City of Bellevue

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June 17, 2011

Municipal Stormwater Permit Comments
Attn: Mr. Bill Moore
WA State Department of Ecology
Water Quality Program
PO Box 47696
Olympia, WA 98504-7696

Subject: Future NPDES Western Washington Phase II Municipal Stormwater Permit:
Bellevue's Comments on Ecology's Permit Reissuance Process and Schedule and Preliminary Draft Permit Language for Low Impact Development (LID) and Monitoring

Dear Mr. Moore,

The City of Bellevue appreciates the opportunity to review and comment on Ecology's proposed:

- Permit reissuance process and schedule; and
- Preliminary draft permit language for low impact development (LID) and monitoring.

Our comments are for the NPDES[1] Western Washington Phase II Municipal Stormwater Permit proposals.

Bellevue also appreciates Ecology's July 2010 recognition[2] that municipal permittees' current stormwater investments are delivering results and that it will be a significant challenge for municipalities to maintain these current stormwater investments given the declining economic capacity of both local and state governments.

Fiscal conditions continue to be dire with little projected improvement to the economy. Layering new mandates on top of the already significant challenges that municipalities face in meeting current permit requirements exacerbate the existing fiscal crisis facing Bellevue, like other jurisdictions. What is particularly concerning to Bellevue is that certain low impact development conditions (discussed herein) proposed by Ecology as new mandates are untested and based on limited modeling exercises and unexamined assumptions or cost-benefit analyses. Bellevue strongly believes that conditions not proven to have a nexus with the desired outcome are better suited as pilot programs subject to further research and revision rather than mandates in the permit. After review of certain provisions of the proposed permit, Bellevue believes the regulations and methodology for review is unreasonable and, perhaps unlawful by failing to conduct the appropriate economic analysis under Chapter 173-226 WAC and by otherwise failing to adequately evaluate and consider the economic impact of the proposed permit conditions. Bellevue strongly urges Ecology to delay new, unfunded mandates until economic conditions improve and until such mandates are proven through testing and scientific means to accomplish the desired outcome.

Bellevue takes issue with aspects of the permit that take away local government's discretion with regard to their stormwater management program, obligate municipalities to take on regulation that is already

[1] NPDES = National Pollutant Discharge Elimination System
[2] Source - July 30, 2010 Ecology's Preliminary Thinking for the Reissuance of the Municipal Stormwater Permits

handled by Ecology and that may expose municipalities to litigation from third parties. All of these issues are, at least in part, related to the fact that Ecology's proposed permit modifications go beyond the mandates in the federal Clean Water Act.

Bellevue's comments reflect what appears to be an imposition of Phase I LID conditions to Phase II jurisdictions. Imposing these conditions is entirely inappropriate given the Pollution Control Hearing Board (PCHB) rulings recognizing that Phase II jurisdictions are factually and legally different from Phase I jurisdictions:

- *"Environmental Protection Agency (EPA) recognized the difference between Phase I and Phase II permittees and required less of Phase II permittees in its rules"* [PCHB NOS. 07-022, 07-023 page 45, lines 19-20];
- *"The Board concludes that there are sufficient distinctions between Phase I and Phase II permittees in terms of available resources and experience in administering a municipal stormwater management program to justify different requirements between the two Permits and to allow the Phase II jurisdictions to address certain requirements on a different time schedule than Phase I jurisdictions*." [PCHB NOS. 07-022, 07-023 page 46, lines 11-15].

The remainder of this letter and its attachments provide comments on major and specific issues identified to date with Ecology's proposed:

- Permit Reissuance Process and Schedule;
- Low Impact Development (LID) Proposals; and
- Monitoring Proposal.

Bellevue intends to provide Ecology with additional comments as advised in your letter to me, dated June 14, 2011(attachment 1). It is expected that these additional technical comments by Bellevue staff will be submitted the week of June 20 or soon after.

