pending Litigation Matters

2020 Industrial Stormwater General Permit Appeal

- Appellants: NWSA, POS/POT, SSA, Pacific Merchant Shipping Association, BNSF, and PSA.
- Pollution Control Hearings Board: plain language does not expand activities subject to ISGP.
- Did not reach whether expansion reasonable/lawful.
- PSA appealed. Court of Appeals ruling expected Q1/Q2 2024.

ISGP



AKART

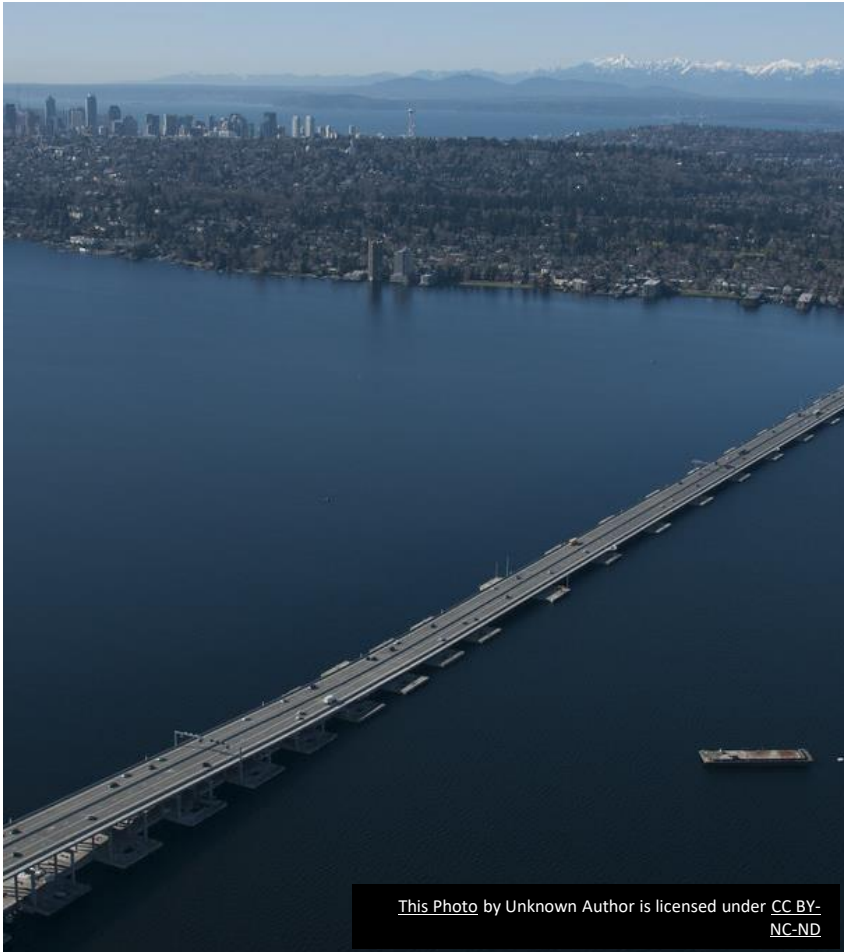


DILUTION



POLICY

Assumption: Treatment is AKART

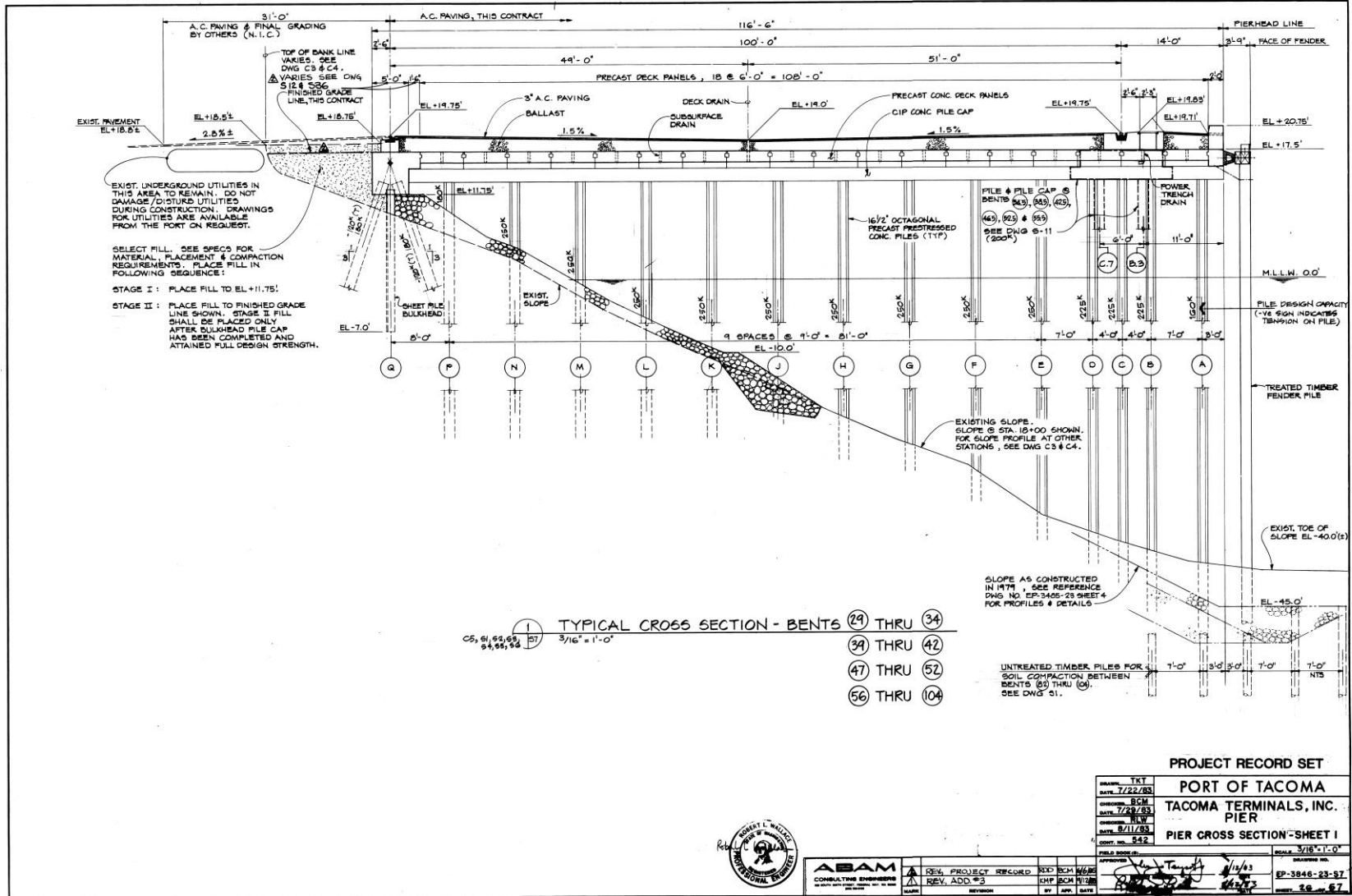


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AKART means all known, available, and *reasonable*.

SR 520: AKART is sweeping and spill control – not stormwater treatment.

Infrastructure



Assumption: Minimal Dilution Available

Dilution assumption (5) makes the ISGP's benchmarks very low.

Substantial dilution *is* available in marine waters

- Fairhaven Shipyard (Bellingham): 85
- Ambrosia Tech (Willapa Bay): 43



Dilution changes benchmarks

Boatyard GP (Copper)

Assumed dilution: 13

Benchmark:

- Marine Water: **44** ug/L
- Tidally Influenced Streams: 36
- Western Streams: 45
- Eastern Streams: 60
- Lakes: 32

ISGP (Copper)

Assumed dilution: 5.

Benchmark:

- Everywhere: **14** ug/L

Litigation

- No citizen suit enforcement of state law.
- Federal law: only for activities studied by EPA or found to be “significant contributors.”
- The “citizen” does not fund litigation or exercise billing discretion.
- Suits against landowners for “control.”
- Rare judicial/DOJ oversight of plaintiff fees.

