

July 14, 2022

Skagit County Board of County Commissioners
1800 Continental Place, Suite 100
Mount Vernon, WA 98273

RE: Comments on Proposed Amendments to Water Pollution Code
(Chapter 14.04 SCC and Chapter 16.32 SCC)

Dear Commissioners:

Please accept this letter as comments from the Port of Skagit (the “Port”) on the above-referenced proposed amendments to the County Water Pollution Code, Chapter 16.32 SCC (the “Amendment”).

As indicated in comment letters submitted to the County Commissioners by the Port in May and June 2022 on proposed amendments to the stormwater management standards, the Port operates Bayview Business Park and Skagit Regional Airport on Bayview Ridge within the Phase II Municipal Separate Storm Sewer System (MS4) permit coverage area for Skagit County. Currently, the Port is home to 75 businesses and provides good paying jobs for 1,155 people.

The Port appreciates the important role the County plays in controlling pollution from the MS4 and protecting the waters of the State. The Amendment, as currently written, goes beyond the requirements of the MS4 Permit and contains definitions that alter and in some cases are in conflict with the MS4 Permit and Ecology Stormwater Manual. Please accept these comments with the intended spirit of finding a win-win for both Skagit water quality protection and Skagit business, including value-added agricultural businesses, that also need reasonable, clear, and unambiguous regulations to move forward and continue to invest in this community. The Port encourages the County Commissioners and staff to re-examine the Amendment, including the areas discussed in more detail in this letter.

1. The MS4 Permit only requires the County to prevent and reduce, not eliminate, pollutants in runoff from areas that discharge to the MS4.

The Western Washington Phase II Municipal Separate Storm Sewer System Permit (“MS4 Permit”) requires that the County “implement a program to prevent and reduce pollutants in runoff from areas that discharge to the MS4.”¹ However, a prohibition or elimination of discharges of all contaminants to stormwater, as called for in the Amendment [SCC 16.32.010], is not consistent with the allowances in the MS4 Permit itself; specifically, Section S.2.A which “authorizes discharge of stormwater to surface waters and to groundwaters **of the State** from MS4s owned and operated by each Permittee [such as the County] covered under this Permit...”² The Port understands the importance of water quality

¹ MS4 Permit, Section S5.A.8, pg. 28.

² MS4 Permit, Section S2.A, pg. 5 (emphasis added).

protection, but elimination of all contaminants to stormwater is impractical in today's built environment and is not required by the MS4 or other Ecology NPDES permits.

Additionally, the Amendment does not limit its purpose to discharges to waters **of the State**, which is what the Permit covers. The term "pollution" is not defined in the MS4 Permit, but the Department of Ecology Stormwater Management Manual for Western Washington 2019 (the "Stormwater Manual") does define pollution.³ Pollution specifically requires impacts to waters of the State. If a conveyance does not discharge to waters of the State, then it is not an MS4 subject to the MS4 Permit.

For example, consider a retention facility that does not release any waters to the MS4. Such a facility would not be governed by the MS4 Permit and therefore should not be subject to the inspection and enforcement provisions of the Amendment. Yet, as written, the Amendment definitions of discharge and receiving waters could encompass a retention facility that does not discharge to waters of the state, even though the MS4 Permit does not mandate or even authorize such an action.

The Amendment states its purpose is to prohibit the discharge of contaminants to water, but a stormwater permit holder (e.g., a holder of an Industrial Stormwater General Permit "ISGP") is permitted to discharge up to a certain amount of contaminants in accordance to their permit. The County, as a Permittee in compliance with the MS4 Permit, is not liable for water quality standard violations or receiving water impacts caused by industries or other Permittees covered, or who should be covered, under a different NPDES permit, such as an ISGP, issued the Department of Ecology.⁴ Accordingly, while the County is required to reduce discharge of pollutants to the Maximum Extent Practical, the County need not prohibit or eliminate all discharges of contaminants to stormwater to comply with the MS4 Permit requirements.

Requested Changes:

- A. SCC 16.32.010 – Purpose: Remove subsection (1); keep subsections (2) - (6), with revisions as follows:
- B. Add in the requirement that the covered discharges be to waters of the State.
- C. SCC 16.32.010 (4): Revise to: "Protect the function and integrity of the County's Stormwater Infrastructure."

2. The Definitions in the Amendment expand, alter, and conflict with the definitions in the MS4 Permit and Stormwater Manual, which are incorporated by reference into the Amendment.

³ "Pollution" is contamination or other alteration of the physical, chemical, or biological properties, of waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious 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. Stormwater Manual, pg. 1071.

⁴ MS4 Permit, Section S5.C.8.a.iii, pg. 29.

The definitions in the Amendment are problematic in several respects and would likely add to confusion related to the enforcement provisions required by the MS4 Permit.