A. PERMIT REISSUANCE PROCESS AND SCHEDULE

A description of the proposed public review process and schedule for the next 5-year NPDES municipal stormwater permits and revised 2005 Ecology Stormwater Management Manual is attached (attachment 2). Bellevue has the following comments on the proposed process and schedule.

The current process proposes concurrent public review processes for a significantly revised 2005 Ecology Stormwater Management Manual and a formal draft of the next 5-year NPDES permit, which would include the proposed Manual revisions as requirements in the Permit's Appendix 1[3].

This proposed process does not meet Administrative Procedure Act (APA) public review rulemaking requirements. By incorporating modifications to the Manual with permit mandates, Ecology is potentially violating Chapter 34.05 RCW.

The proposed revisions to the Manual are significant and must undergo a complete and separate public review rulemaking process. It's important that Ecology has the opportunity to perform the scientific, engineering, and cost-benefit analyses underlying these revisions before they are proposed as requirements in the next 5-year Permit. This will allow the public to assess and comment on Ecology's methodology and proposed Manual revisions.

[3] Appendix 1 – Minimum Technical Requirements for New Development and Redevelopment

B. <u>LOW IMPACT DEVELOPMENT (LID) PROPOSALS</u> (preliminary draft permit pgs 1-10 and Appendix 1)

Bellevue supports the appropriate use of LID in stormwater management programs. However, there are many conditions that need to be addressed in order to reasonably and feasibly increase the use of LID in the future. For example, as a result of the Pollution Control Hearings Board rulings, permittees were required to report on LID implementation barriers (and potential measures to address them) with their March 31, 2011 NPDES annual report submittal. Attachment 3 is a copy of Bellevue's report.

The preliminary draft permit language proposes three new, significant sets of low impact development requirements:

- Minimum Technical Requirements for New Development and Redevelopment – also referred to as site and subdivision-scale LID requirements (preliminary draft Appendix 1);
- Review and revision of (all) local codes, rules, standards, or other enforceable documents to require LID principles and best management practices to the maximum extent practicable; includes land use codes, fire codes, building codes, stormwater codes, etc. (preliminary draft Permit condition S5.C4.a.iv – page 4); and
- Watershed-scale stormwater planning requirement triggered by land use actions (preliminary draft Permit condition S5.C4.g – pages 9-10).

The draft permit language requires permittees to use specific documents and hydrologic models to implement certain LID principles and best management practices. However, the documents and hydrologic models have not undergone a separate public review process. Revising the Manual without appropriate public rulemaking is contrary to governing statutes. Public rulemaking is required to be completed before any modifications of the Manual can be included in Appendix 1. In addition, the documents and modifications to the Manual are not yet available to municipal jurisdictions and other stakeholders for review or comment.

With respect to preliminary draft LID proposals, Bellevue's comments and concerns are as follows:

1. <u>Watershed-scale stormwater planning condition</u> (preliminary draft permit S5.C4.g – pg. 9-10)

   The watershed-scale stormwater planning LID condition **should not be included** in a federal Clean Water Act permit for Phase II municipal stormwater permits for the following reasons:

   - It goes beyond the Pollution Control Hearings Board's definition of AKART (all known, available, and reasonable treatment methods) for LID:

     "The Board finds, as it did in the Phase I Permit decision, that LID methods are ***known and available method*** *to address stormwater runoff* ***at the site, parcel, and subdivision level in Phase II jurisdictions****."* [PCHB NOS. 07-022, 07-023, pg. 23, lines 15-17];

   - The Board's Phase II LID ruling does not require Ecology to explore a basin or watershed-scale LID application for the next Phase II permits. [PCHB NOS. 07-022, 07-023].

   - The Board's Phase I ruling includes statements about possible, limited future application of LID at a basin or watershed level for **Phase I permittees, not Phase II permittees**.

