

February 3, 2012

Municipal Permit Comments
WA Department of Ecology
Water Quality Program
PO Box 47696
Olympia, WA 98504-7696

Sent via email SWPermitComments@ecy.wa.gov

RE: Comments on Draft Municipal Stormwater Permits

To Whom It May Concern:

BIAW appreciates the opportunity to submit these comments on the draft municipal stormwater permits.

Representing over 8,000 businesses engaged in every aspect of the homebuilding industry, BIAW is concerned now more than ever with making sure Washingtonians have access to affordable housing. Any additional regulation affects BIAW's members directly and serves to drive up the cost of housing. The changes proposed will result in local codes and regulations affecting construction activity.

BIAW has been an active participant in the Construction Stormwater General Permit process and has made it a priority to develop a successful training program to facilitate and encourage our members to complete the Certified Erosion and Sediment Control Lead (CESCL) program. Educating of our membership on these issues will continue to be a priority for BIAW leadership.

Low Impact Development

BIAW recognizes the importance of low impact development (LID) and offers an education program for builders and developers on aspects of LID. BIAW also supports local Built Green® programs around the state; one of the aspects of these certification programs is the utilization of low impact development. As they are the ones moving the dirt, BIAW's members know firsthand how successful LID approaches can be in managing stormwater.

We are concerned, however, with the prescriptive, top-down approach to implementing LID requirements for new development and redevelopment. Instead, the state should support an approach that encourages voluntary incentive-based solutions and includes a substantive commitment to both public and, especially, technical education. Any other approach will set LID up to fail, an outcome not in the best interests of the state or the development community. In fact, the recent example in Ballard of rain garden/bioretenion cell failure is likely to be repeated if LID implementation is required. We strongly believe requiring LID will result in installations that are not appropriate, resulting in failures identified as examples of LID not working – when in actuality it is the mandate that will have failed. These examples of failures will ultimately slow the acceptance and use of LID.

We also believe the prescriptive approach that requires specific LID techniques be used is not appropriate. Use of LID should be based on the site and project goals. Otherwise, the requirement to use specific LID techniques will result in inappropriate installation locations resulting in failures. One specific requirement that we find perplexing is the vegetative roof requirement for commercial projects. In our climate, vegetative roofs only mitigate up to 40-50% of stormwater volume – and roofs are not pollution-generating surfaces. Additionally, the engineering, structural and shear requirements to support the added weight of a vegetative roof will often add substantial costs.

Factors such as soil, groundwater levels, adjoining uses, and project requirements are all critical in effective use of LID. We strongly encourage you to use the Kitsap model of public and technical education leading to actual market-based LID application and use. The Kitsap model actually shows that, when done correctly, LID can and will become the tools of choice for stormwater mitigation – a voluntary choice – not a mandated one.

We are aware that Ecology also plans to support LID research, a LID manual, and education to promote expanded use of LID in the future as available funding dictates; this research and education should come before any new regulatory requirements. While the WSU LID Technical Training Program provides the best technical training available in the country, but it has trained less than 1,000 public and private sector professionals to date. There needs to be thousands more professionals technically trained before LID can be implemented widely and effectively throughout Washington State.

Specifically directing local governments to update their development codes to achieve LID goals of retaining vegetation and limiting paved areas using methods such as reducing hardened surface areas through clustered developments, smaller parking spaces, narrower roads, and landscaping with plants that filter pollutants from the runoff, amounts to an inflexible list of boxes to check. BIAW suggests that local government planners, engineers, maintenance staff, and others receive the appropriate technical training and then review their development codes to begin to remove obstacles to LID implementation. BIAW

also suggests a more effective approach is to allow for any options that achieve the desired performance standard; and allow for local approaches based on local conditions and circumstances.

A performance-based standard is consistent with the PCHB's position that LID should be implemented "where feasible." A feasibility determination necessarily suggests a more local, bottom-up approach in order to be effective and cities and counties are best suited to determine with locally-tailored plans spelling out how to meet the performance standard in their jurisdictions. Economic considerations also need to be considered where appropriate.

