EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

August 27, 2010

Dear Kate, Ed, and Bill:

On behalf of Puget Soundkeeper Alliance and People for Puget Sound ("PSA"), I am providing the following comments on the draft proposal to incorporate LID distributed August 2, 2010. We have appreciated the opportunity to participate in the advisory process leading up to this draft proposal, and recognize the hard work of you and other Ecology staff in getting to this point.

Nonetheless, we find the draft proposal to be a major disappointment that fails to meet the PCHB's direction to require LID where feasible and set a standard that actually protects water quality and beneficial uses like salmon. The proposal does not call for the paradigm shift that is required by law as well as by the urgency to change development practices to protect and restore Western Washington's imperiled water resources. Moreover, by over-emphasizing onsite infiltration and underemphasizing protection of native vegetation and reduction in footprints, this proposal may actually encourage failure of LID BMPs that result in a retreat from the LID approach. We think that the draft proposal must be significantly strengthened. What follows is a list of our primary concerns and our recommendations for improvement.

1. Failure to Require LID at Small Projects: While we believe that there are significantly better performance standards that should be adopted, we recognize that that the proposed hydrology standard is preferred by Ecology and understand that it can be effective at driving LID in some situations. However, the proposal only requires reliance on that standard in a exceedingly narrow range of situations. For example, the performance standard is completely inapplicable to all projects below high size/disturbance thresholds, and no meaningful requirements exist to replace them.

a. Small projects Small projects are exempt from all LID requirements in all situations. This is a major missed opportunity. We've previously endorsed a streamlined approach that uses some kind of checklist rather than a complex performance standard and engineering burdens for small projects, but strongly disagree that they should be exempt from LID altogether. The City of Seattle proposal applies to all projects regardless of size. It is difficult to see how exempting all projects meets Ecology's obligation to require LID where feasible.

b. Medium projects The draft proposes very marginal LID requirements for projects between 2K and 10K square feet imperviousness: simply apply the existing requirements in the stormwater manual (explicitly found by the PCHB to be inadequate to require LID), as

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amended to require infiltration below pavement unless infeasible. This does not appear to be a meaningful requirement, because without some requirements to minimize impervious surfaces , retain native vegetation, and amend soils (i.e. utilize LID site design principles), infiltration below pavement may well be infeasible in many situations. Projects up to 10K square feet are significant projects, with significant opportunities to minimize runoff via design principles and the full range of LID tools, but there is no requirement that they do so. Another significant missed opportunity.

Recommendation 1: Apply "mandatory list" to require LID for all projects below existing flow control thresholds in the manual. Mandatory list must include requirements to maintain as much native vegetation and minimize impervious surfaces as feasible on each site. (See other recommendations below re. content of mandatory list). This may mean re-designing the site plan and project.

2. Inappropriate Option to Use "List" Instead of Meeting Performance Standard: In a great many development situations (i.e. below 5 acres of disturbance and in some cases even above that size), permittees have the option of meeting the LID requirements via a "mandatory list" rather than meeting the performance standard. We strongly disagree that this option should be available, and strongly disagree with the elements in the mandatory lists. There was virtually zero conversation during the year of advisory group meeting about using a list rather than the performance standard for large projects. In fact, the very reason that a significant percentage of both group's time was devoted to discussing the performance standard was because there was a shared assumption that this would be the only option for larger projects. It is both surprising and unjustified to see the "list" option available to these very large projects.

Moreover, we have major concerns with the content of the mandatory lists. For example, Ecology has decided that rainwater harvesting is not a mandatory technique and will not be required, even though it is commonly practiced today and even though there are many years before these requirements will come into effect.[1] Other important LID tools like amending soils and using pin foundations are omitted. Raingardens are not required at all for slowly infiltrating soils—there was no discussion at the advisory group level the supports the conclusion that these could not be engineered to avoid mosquito breeding problems. There is a very vague requirement to "retain native vegetation and minimize impervious surface" that has no metric or standard associated with it. As Ecology recognized in the proposal, use of the performance standard will "drive" the use of appropriate development principles. Allowing vague requirements to replace the more accountable approach of the performance standard significantly undercuts the effectiveness of the permit. Finally, the directive to retain native vegetation etc. "as allowed by local code" gives permittees discretion to place regulatory, legal and administrative barriers to achievement of LID goals. This would be highly inappropriate.