     "The cost of implementing LID across a broader land use spectrum, through basin or watershed planning is more speculative, and the Board was presented with no clear

evidence on costs associated with broader scale implementation of LID in this manner. Although such planning is underway in certain areas, a longer public and political process could be expected to accompany such an effort." [PCHB NOS. 07-021, -026, -027, -028, -029, -030 and -037, pg. 43, lines 20-21 and pg. 44, lines 1-4]

"Although we conclude that the permit must require municipalities to employ broader use of LID at the parcel and subdivision level, we stop short of concluding that the permit must, at this time, require use of LID at a basin and watershed level. Based on the evidence before the Board, we cannot conclude that the current iteration of the permit must require implementation of LID on a basin or watershed scale in order to meet federal and state water quality standards. Little evidence was presented as to the elements and cost of basin or watershed planning that would be necessary to implement LID at this level. [PCHB NOS. 07-021, -026, -027, -028, -029, -030 and -037, pg. 58, lines 18-21 and pg. 59, lines 1-3]

"Given these several factors, the Board concludes that a permit condition requiring municipalities to implement LID at a basin or watershed level is not, at this time, reasonable or practicable. This is not to say that no steps can or should be taken at this time. Ecology has identified the particular importance of basin planning in areas which are relatively undeveloped where new development is occurring. The Board concludes that city and county permittees should identify such areas where potential basin planning would assist in reducing harmful impacts of stormwater water discharges upon aquatic resources. This will assist Ecology in readying for the next round of permits when such requirement may be necessary to meet the state AKART standard and, under federal law, to reduce pollutants in municipal stormwater to the maximum extent practicable." [PCHB NOS. 07-021, -026, -027, -028, -029, -030 and -037, pg. 59, lines 8-17]

- This proposal (or any of the new LID proposals) may have a conflict with the Growth Management Act if the "harmony" anticipated by the Board in its Phase I ruling is not an outcome after implementation of this proposal.

  "With respect to GMA concerns expressed by Ecology, the Board concluded that the GMA and water pollution control statutes must be, and could be, harmonized, concluding that the GMA is not a barrier to greater use of LID for the Phase I jurisdictions." [PCHB NOS. 07-022, 07-023, pg.14, lines 4-7];

- The proposal is speculative, experimental, untested, and procedurally flawed from an application perspective. The assessment process is deficient, modeling tools are in developmental stages (experimental) and are generally unavailable and untested. If desired, this proposal is better suited as a discretionary pilot project rather than a state imposed mandate.

- It is technically and legally inapplicable through an NPDES municipal stormwater permit process because it requires municipalities to address and be held accountable for discharges and actions that local jurisdictions cannot control nor are responsible for under the Permit. In any one watershed, there are numerous discharges and sources of pollution to receiving waters besides the municipal discharge sources covered by the permit and it is unreasonable and counterproductive to expose municipalities to liability for sources of pollution that they cannot control.

As noted above, this preliminary draft watershed-scale stormwater planning LID condition **should not be included** in a federal Clean Water Act permit for Phase II municipal stormwater permits. It is better suited to evaluation by a discretionary pilot project.

2. Definition of "receiving waters has been revised to include "groundwater to which surface water runoff is directed by infiltration" (pg. 6 of Appendix 1)

This revision is not consistent with the EPA's definition for receiving waters. The EPA definition is "*water of the United States* as defined in 40 CFR 122.2 into which the regulated stormwater discharges." Bellevue strongly recommends deleting this addition to the definition of receiving waters.

3. Ecology requests comments on decision criteria for roadways that would make permeable or pervious pavement infeasible (pg. 36 of Appendix 1)

There is a lack of research and information on pervious and permeable pavement roadways and many questions remain regarding construction, structural, life safety, operation and maintenance and life cycle issues.