Permitting Beyond Transportation



Regional Board



Programs



News Room



Board Decisions

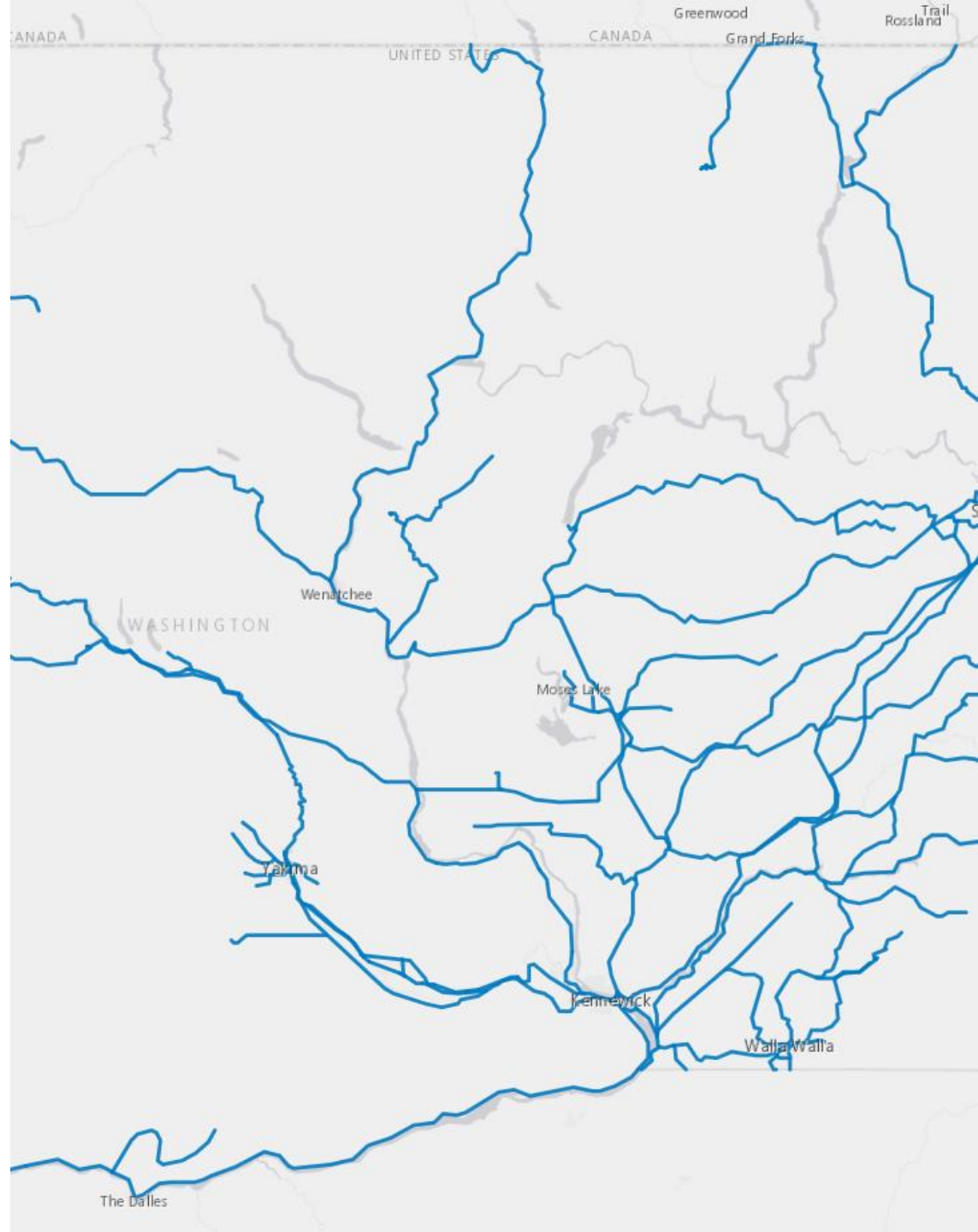


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Storm Water – Commercial, Industrial and Institutional (CII) Permit

Summary

- Extends ISGP assumptions.
- Potential treatment for additional acres.
- Increases costs to move goods.
- Expands for-profit CWA citizen enforcement.
- Precedent for expansion of stormwater permitting of commercial activities.
- No other state has similar permit requirements.



Opportunities for Advocacy

Completed:

- ~10 meetings with Ecology staff
- Meeting with Governor Inslee's staff

Ongoing:

- Coalition building.
- Comment on draft Permit (Q2 2024).
- Evaluate Final Permit.

Opportunities for Collaboration

Cost/benefit implications of proposed coverage scope.

Challenging scientific assumptions.

Assessing “mitigation” measures (e.g., waivers, benchmarks, other permit modifications).

Legislation (e.g., funding, process, standards).

Next Steps and Our “Ask” of Ports

Information provided today is a start, encourage everyone to evaluate how this will impact your port.

Engagement and involvement as our partners.

Encourage your government affairs teams in Olympia to be in touch with ours to collaborate in further work

Consider WPPA’s role as advocate and leader on this issue.