

Snohomish County Comments
Ecology's Modifications to the Phase II NPDES Municipal Stormwater Permit

Document at Issue	Section, Page# and/or Paragraph#	Modified Language	Comment	Snohomish County Proposed Language
Phase II Permit Phase I Permit	S5.C.5.g - .i S5.C.5.c	Watershed-scale stormwater planning requirements in their entirety	<p>Snohomish County has consistently expressed its concerns regarding a permit obligation that requires it to perform actions in and conduct analysis and planning regarding geographic areas located outside of the County's jurisdictional boundaries, where the County's MS4 does not exist. The PCHB found this concern to be valid and ordered Ecology to ensure that each jurisdiction subject to an Ecology municipal stormwater permit be obligated to fully participate in the watershed-scale planning process for the portion of the watershed within its jurisdiction. Unfortunately, there are many aspects of the modified permits that do not appear to satisfy this full participation requirement.</p> <p>The County has also consistently expressed its concerns with any permit requirements that make Snohomish County's compliance with its permit dependent on the actions of third parties over whom Snohomish County has no control. Unfortunately, there are many aspects of the modified permits that needlessly and inappropriately make Snohomish County's ability to comply with its own permit dependent on the actions of another permittee. One such example is the apparent requirement that any consultant contracts entered into by the County must also be executed by all participating entities in the Little Bear Creek watershed. Further, the requirement that participating entities provide funding to lead County entities is effectively a requirement to contract as well. The exchange of funds contemplated will not and cannot take place absent a contract between the permittees governing the timing of payment, the scope of work to which said payments will be applied, the basis for apportioning financial obligations, and numerous other rights and responsibilities to govern this relationship. The County cannot force other jurisdictions to contract with it. A requirement to contract is, therefore, the loss of the County's ability to control its own permit compliance. Mixing permit requirements with contractual obligations will create ambiguity, confusion, and delay and should be avoided.</p> <p>Ecology created the watershed-scale stormwater planning process and has tasked certain permittees with certain roles and responsibilities. Ecology obligated the Phase I permittees to select the watershed. This arguably set up an unfortunate dynamic with other jurisdictions within the selected watershed that did not agree with the selection. Further, Ecology directed that Phase I permittees convene and lead the process. Ecology has not altered this basic structure with these proposed modifications. Accordingly, having set these ground rules, Ecology must not draft the permits in a manner that undermines a permittee's ability to comply with its assigned responsibilities. For example, the Phase I permittees bear the burden of meeting the final plan deadline in the Phase I permit. Neither the current Phase II permit, nor the proposed</p>	