[1] Moreover, by declaring water harvest to be a technique that is not ready for widespread application, Ecology has opened the door to allowing variances from the performance standard under feasibility review without any consideration of this approach.

In short, the mandatory list is remarkably thin and can be used in almost all large development situations. There is no justification to give projects of this scope and impact the ability to avoid using the full range of LID techniques and BMPs to meet a protective standard performance standard.

Recommendation 2: Apply the performance standard to all projects above existing flow control thresholds, and remove option of using mandatory list. Remove varying standards based on soil conditions and UGA boundaries, as questions of density and soil conductivity can be addressed through a project-specific feasibility review, once all LID site development principles and BMPs have been fully applied.

Recommendation 3: Mandatory list should be for small projects only, and should include rain gardens on all soil types (with requirements to amend soils and engineer as needed), and water harvest subject to feasibility review. Remove any reference to using LID site design principles as limited by local laws.

3. Inappropriate use of Exemptions: The limited requirements above are subject to even more exemptions and limits that lack a technical or policy basis.

Flow Control Exempt Areas: While we're relieved that Ecology has not proposed to withdraw these areas (direct discharges and large rivers) completely from the requirements, they are subject to a relaxed standard that is not supported. There was little or no support in the advisory group for doing so. Due to the high level of air pollution in urban areas roofs should be not be considered exempt from treatment requirements. In light of the benefits of LID to recharging groundwater and restoring normative flows, the concept of flow control exempt areas should be eliminated entirely.

Highly Urbanized Areas: The draft proposes to continue the existing relaxed flow control standard for areas that have been highly urbanized for a long time. (Specifically, rather than meet historic flow conditions, development projects need only meet existing flow conditions.) This is in our view a missed opportunity to improve degraded streams using feasible techniques. While we understand the need for greater flexibility in the highly urban environment, we think there is already more than enough flexibility in this proposal (as modified with our recommendations) to accommodate those concerns.

Recommendation 4: Remove relaxed standards for flow control exempt and highly urbanized areas. Apply performance standards and mandatory list as proposed above.

4. Excessive Timelines: Most Phase I and II jurisdictions would have to have apply new permit requirements by December 2014, i.e. three years from permit issuance. A smaller group would have until December 2015, i.e. four years. This is a highly excessive timeframe and there was very little support for moving this slowly in the advisory groups. Representatives of the

regulated jurisdictions repeatedly indicated that they could move far faster than Ecology proposed. The Board's ruling came in 2008 and directed Ecology to modify the existing Phase I permit—it is already far behind in implementing this requirement. It should come as no surprise to anyone that these requirements are coming, nor has Ecology made the case that there are significant efficiencies to be gained by timing this with comprehensive plan overhauls. At a minimum, if Ecology insists on granting a long time frame for revision of codes, there should be an earlier requirement to modify the existing stormwater codes or manuals to achieve the greatest degree of LID within existing codes.

The timing problems are compounded by Ecology's statement that it is not going to change its approach to vesting of permits. Ecology's position on vesting is that state vesting law does not apply to the requirements of the permit but that it has the discretion to exempt vested projects and, presumably, will continue to do so. This allows projects to lock in non-LID approaches to stormwater even though they will not be built for many years past the deadline. The timing problems are further compounded by the fact that Ecology has not meaningfully enforced timelines and there are no adverse consequences for missing deadlines.

