Washington's Draft 2026 Construction Stormwater General Permit Out for Public Comment

Article By:

Andrew C. Silton

Erika H. Spanton

Katherine S. O'Keefe

Key Takeaways

- What is Happening? The Washington State Department of Ecology (Ecology) <u>published</u> for public comment its proposed 2026 Construction Stormwater General Permit (CSWGP), which authorizes stormwater discharges from construction activities taking place in the State of Washington, as well as a corresponding draft <u>Fact Sheet</u> and <u>Small Business Economic Impact Analysis</u>. This is Ecology's first attempt to implement *City and County of San Francisco v. EPA*, 145 S. Ct. 704 (2025), in which the Supreme Court held that NPDES permits may contain "end-result" provisions that subject permitholders to liability when receiving water conditions exceed receiving waters. B&D represented San Francisco in this major decision that will improve the clarity of NPDES permits across the country.
- Who is Impacted? In the short term, the proposed changes will affect construction site operators in Washington State currently covered under the CSWGP, or that may need coverage in the future. In particular, small construction sites may be impacted the most by the changes proposed in the 2026 CSWGP. In the long term, Ecology's approach to *San Francisco* could serve as a model for how it approaches conforming other Ecology-issued individual and general NPDES permits to the Court's holding.
- What Should I Do? Construction operators covered by the existing CSWGP or anticipating needing coverage under the CSWGP and other interested parties should consider submitting public comment by the May 9, 2025, deadline.

Ecology's proposed 2026 CSWGP contains several changes from the <u>current CSWGP</u>, which took effect in 2021 and expires on December 31, 2025. This alert provides a high-level overview of the proposed changes.

Background

The federal Clean Water Act (CWA) and its implementing regulations require a National Pollutant

Discharge Elimination System (NPDES) permit for stormwater discharges from any construction activity disturbing one or more acre of land, or construction activity disturbing less than one acre of land and part of a common plan of development or sale that will ultimately disturb one or more acres of land. Like most states, Washington has EPA authorization to administer the NPDES program for discharges within its borders.

There are two types of NPDES permits: (1) individual permits that reflect site-specific conditions for a discharger, and (2) general NPDES permits that cover multiple discharges with similar operations and types of discharges, such as the CSWGP. Construction operators in Washington requiring a NPDES permit can seek coverage under the CSWGP in lieu of an individual NPDES permit by submitting a Notice of Intent (NOI), indicating the discharger will comply with the conditions of the CSWGP.

Significant Changes from the Current CSWGP

Discharges must not cause or contribute to a violation of surface water quality standards (Chapter 173-201A WAC), groundwater quality standards (Chapter 173-200 WAC), sediment management standards (Chapter 173-204 WAC), and human health-based criteria in the Federal water quality criteria applicable to Washington. (40 CFR Part 131.45) Discharges that are not in compliance with these standards are prohibited.

The above provision violates *San Francisco* by making the permitholders responsible for the overall quality of waterbodies. However, Ecology proposes to leave in—with modified language—a statement that "Ecology presumes that water quality standards are protected in the receiving water when" a permittee complies with the CSWGP.

- All site inspections will need to be conducted by a Certified Erosion Sediment Control Lead (CESCL). The draft 2026 CSWGP permit proposes an inspection requirement where all site inspections must be conducted by an individual with CESCL certification once every calendar week and within 24 hours of any discharge from the site. Ecology posits that this new requirement will promulgate increased consistency in monitoring and ensure that increased levels of erosion and sediment control training occur at all permitted sites regardless of size. This departs from the 2021 CSWGP, which permitted construction sites one (1) acre or less to be inspected by persons without CESCL certification.
- Construction sites one (1) acre or less will be required to conduct weekly sampling for either turbidity or transparency and weekly sampling for pH. The draft 2026 CSWGP permit proposes to require sites that are one (1) acre or less to sample weekly for pH and either turbidity or transparency. Under the current CSWGP, sites one (1) acre or less are not required to sample for turbidity, transparency, or pH_Additionally, all the proposed CSWGP will require all permittees to perform weekly pH sampling with a calibrated pH meter, whereas the current CSWGP allows permittees to perform pH analysis with a pH test kit or a wide range pH indicator paper in lieu of a calibrated pH meter. Ecology purports that the updated equipment requirement for pH sampling will be adopted to comply with 40 CFR 136.3.
- Dissolved oxygen impairments will also trigger a numeric effluent limit for turbidity. The draft 2026 CSWGP proposes adding low dissolved oxygen to the list of 303(d) impairments that will trigger numeric effluent limitations for turbidity. Ecology purports that increased turbidity is closely linked with elevated nutrient levels (phosphorus and nitrogen), which can lead to low dissolved oxygen in water.
- Daily turbidity effluent limitation sampling will be required for dewatering discharges to certain impaired water bodies. The draft 2025 CSWGP proposes to require daily turbidity

effluent limitation sampling for discharges to impaired waterbodies from sites that are dewatering. Dewatering refers to the act of pumping groundwater or stormwater away from an active construction site.

Implications

Operators of small sites (i.e., those disturbing 1 acre or less) could see increased compliance costs. For example, the draft 2026 CSWGP permit will increase the small site compliance burden by requiring small sites to comply with weekly turbidity, transparency, and pH testing in comparison to the 2021 CSWGP permit where small sites were not subject to weekly testing. Additionally, as was the case with the current CSWGP, Ecology anticipates the 2026 CSWGP will also have a disproportionate impact on total annual compliance costs for small businesses who employ an average of ten (10) employees as compared with larger businesses with an average of 78,647 employees, notwithstanding Ecology's purported measures to mitigate disproportionate costs such as providing extreme hardship permit fee reduction. See <u>Small Business Economic Impact Analysis</u> at p. 10.

On the other hand, permittees will no longer face the uncertainty and compliance burden of struggling to comply with vague and unattainable "end-result" prohibitions, making them responsible for water quality conditions that no single permittee can control.

Ecology's draft 2026 CSWGP and associated fact sheet with additional supporting documentation is available for public comment through May 9, 2025. Operators currently engaged in construction activities, or expected to engage in construction activities in the near future, should consider submitting public comments. For more information on or assistance with the <u>public commenting</u> <u>process</u>, please contact the authors.

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