Bellevue recommends that pervious or permeable pavement **not be considered feasible for widespread or mandated use in roadways until studies and pilot programs have been completed to address these questions.** Bellevue recommends that permeable or pervious pavement continue to be primarily used or required, as feasible, for parking lots, sidewalks, driveways, parking areas outside of travel paths, and separated bike lanes

4. Condition requiring municipalities to conduct extensive review and revision of local regulations to incorporate low impact development principles and best management practices (BMPs) to the maximum extent practicable (preliminary draft permit language – S5C4.a.iv(1) – pg. 4).

- This condition refers to incorporating low impact development into local regulations "to the maximum extent practicable." We understand that this was an error on Ecology's part and that the condition was meant to say "to the maximum extent feasible" and that it will be corrected in the next draft of the permit. Bellevue recognized this error and agrees that it needs to be corrected; although it might more appropriately be corrected to "where feasible" rather than to the "maximum extent feasible."

- This condition will require substantial municipal resources to implement because it requires significant local code amendments and the City has limited fiscal and staffing resources to undergo another extensive code revision (considering the City just completed in 2009 the code amendments necessary to implement the existing permit requirements). The staffing requirements and public process requirements are enormous and would require, at a rough estimate, a minimum of 4 years for Bellevue. In addition, implementation of new and more onerous code amendments requires significant and costly public outreach, training and implementation of the revised regulations. Bellevue strongly urges Ecology to delay this new unfunded mandate because of the dire fiscal conditions, with no improvement on the horizon. Alternatively, Bellevue requests that Ecology reduce the scope of required local code amendments by limiting such to only those regulations required to implement new site and subdivision-level LID requirements.

C. <u>MONITORING PROPOSAL</u> (preliminary draft permit S8 – pgs. 11-15 and 8-pg draft funding agreement)

Bellevue appreciates that Ecology adopted the Stormwater Workgroup recommendations for a coordinated, regional approach to the S. 8 Monitoring requirements (regional stormwater monitoring program or RSMP). The preliminary draft permit language and funding agreement support the intent and direction of the Stormwater Workgroup plan and reflect the work of multiple stakeholders over the last four years to develop a new, more efficient and effective approach to monitoring stormwater in the Puget Sound region. However, Bellevue recommends delaying implementation of the S.8 Monitoring regional stormwater monitoring program requirements or sharply reducing the scope because:

- Fiscal conditions continue to be dire and no improvement is seen on the horizon;
- Municipalities are investing significant *and increasing* levels of resources to implement other monitoring conditions required by the existing permit (such as the pollutant source investigations) that will continue in the next permit; and
- Municipalities have to balance NPDES Permit monitoring mandates against monitoring needs driven by local concerns and priorities and other mandates (TMDLs, Endangered Species Act, Model Toxics Control Act, Resource Conservation and Control Act).

The following include Bellevue's comments on the proposed cost allocation option recommendations (preliminary draft permit S8.C.2 – pgs. 12-15). Ecology has identified 3 cost allocation options:

- Allocate strictly by population.
- Evenly split half the cost of status and trends (all jurisdictions pay same), then allocate remaining by population; and
- Evenly split cost of effectiveness and source identification monitoring (all jurisdictions pay same), then allocate remaining by population.

Ideally, we propose an alternative option: All jurisdictions pay a base price of $5,000 with the remainder of the costs allocated by population. This would set a minimum base price for all with the remainder being allocated by population.

With respect to the funding agreement between the State and permittees, Bellevue will be providing suggested edits to that Agreement and will likely have those edits transmitted to Ecology during the week of June 20 or soon after.

Please be aware that these comments are preliminary in nature and that Bellevue does not waive any comments or concerns not otherwise included in this letter.

Thank you for your consideration of these comments. If you would like to discuss these comments, please contact Phyllis Varner, NPDES Permit Coordinator, at 425-452-7683 or pvarner@bellevuewa.gov.

Sincerely,

Nav Otal
Interim Director
Bellevue Utilities

Attachments enclosed
cc: Coalition of Phase II municipalities