



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington State Habitat Office
510 Desmond Drive SE, Suite 103
Lacey, WA 98503

February 3, 2012

Mr. Michael A. Bussell
Director, Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
(OWW130)
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

Phase I and II Municipal Permit Comments
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504

Mr. Kelly Suswind
Department of Ecology
Water Quality Program Manager
P.O.Box 47600
Olympia, WA 98504

Dear Mr. Bussell, Mr. Suswind, and Ecology staff:

The State of Washington Department of Ecology (Ecology) has recently issued a Public Notice requesting review and comment on the Draft Phase I and II Municipal Stormwater Permits. The National Marine Fisheries Service (NMFS) is pleased to provide comments on the proposed permit modification pursuant to our role as providers of biological and technical assistance under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), as amended (ESA) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*). We are sending these comments to the U.S. Environmental Protection Agency (EPA) because of EPA's oversight role in the issuance of this permit under Section 402(d) of the Clean Water Act (CWA), and responsibility to comply with Section 7(a)(2) of the Endangered Species Act (ESA). In addition, these comments are provided per the processes outlined in the Memorandum of Agreement between the EPA and the NMFS regarding enhanced coordination under the CWA and ESA (hereafter "MOA") (May 22, 2001, 66FR 11202-11217).

Because EPA has delegated authority under the CWA to the State, Ecology proposes to re-issue the Phase I and II Municipal Stormwater Permits for Washington State on August 1, 2012. The geographic area covered by the permit overlaps the range of 15 federally-listed threatened or endangered salmon, as well as designated critical habitat for 13 of these populations. Some

discharges will also affect listed marine species including Southern Resident Killer Whales and rockfish. The permit area overlaps areas addressed by the Puget Sound Shared Strategy Recovery Plans, Lower Columbia River Fish Recovery Board, the Upper and Lower Mid-Columbia Fish Recovery Boards, the Governor's Salmon Plan, and the Puget Sound Partnership. Most of these plans have identified stormwater runoff and water quality as environmental factors that require significant improvement to reach salmon recovery. The Puget Sound Partnership developed recommendations for addressing stormwater effects with the goal of achieving a healthy Puget Sound by the year 2020. Also, a recent report supported by Ecology, identified stormwater runoff as the greatest contributor of the worst pollutants in Puget Sound (Hart Crowser, Inc. et al. 2007). Substantial improvements in the NPDES Municipal Stormwater permits will help to reduce the adverse effects that currently occur as a result of stormwater discharge.

The letter acknowledges the proposed permit improvements that Ecology has identified and recommends additional changes that will contribute to the survival and recovery of listed species. The letter initially focused on Phase I permit holders, but the recommendations will also apply to smaller (Phase II) municipalities.

NMFS commends Ecology for the following improvements that will improve habitat condition for listed species:

- Ecology has done an excellent job through the permit of requiring municipalities to identify all departments that conduct stormwater-related activities, clarifying roles and responsibilities' between internal departments and co-permittees required in the Permit S5.C.(3) *Coordination*
- The educational and public outreach requirements contained in the permit have improved to include a broader range of constituents, (i.e. elected officials, policy makers, and planning staff) and audiences and subject areas. The permit highlights the types of Best Management Practices that individual homeowners can utilize to improve stormwater quality.
- NMFS appreciates the work Ecology has done to create a regional (and cost effective) approach to water quality monitoring in the permit which includes options for municipalities to select different effectiveness studies and provides a repository of this monitoring information at Ecology.
- This new permit emphasizes the need and use of enforcement for permit compliance when municipalities develop stormwater management programs. NMFS supports this new focus and provides recommendations for additional improvements in the sections below.
- The permit requires municipalities to report on their progress of implementing Low Impact Development techniques, watershed basin planning, and maintenance requirements. This is an excellent first step in improving water quality across the state.