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			modifications to the Phase II permit, subject Phase II permittees to this deadline and the resultant permit violation if it is not met. In fact, neither the current Phase II permit nor the proposed modifications to the Phase II permit address the timeliness of the required actions at all. Ecology cannot obligate Phase I jurisdictions to meet a deadline and then place outside of their control the ability to meet said deadline.	
Phase II Permit	S5.C.4.g - i	Watershed-scale stormwater planning requirements in their entirety	The regulatory language employed by Ecology in these proposed modifications is, in many instances, confusing and unclear. Ecology's use of passive voice in setting forth the roles and responsibilities of multiple permittees subject to multiple permits in a coordinated endeavor creates needless confusion and will only lead to delay and conflict. For example, stating that data quality and quantity must be compatible with other project data without stating which entity gets to make that determination and when in the process is problematic.	
Phase I Permit	S5.C.5.c			
Phase II Permit	S5.C.4.g	“Each Permittee that has all or part of its coverage area under this Permit in a watershed selected by a Phase I county for watershed-scale stormwater planning under condition S5.C.5.c of the <i>Phase I Municipal Stormwater General Permit</i> shall participate with the watershed-scale stormwater planning process led by the Phase I county. As needed and as appropriate, the permittee shall:...”	The Phase II and Phase I permits are inconsistent in their presentation of participating entity obligations. The Phase II permit introduces the list of obligations as follows: “As needed and as appropriate, the permittee shall: ...” In contrast, the proposed Phase I permit introduces the list of obligations as follows: “The permittee shall: ...” This inconsistency is problematic for a couple of reasons. First, Snohomish County, as a participating entity in King County's Bear Creek planning effort, is arguably held to a different standard of participation than Phase II participating entities in the Bear Creek effort. While the Phase II jurisdictions must only do those actions “as needed and as appropriate” Snohomish County shall be required to do those actions whether or not they are needed or appropriate. Second, who decides when an action is needed and appropriate is not stated, nor is there any further explanation of such a standard. This seems likely to create problems as leading and participating entities dispute when something is needed and appropriate and when it is not. Both permits should employ consistent language when consistent obligations are intended.	Delete “As needed and as appropriate” in the Phase II permit.
Phase I Permit	S5.C.5.c.v	“Each Permittee that has all or part of its coverage area under this Permit in a watershed selected by a Phase I county for watershed-scale stormwater planning under conditions S5.C.5.c.i-iv of this Permit shall participate in the watershed-scale stormwater planning process led by the Phase I county. The permittee shall:...”		
Phase II Permit	S5.C.4.g, Footnote 26	“For S5.C.4.g.i through iii, permittees are not required to collect additional data if existing data is sufficient for model calibration, evaluation of existing conditions, and establishment of correlation between flows and benthic invertebrate data.”	Who decides the sufficiency of existing data is not stated.	Modify as follows: “For S5.C.4.g.i through iii, permittees shall be required to collect additional data if existing data are not sufficient for model calibration, evaluation of existing conditions, and establishment of correlation between flows and benthic invertebrate data, as determined by the lead County Permittee at any time during the project.”
Phase II Permit	S5.C.4.g.i – iii	“Data quality and quantity must be compatible with the rest of the project data.”	It is unclear how this is determined or by whom. The approved scope of work will contain enough specificity for some of the data, but for other data the criteria for adequacy will only be determined after approval of the scope of	Change the last sentence in S5.C.4.g.i - .iii to read: Data must be provided according to the schedule set

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			work. Further, there is no specific schedule or set of deadlines by which the participating entities must provide adequate data. This has the potential to seriously undermine the ability of the lead County permittee to meet the final deadline imposed.	forth in the Ecology-approved Scope of Work for the watershed plan, and data quality and quantity must be adequate for the project as determined by the lead County Permittee.
Phase II Permit	S5.C.4.g.vi – viii	“...pro rata share of time spent...”	Pro rata share should be based on cost, not “time spent.”	Replace the phrase “pro rata share of time spent” with “pro rata share of cost” in the subsections of the Phase II permit indicated.
Phase II Permit	S5.C.4.g.x	“The strategies and schedules for each permittee must be part of an integrated watershed-wide implementation plan.”	As regulatory language, the purpose of this sentence is unclear. Is it intended to direct the Phase II permittees to submit the implementation plan and schedules they develop to the Phase I lead entity? If so, the language should be modified to clearly state that requirement.	Revise for clarity.
Phase II Permit	S5.C.4.g.ix, p. 33 (redline)	“Select stormwater management strategies and conduct an evaluation of the effectiveness of those strategies This could require multiple model runs.”	Ecology's proposed comment on multiple model runs is unnecessary.	Delete the following sentence: “This could require multiple model runs.”
Phase II Permit	S5.C.4.g.xi	“Provide a pro rata share of a public review and comment process on the draft watershed-scale stormwater plan.”	This language is unclear. Consider revising for clarity.	“Provide a pro rata share of the total costs of a public review and comment process on the draft watershed-scale stormwater plan.”
Phase II Permit Phase I Permit Statement of Basis	S5.C.4.g.1 – xi S5.C.5.c.v(1) – (11) p. 17	“The list of watershed-scale planning activities, above, to which Phase II permittees (and Phase I permittees, where they are participating in but not leading a process) must contribute is intended both to obligate full participation by all entities, and to prevent Phase I counties from requiring participation in planning activities that are not required by the permit.”	Ecology appears to misapprehend the role of Phase I permittees in this watershed-scale planning process. Phase I permittees are not requiring Phase II permittees to conduct watershed-scale stormwater planning. Ecology is the responsible regulatory authority and should be setting forth clear requirements for this process in the appropriate permits. Further, Phase I permittees have no interest in “requiring participation in planning activities that are not required by the permit.” Accordingly, there is no need for Ecology to suggest it needs to “prevent” them from doing that. The watershed-scale planning process is a creation of Ecology. Phase I permittees are interested in complying with their Phase I permit obligations.	
Phase II Permit	S5.C.4.i p. 33 (redline)	“When the Permittee is obligated to fund a portion of the work described above, or elects to fund a task rather than performing the task itself, their financial obligations will be apportioned in accordance to the percentage land area over which the permittee has jurisdiction within the planning area. ...”	Snohomish County has a number of concerns with the proposed apportionment of financial obligations. As a general proposition, a better cost basis is impervious area, which has a direct relation to stormwater runoff and pollution. An impervious area basis fairly distributes the costs in proportion to contribution to stormwater runoff and stormwater pollution. The percentage land area basis has no relation to the nature of stormwater runoff or pollution. The percentage land area basis treats	Modify for consistency with the PCHB decision.

