



February 3, 2012

Comments: Draft Western Washington Phase II Municipal Stormwater Permit

On behalf of Washington's cities and towns, we appreciate the opportunity to provide comments on the draft Western Washington Phase II municipal stormwater permit. We fully support the need to ensure clean water across the state, and recognize the role that city stormwater management plays in reaching that goal. Cities have been leading the way in investing in fighting stormwater pollution, and we will continue to do so. We raise and spend more money on stormwater management than the state and counties combined. Our serious concerns about this draft permit do not mean that we do not support strong and effective stormwater management.

Washington's cities have borne the full weight of the Great Recession for several years now. Our staffs are shrinking at the same time that service needs are rising across city government. We are asking for recognition of our financial and technical capacities at this time.

Although we raise many distinct issues below, our concerns primarily come down to resources and timing. In many instances we are struggling to meet existing permit requirements, and the additional cost drivers proposed in this draft permit may make that challenge impossible. In addition to a lack of financial resources, we do not currently have the informational and technical resources necessary to implement this permit as written. For instance, we do not have sufficient information from our leading jurisdictions on exactly when low impact development is feasible, and when it isn't. We do not have successful long-term examples of legal structures that would provide for perpetual maintenance of private stormwater facilities and access for local government inspectors on private property. We do not have the maintenance tools to manage permeable pavement deployment to the degree that this permit requires.

We believe that these resources can be brought to bear, but not on the timeline proposed by this draft permit. Below are our specific areas of concern with the proposed draft permit:

Low impact development:

Cities have had a variety of experiences with LID – where appropriate training, staff resources and technical knowledge from both the public and private sector can be applied, there have been great successes. When those resources are not available there have been public failures. Many of these techniques require very site specific design, construction and maintenance. We are concerned that broadly mandating LID across the Western Washington will lead to more failures than successes.

We welcome the opportunity to continue to learn from the jurisdictions that have been able to implement LID requirements at the local level. Some Phase IIs have the geography and soils to easily adapt to LID requirements and others do not. We believe it is premature to extend these requirements to every Phase II city. Without more time to gather experience from our innovators, it is difficult for cities to comment on whether the feasibility criteria are appropriate or not. As an example, we are hearing concerns about whether the "competing needs" criteria is sufficient to cover conflicts with other regulatory responsibilities. Cities continue to feel that permit requirements around Low Impact Development are best phased in slowly and gradually. We would again request that Ecology consider other opportunities to move the ball forward on LID without jumping to require it of all jurisdictions at this point.

We request an incentive based approach that would allow some jurisdictions to move ahead more quickly than others. We believe that the right incentives could be provided both within and outside the permit to create a new dynamic around LID: developers figuring out how to make LID work for their projects. Our fear is that the current draft will result the majority of the effort being expended on figuring out how to avoid LID requirements rather than figuring out how and where it can work. A combination of the right training, the right incentives and the right timelines will provide a much more successful integration of low impact development techniques in new development across Western Washington.

Permeable pavement:

The LID requirements in the new permit around permeable pavement are of particular concern. Cities are worried that requiring permeable pavement on neighborhood streets will drive costs in two specific ways: costs of maintenance, and increased repair costs. Cleaning and maintaining the permeability of this pavement will require expensive equipment that most cities do not currently have access to. And perhaps more concerning is the potential loss of maintenance tools like chip seals and refinishing that currently extend the useful life of our traditional roads by many years. Without these tools we may see an increased replacement schedule for our neighborhood streets – without the revenue to pay for it.

One-acre threshold:

For several cities, the expansion of permit responsibilities to below one acre is a problem – they are still struggling to staff the existing permit. Although many cities extend at least a portion of their stormwater regulations to projects below a one-acre size, on the whole this is a large expansion of responsibilities for cities.

In addition to the potential impact that removal of the one-acre threshold will have on city operations, our cities also expressed significant concerns that this new requirement could stifle the homebuilding industry at a time we most need it to recover from the recessionary economy.

Inspection requirements for municipal catch basins and private stormwater facilities:

Many cities have expressed concerns about the new and enhanced responsibilities for inspection of stormwater facilities. The resources needed to inspect and maintain these facilities is not adequately acknowledged by the draft permit. Many jurisdictions expect that these new responsibilities will require purchasing of new equipment and the hiring of new dedicated staff in a time of declining resources.