The Amendment states that the definitions in the MS4 Permit are incorporated by reference, however there are direct conflicts between the definitions in the Amendment and the MS4 Permit. The Amendment defines “discharge” much broader than the MS4 Permit definition. The Amendment, by reference to SCC 14.04.020, also defines “receiving waters” such that it does not require a discharge be from the MS4 to be governed by the Code. The consequence of this definition, if adopted, would subject the release of anything to any naturally occurring waterbody to the Code. This is not what the MS4 Permit is intended to govern. The Amendment should incorporate the terms “discharge” and “receiving waters” as defined in the MS4 Permit and Stormwater Manual.

In a similar departure from the MS4 Permit definitions, the Amendment omits from its definition of “illicit connection” non-stormwater discharges allowed by the MS4 Permit. It is worth noting that under the Stormwater Manual, the definition of illicit discharges includes the requirement that the discharge “cause or contribute to a violation of state water quality, sediment quality or ground water quality standards,”⁵ which is yet another indication of the focus of the MS4 Permit on preventing discharges in waters of the State.

Other defined terms in the Amendment conflict with the defined terms in the MS4 Permit. For example, “Director” is defined in the MS4 Permit as the Director of Ecology, but in the Amendment “Director” is separately defined as the County’s Director of Public Works. “Director” as a defined term can only have one meaning between the Amendment and the MS4 Permit, which is incorporated in the Amendment by reference.

Under SCC 16.32.030 – Illicit Discharges Prohibited, the Amendment includes an undefined phrase “County drainage system.” This appears to be in reference to the County’s Stormwater Infrastructure, which is defined as the MS4. See Amendment SCC 14.04.020. If the County is referring to the stormwater system, then MS4 is the appropriate term of art to be referenced in this section. Another undefined phrase in the Amendment is “regulatory mechanism” in SCC 16.32.060 and would benefit from similar revisions for clarity.

Requested Changes:

- A. SCC 16.32.020(3)(d) – *Discharge* should either refer to or restate the Stormwater Manual Definition: runoff leaving a new development or redevelopment via overland flow, built conveyance systems, or infiltration facilities. A hydraulic rate of flow, specifically fluid flow; a volume of fluid passing a point per unit of time, commonly expressed as cubic feet per second, cubic meters per second, gallons per minute, gallons per day, or millions of gallons per day.
- B. SCC 14.04.020 – *Receiving Water* should either refer to or restate the MS4 Permit / Stormwater Manual definition: Receiving Waterbody or Receiving Waters means naturally and/or reconstructed naturally occurring surface water bodies, such as creeks, streams,

⁵ Stormwater Manual, pg. 1058.

rivers, lakes, wetlands, estuaries, and marine waters, or groundwater, to which a MS4 discharges.⁶

- C. SCC 16.32.020(3)(c) – *Director* should be changed to “Public Works Official” or some other term not already defined in the MS4 Permit.
- D. SCC 16.32.020(3)(g) – *Illicit Connection* should either refer to or restate the MS4 Permit definition: Illicit Connection means any infrastructure connection to the MS4 that is not intended, permitted or used for collecting and conveying stormwater or non-stormwater discharges allowed as specified in the MS4 Permit (S5.C.5 and S6.D.3). Examples include sanitary sewer connections, floor drains, channels, pipelines, conduits, inlets, or outlets that are connected directly to the MS4.
- E. SCC 16.32.030 – Change references to “the County’s drainage system” to the MS4 (i.e., the County’s Stormwater Infrastructure).
- F. SCC 16.32.060 – Revise the preamble paragraph as follows:

The following categories of non-stormwater discharges may be allowed only if:

3. The Amendment could be interpreted as not allowing discharges by holders of state waste discharge permits.

The MS4 Permit includes a list of non-stormwater discharges that are “allowable discharges” and therefore need not be prohibited as an illicit discharge.⁷ A major category of allowable discharges under the MS4 Permit that is **NOT** included in the Amendment’s allowable discharges in the Amendment SCC 16.32.050 is “non-stormwater discharges authorized by another NPDES or state waste discharge permit.” This implies that the County is not allowing discharges by holders of State discharge permits (e.g., ISGP). Further SCC 16.32.050 gives authority to the “Administrative Official” a term not defined in the Amendment, but identified as the Director of Planning and Development Services in Chapter 14.04 SCC. As currently written, the Administrative Official, has the authority to determine if the discharge is causing or likely to cause pollution of surface water or groundwater, but without the limitation intended by the MS4 Permit of pollution of the waters of the State.