Recommended Permit Improvements

Although the proposed changes discussed above will reduce adverse effects to water quality, NMFS provides recommendations below that will further enhance water quality and reduce risk to listed species:

- NMFS recommends that the permit include benchmarks for loading and concentration levels of pollutants in stormwater at the end-of-the pipe. Without these levels identified, it is unclear how any monitoring would result in improvements to water quality and how enforcement and adaptive management could be accomplished to ensure compliance with the permit conditions.
- NMFS recommends that all monitoring data from the Status and Trends section of *Special Condition S8.C.* be compared to the benchmarks to ensure permit compliance. Failure to comply with the benchmarks should stimulate adaptive management practices to reduce the concentration of contaminants in the discharge.
- NMFS recommends that Ecology implement a more effective and predictable enforcement program. In numerous places within *Special Condition 5 Stormwater Management Program* Ecology references the use of enforcement by municipalities' as a compliance tool. The tools referenced include inspection, warning letters, and follow-up inspections. NMFS is not aware of any local government that has the capability or policies in place to enforce the conditions of the permit. If there are no benchmarks for pollutants and there is no feedback mechanism for identifying noncompliance it is difficult for us to understand under what conditions enforcement could occur. NMFS recommends that Ecology incorporate an endpoint or expectation that escalates the level of enforcement that goes beyond the traditional paradigm of "inspect, warning letter, re-inspect." Ecology is requiring that local municipalities submit enforceable requirements for review to Ecology. NMFS recommends that a penalty calculation matrix should be part of that documentation as well.

The NMFS Washington State Habitat Office provides the following recommendations to strengthen salmon recovery and improve salmon critical habitat:

- NMFS recommends that Ecology require Permittees to list salmon critical habitat and waterbodies with listed salmon species as one of their mapping criteria under Permit Condition S5.C.(2) *MS4 Mapping and Documentation*.
- NMFS recommends that the forest cover and riparian buffer requirement be retained to the Maximum Extent Possible. Removal of vegetation increases the quantity of precipitation that must be processed and removal of riparian buffers adversely affects water quality.
- NMFS is concerned that the permit states that the performance standard for maintenance is, "whether maintenance is required at all" instead of a measure of the facility's condition at all times between inspections. NMFS recommends that Ecology implement a maintenance performance standard that increases the frequency of facility inspections and catch basin cleanouts within a watershed that discharge to salmon critical habitat or ESA-listed waterbodies.

To further assist in salmon recovery efforts, the NMFS Washington State Habitat Office provides the following recommendation to help ensure consistency with the Puget Sound Federal Agency Action Plan:

- Federal agencies are working together to protect and restore habitat with the aim of conserving habitat for salmon and other species in Puget Sound. Improving water quality is one of the three areas the agencies are prioritizing for action. NMFS has been using

salmon biological effects thresholds¹ for stormwater in section 7 consultations with several action agencies in Washington State. Including them in the permit to advise local municipalities regarding potential effects to salmon within NPDES permits will ensure their use for more projects across larger geographic areas in Puget Sound. Reducing levels of pollutants (e.g. copper) in stormwater below these biological thresholds through NPDES permits, is one way to work towards the goal of improving water quality in Puget Sound consistent with the action plan.

We thank you for the opportunity to provide these comments under the process identified in the MOA. We look forward to continued coordination with EPA and Ecology on NPDES permits in Washington State, in part to meet the needs of ESA listed salmon. Please call me at (360) 753-6054 if you would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Landino". The signature is fluid and cursive, with a large initial "S" and "L".

Steven W. Landino
Washington State Director
for Habitat Conservation

¹ The biological effects thresholds come from a technical memo developed by the Northwest Fisheries Science Center which is an overview of sensory effects on juvenile salmon exposed to dissolved copper (Hecht et. al., 2007)

References:

- Hart Crowser, Inc. 2007. Control of Toxic Chemicals in Puget Sound. Phase 1: Initial Estimate of Loadings. Prepared for Washington State Department of Ecology, U.S. Environmental Protection Agency, and Puget Sound Partnership. Publication No. 07-10-079.
- Hecht, S.A., D.H. Baldwin, C.A. Mebane, T. Hawkes, S.J. Gross, and N.L. Scholz. 2007. An Overview of sensory effects on juvenile salmonids exposed to dissolved copper: Applying a benchmark concentration approach to evaluate sublethal neuro behavioral toxicity. U.S. Dept. Commerce, NOAA Tech. Memo. NMFS-NWFSC-83, 39p.