In addition to the financial and staffing resources needed to meet these proposed inspection requirements, there are also concerns about legal and technical resources. Jurisdictions will continue to struggle to develop sophisticated and legally sound mechanisms to meet their responsibility for inspections of stormwater facilities on private property. We need to ensure continuing access to such facilities. We need to develop mechanisms to ensure that property owners or groups of property owners have the resources to operate and maintain these facilities. Although the responsibility is on the property owner to maintain these facilities, ensuring that they are organized in such a way as to have permanent capacity to pay is the local government's responsibility.

We only have a handful of years of experience with the Phase I requirement to develop legal mechanisms to enforce inspection and maintenance responsibilities on new development and redevelopment. Ideas are being considered, such as potentially requiring new development of the size to trigger these requirements to have homeowners associations with sufficient annual assessments. This is new ground with serious property rights and community development ramifications. Substantial work must be done to understand how this will work on the ground.

We need more time to ensure that there are workable mechanisms for smaller Phase II jurisdictions to follow. Smaller cities have neither the legal expertise to develop these mechanisms from whole cloth, nor the financial capacity to gamble with tools that haven't been proven over time.

The extension of the bi-annual inspection for newly developed private stormwater facilities from 1-2 years to a 90% constructed threshold is problematic. As written it could extend biannual inspection requirements for

decades for subdivisions until 90% of the lots are built out, while providing no additional protection to stormwater quality.

Watershed-scale planning:

Our cities that are potentially covered by the watershed-scale planning requirements of Phase I permittees want more information about their role. Affected cities are unclear about the potential impact of this requirement and need to know what “participate and cooperate” means before they can assess the potential impacts.

Vesting:

The vesting language in the permit may be problematic – we believe that permit requirements cannot create or change existing vesting laws in the state. We suggest that this be carefully reviewed against state law.

Permit timelines:

The timelines contemplated in the permit are viewed by many cities as too aggressive. Timelines are both too short for cities to change all of the necessary codes and, with concerns about what’s required, believe that it is too soon to require all of this within the 5-year permit horizon. In many instances, the same staff will be overseeing both the necessary code changes to implement the LID requirements and the broader-scale code review to incorporate LID principles in the broader regulatory environment. This is on top of other mandated code reviews and updates – all at a time when staff resources are reduced. The one-year gap between these requirements does not provide the necessary staging to ensure that limited staff can adequately address both requirements and their other mandated workload.

Many cities have expressed concern over the concurrent review process for the combined review of the draft permit language and the supporting technical documents (i.e. the 2012 Stormwater Management Manual for Western Washington and the LID Guidance Manuals). They have also identified concerns over the limited availability of these documents, especially the LID documents. As these documents are interrelated and changes to one will likely affect the other, the existing comment period does not allow adequate time for review of these regulatory and technical documents. We request there be consideration of how to ensure appropriate time to allow for sequential review of these documents, beginning with the technical ones.

Monitoring:

Cities support some level of monitoring to ensure that permit requirements are effective in managing stormwater flows and pollution. We are concerned that the opt-out option that has been provided is not likely to be workable for many jurisdictions that have made investments in their own monitoring programs. Given the economic situation facing cities, the assumption that cities can pay for enhanced monitoring absent state financial assistance is not one we’re willing to support, especially considering the scale of new financial responsibilities that are embedded in other areas of the permit.

Increased liability:

Requiring changes to local land use codes and regulations in and of itself increases liability exposure. Doing so to include LID requirements that by their very nature have a range of applications, increases the risk of potential litigation. Litigation has been widespread on NPDES stormwater issues. It’s costly and time-consuming. These new requirements add a layer of litigation exposure to cities beyond those already present when they review and update local land use regulations under GMA. For instance, the broad-scale regulatory review of non-development codes that may present an opportunity to promote LID could open a wide swath of city codes to third-party challenge under the Clean Water Act. That is a major concern. We would request that the Department take specific and proactive steps to limit litigation exposure in this permit.

EPA integrated planning efforts:

Cities are interested in what we are hearing from the Environmental Protection Agency about efforts to take a holistic look at the clean water obligations of permittees and efforts to ensure that limited resources are first directed at regulatory obligations that will provide the most environmental benefit for the cost. We understand and appreciate the fact that this idea is in its infancy and not fully fleshed out. That said, if flexibility to act on these concepts is not built into this permit many years may go by before there is an opportunity to utilize these

tools. We request that Ecology incorporate flexibility into this permit to take advantage of these efforts should they come to fruition.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Williams". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Dave Williams

Director of State & Federal Relations, AWC