Requested Changes:

- A. SCC 16.32.050 - Add the allowable discharge identified in the MS4 Permit S5.C.5.c.i(i) for “Non-stormwater discharges authorized by another NPDES or state waste discharge permit.”
- B. SCC 16.32.050 - Change “Administrative Official” to the new defined term referring to the Public Works Director, or designee (see above comment on definition of “Director”).

⁶ MS4 Permit, pg. 53, Stormwater Manual, pg. 1075.

⁷ MS4 Permit, S5.C.5.c.i, pg. 18-19.

- C. Revise preamble paragraph of SCC 16.32.050 to the following (underline language added):

The following types of discharges are not illicit discharges for the purpose of this Chapter unless the [insert new defined term for Public Works Director, or designee] determines that the type of discharge, whether singly or in combination with others, is causing or is likely to cause pollution of the waters of the State, whether in surface water or groundwater:

4. The enforcement on a “responsible party” should place the primary obligation of compliance with the person or entity directly responsible for the violation.

As currently written, the Amendment provides that a property owner, tenant or licensee, and party who caused the violation are all obligated to remediate a violation. The definition of responsible party essentially creates a strict liability scheme, which can be enforced on any party with a connection to a site at the discretion of the County Public Works Director. See Amendment SCC 16.32.020(3)(i), SCC 16.32.080, and SCC 16.32.110. Additionally, the Amendment provides that the “primary obligation of compliance with this chapter is placed upon the person holding title to the property.” See Amendment SCC 16.32.160. Yet, the MS4 Permit only requires “implementation [of] a progressive enforcement policy that requires **sites** to comply with stormwater requirements within a reasonable period of time...”⁸ Thus, the County has flexibility under the MS4 Permit to structure an enforcement program to achieve compliance from liable owners or operators on sites.

As a lessor of commercial and industrial property, the Port is concerned that in the event of a violation the Port may be looked to first under the provision in the Amendment indicating the primary obligation of compliance is upon the person holding title to the property, even when the Port is not the party responsible for the act or omission leading to the violation. The Port makes significant efforts to work with businesses located on Port property to help those businesses navigate environmental regulation in a way that supports the business, while also protecting Port property and the environment from contamination and damage. That said, each business assumes liability for management of their business practices, including management of stormwater discharge and waste. The Port is concerned that a policy that effectively separates a business owner’s management practices from responsibility for resulting liability will lead to less diligent management practices and wasted public resources.

Given the enforcement focused nature of the Amendment, the primary obligation should first be on the party responsible for the act or omission leading to the violation. A lessee or site operator is in a much better position than the Port (as lessor) to manage risk and report and respond to violations as the operator of the site. A lessor property owner should only have the responsibility to respond to enforcement actions under the Amendment if a responsible party tenant is non-responsive. This progressive enforcement model does not absolve a lessor property owner, but rather puts the primary obligation of compliance on the site operators as their actions lead to the violation.

⁸ MS4 Permit, Section S5.C.8.b.iv, pg. 30.

Lastly, it is worth noting that the MS4 Permit allows until January 1, 2023, for the implementation of an inspection program and enforcement policy.⁹ Accordingly, the County has time to refine the language of the Amendment to clarify the enforcement upon a responsible party consistent with the requirements in the MS4 Permit. The Port requests an opportunity to meet with County staff to discuss how the inspection and enforcement provisions of the Amendment can be improved.

Requested Changes:

- A. SCC 16.32.020(3)(i) – Revise definition of “responsible party”.
- B. SCC 16.32.080, SCC 16.32.100 and 16.32.110 – Remove these sections from the current proposed Amendment in order to work with the Port and any other interested stakeholders to refine the notice and enforcement processes by the January 1, 2023 implementation deadline.
- C. SCC 16.32.120 - Revise first sentence of the paragraph to the following (strike through language to be deleted, underline language added):

The County will use education as a first step toward achieving compliance with the chapter and offer ~~property owners~~ any and all responsible parties the opportunity to correct violations before imposing fines.
- D. SCC 16.32.160 - Delete the first sentence of SCC 16.32.160.

5. Other Miscellaneous Revisions

- A. SCC 16.32.090(3) – Amendment references “County Stormwater Management Manual” – is this intended to reference the Western Washington Stormwater Management Manual?
- B. SCC 16.32.060(e) refers to “pollution prevention plan” but SCC 16.32.090(3) refers to “stormwater pollution prevention plan” – recommend using consistent language and clearly defined terms.

Thank you for your consideration of these requests and comments. The Port would appreciate an opportunity to meet with County staff to review the requests and assist with drafting language that will meet the Port and County’s shared goals of managing stormwater and protecting water quality while also supporting business and economic development and jobs in Skagit County.

Sincerely,



Heather A. Rogerson
Director of Planning and Development

⁹ MS4 Permit, Section S5.C.8.b.iii and .iv, pg. 29-30.