At minimum, a waiver process should be in place whereby project applicants or their experts/engineers have the opportunity to determine that LID is not practical or feasible. Until Ecology and/or local governments have the resources necessary to complete a robust research and education program, those on the ground actually disturbing the site – the people most familiar with the dirt – will be best equipped to determine whether LID is feasible.

Small development sites/one-acre threshold (WWA Phase II only)

BIAW members in Western Washington counties are particularly concerned with the removal of the one-acre threshold for applying the permit standards.

Imposing a new, cumbersome regulatory scheme on small development sites will have a far-reaching affect on those making the least impact. It will serve as another barrier to already-challenging infill development projects (therefore frustrating GMA density goals). Another regulatory layer imposed on the small contractor/developer who does not have the resources to wade through the requirements of yet another 30-page local ordinance, is an all-around deterrent to development. Removing the one-acre threshold will result in less available affordable housing stock and less revenue for the state and local governments.

BIAW strongly encourages Ecology to reconsider keeping the one-acre threshold. In the alternative, we encourage considering another appropriate site-size threshold or allowing local governments to make the decision.

Five-year vesting

The draft permits include a five-year time limit for development on projects that already have permits pulled. This, in effect, means that projects in the pipeline are only vested for a period of five years. BIAW and the Building Industry Association of Clark County have been involved in the *Rosemere* litigation, part of which centers on the question of whether stormwater requirements are subject to our state's vesting laws.

As you are aware, Washington's strong vesting laws are rooted in a century of caselaw and reflected in statute. Our state's high court has repeatedly said that

certainty and predictability are the cornerstones on which permit holders must be able to rest when they commence a project. The ongoing litigation referenced above, which is before the Court of Appeals, will address this issue in the stormwater context. It is both inappropriate and premature for Ecology to address it in these draft permits.

Other permit requirements

Long-Term Operations and Maintenance (O & M) of BMPs/facilities: The new permit imposes requirements for verification of adequate O & M of post-construction stormwater treatment and flow-control measures. Included in the draft permit are inspections every six months until 90 percent of lots are constructed, and then an established annual inspection program for which compliance is determined by “achieving at least 80% of scheduled inspections.”

BIAW sees this as a landmine for potential problems/issues. 1) Will the 80-percent inspection rate result in enforcement that is not equally applied? 2) Does this impose a logistical nightmare – especially considering the elimination of the one-acre threshold – that local jurisdictions will simply not be able to handle given the scope of the assignment and current resource challenges? 3) Who is responsible for what record-keeping? (E.g. the initial permit holder? The O & M contractor? The new homeowner who now controls the O & M and condition of BMPs on his/her property?)

Basin/Watershed Planning: The new requirements for basin-wide or watershed-wide planning leave us wondering if Ecology is proposing to add another regulatory overlay to an already burdensome and planning process at the local level. At a time when state leaders are looking for ways to eliminate redundancies in permitting, planning and process, we encourage Ecology to reconsider this. We also pose the question of whether this requirement can be legally inserted into the Growth Management Act process.

Definitions and Terms

Low Impact Development. This should be clarified to make sure actual site disturbance must occur in order for the requirements to apply. It is not clear, as drafted. BIAW attorneys have experienced confusion amongst local government staff as to whether certain regulations apply before site disturbance (at the point of short plat application, for example).

Stormwater. “Interflow” has been added to the definition. This is a definition that needs a definition. What exactly is “interflow?”

“Pre-disturbance” v. “pre-development.” Both of these terms beg interpretation and serve only to encourage litigation. The definition should be crafted around the goal, which should be a performance standard. “Strives to mimic

pre-development” is not a measureable performance-based standard. It is fictional and subjective.

Co-permittee “in proximity.” The phrase “in proximity” is vague and should be replaced with a phrase that can be somehow measured. Proximity could mean next door to some and within the same county to others.

Conclusion

Again, BIAW is grateful to be able to provide these comments and also for the opportunity to sit down with Ecology staff last year when the draft permits were being released. This gave us an opportunity to assess the impacts of the proposed permit changes and we hope it has resulted in useful feedback from those on the ground.

Please do not hesitate with any follow-up questions.

Sincerely,

Jan Himebaugh
Government Affairs Director
Building Industry Association of Washington