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			<p>less developed areas of watersheds as if they were the same as more densely developed urban areas. Instead, the costs for basin planning should recognize and be proportional to the impacts that necessitate basin planning, which points to an impervious area basis.</p> <p>More specifically, a strict percentage land area basis is likely to be contrary to the decision of the PCHB, which ordered the full participation of each permittee with an area of its jurisdiction in the selected watershed. When actual costs are known and they are greater than a percentage land area calculation, this proposed language would appear to obligate the Phase I permittees to cover the difference, thereby funding another permittee's participation in the process, contrary to the PCHB decision. For example, drainage inventory work should be the sole responsibility of the jurisdiction that owns or operates the drainage system. Why should the lead Phase I jurisdiction be obligated to fund a percentage of the costs associated with an activity that occurs entirely outside of its jurisdiction? There may be other cost items, including but not limited to cross sections for modeling, B-IBI, and water quality data, that should be the sole responsibility of the relevant jurisdiction, as well. Yet Ecology's proposed language would suggest that a participating entity need only pay the percentage land area share of work that is to occur entirely within the participating entity's jurisdiction. This is unreasonable, impracticable and contrary to the decision of the PCHB.</p>	
Phase II Permit	S5.C.4.h & S5.C.4.i	<p>"h. For any of the requirements above (i-xi), a Permittee may provide funds to the lead Phase I county to cover the cost of any of the permittee's activities listed above, rather than provide the data or perform the work, if preferred and agreed to by both parties."</p> <p>"i. When the Permittee is obligated to fund a portion of the work described above, or elects to fund a task rather than performing the task itself, their financial obligations will be apportioned in accordance to the percentage land area over which the permittee has jurisdiction within the planning area. ..."</p>	<p>Subsections .h and .i are potentially conflicting. The "costs of any of the permittee's activities listed above" may not be fully covered by an apportioning of costs based on percentage land area, which makes the two subsections arguably inconsistent. Further subsection .i does not acknowledge that the Phase I permittee must agree to perform the work, as set forth in subsection .h, before a Phase II permittee can "elect[] to fund a task...."</p> <p>Subsection .i merely states that if a Phase II permittee "elects to fund a task..." then financial obligations will be apportioned in a particular manner. Ecology must address these inconsistencies and internal conflicts so that all permittees have a clear understanding of their roles and responsibilities.</p>	Revise for clarity.
Phase II Permit	S5.C.4.i	<p>"Permittees within a watershed may agree in writing to an alternative scheme of distributing financial obligations."</p>	<p>This language is unclear. Is it Ecology's intention that all participating entities and the County permittee must be party to a single alternate scheme agreement? There is no reason to limit the ability of the permittees to craft alternate schemes to calculate financial obligations as they deem appropriate. By imposing this apparent limitation, Ecology gives veto power to a single participating entity even when all other permittees may be in agreement on an alternate scheme to be applied only amongst themselves.</p>	<p>Revise to read as follows:</p> <p>"Each participating entity in a watershed may agree in writing with the County Permittee to an alternate scheme of calculating financial obligations. The same alternate scheme need not be employed as to every participating entity."</p>