Recommendation 5: Permittees will amend codes to meet the new standards within 12 months (Phase I) and 18 months (Phase II). Include permit provision that permittees that fail to meet deadlines must not permit development projects that fail to meet permit standards, or assume a burden to mitigate impacts. Apply permit standards for all projects, regardless of vesting dates.

5. Failure to require Basin Planning: The basin planning proposal in here is far different than anything that was discussed in the advisory group process. Indeed it is not a basin planning process at all. The draft proposes to require an "analysis" whenever permittees change UGA boundaries or significantly increase densities. There appears to be no substantive requirement associated with this analysis: while the permittee would need to identify "mitigation measures" there is no particular performance target or duty to avoid impacts outside of conditions already imposed by law. There is also no requirement aimed at addressing the impacts of growth and existing development within existing built area. This is a surprising and disappointing missed opportunity.

Recommendation 6: Adopt a meaningful approach to stormwater basin planning to be implemented over two permit terms, starting with the most sensitive basins in high growth areas. Specify how local jurisdictions evaluate cumulative impacts. What level of degradation is allowed (environmental outcomes to fish populations) and the level of compensation required? These must be quantified. Define the appropriate level of basin or sub-basin scale.

6. Lack of Mitigation: PSA understands that the Board directed that LID is required "where feasible" and recognizes that in some development scenarios a protective performance standard may not be technically feasible due to engineering or geological limitations. In those situations, permittees must ensure that a level of performance is achieved that is close as feasible to the performance standard. Additionally, where an exemption is allowed due to

feasibility concerns, there must be a requirement to mitigate for any adverse environmental impact that arises from the exemption. Such a requirement is part of other NPDES stormwater permits, and provides a significant additional protection for water quality as well as an incentive to ensure that the performance standards are achieved in as many situations as possible.

Recommendation 7: Adopt a mitigation requirement for development situations where a variance or exemption is provided along the lines of the West Virginia Phase II stormwater permit (pages 15-16).

Additionally, there are some areas of the proposal that are insufficiently detailed for a useful comment. If not handled correctly, these could result in a significant weakening of the permit's usefulness in protecting water quality. These include the following:

Code review: It is unclear in this proposal how Ecology will require the code review that is needed to ensure that contrary code provisions do not interfere with achievement of LID requirements. The draft simply says they Ecology will repeat the PCHB's language and leave it up to the permittees. This does potentially nothing for removing barriers to LID implementation and requiring removal of local ordinances that interfere with meeting performance standards. Moreover, for smaller permittees, this creates a significant burden that will have to be replicated across a large number of jurisdictions. Unless accompanied by significant guidance from Ecology (i.e., a model ordinance) there is a high likelihood that jurisdictions will struggle to perform this code revision process adequately.

Competing Needs Feasibility: We are concerned about the vague provision allowing an exemption based on "competing needs" of other federal or state requirements. It is unclear what this means but it should be tightened up. While federal stormwater requirements cannot create a violation of another federal law, the requirements of the CWA are superior to other contrary state laws. While we believe that the likelihood of a direct collision between the CWA and state law is low, the permit language about competing needs should be significantly clearer.

Soil Evaluation: There are some significant regulatory differences that depend on soil infiltration capacity. For example, there is no need to do raingardens at large projects in certain soils if one is using the "list" as opposed to the "performance standard" option. But as everyone understands, soil is not homogenous but is highly variable, even across a single site. We believe that the appropriate response to this is to simply do away with the regulatory distinctions between soil types and allow the permittees and developers the flexibility to meet performance standards however they see fit. If those distinctions are not eliminated, there should be significant additional direction on how soil testing should be conducted so projects cannot take advantage of relaxed standards for poor soils on the basis of limited tests. Moreover, the use of test pits should not be considered as adequate justification to determine infeasibility once the native soils and duff layers are removed. Those layers should be preserved or replaced with amended soils that provide the same function.

Thank you for the opportunity to share our views. We look forward to working with you further to make this an effective and legal permit.

Sincerely,

Jan Hasselman