

Attachment F

City of Bellevue February 3, 2012 Comment Letter for the
Draft NPDES (2013-2018) Western Washington Phase II Municipal Stormwater Permit

Comments and Recommendations on the Proposed S8 Monitoring Condition and Appendix 10 Funding Agreement

These comments and recommendations address proposed Condition S8 Monitoring and the Appendix 10 of the draft NPDES (2013-2018) Western Washington Phase II Municipal Stormwater Permit.

Permit Condition S8 – page 50

To provide regulatory certainty, the permit language needs to state that payment of the fees for the regional stormwater monitoring program constitutes compliance with Condition S8. Consistent with the Fact Sheet at page 70, revise Condition S8.B to include the following statement: “Permittees participating in the regional stormwater monitoring program that make payments in accordance with the schedules set forth by Permittee in conditions S8.C1, S8.C1.a, S8.D1.and S8.E1 constitutes compliance with Condition S8.

Appendix 10 – Funding Agreement between Ecology and Municipal Stormwater Permittees

Thank you for keeping the overhead costs low. Bellevue appreciates the very low 5% overhead.

General Comments

The Funding Agreement requires amendment to provide clarity and certainty to both Ecology and the Permittees. Our review revealed references to provisions that do not exist in the document, obligations that are not clearly defined, and the omission of provisions common to contracts. Ecology and the Permittees need to work together to ensure that the language in the final Funding Agreement clearly defines responsibilities and the terms of the Funding Agreement. Consequently, the Permittees and Ecology should continue an iterative process after the comment period to ensure the Funding Agreement is complete. To ensure transparency regarding this process, another public comment period for the Funding Agreement may be required before it is finalized.

Interlocal Agreement. Please consider if the Funding Agreement must be defined as, and meet the requirements for, an interlocal agreement to ensure complete bid process is satisfied because Ecology will be using Permittee funds to hire consultants.

Compliance Statement. Consistent with the Fact Sheet at page 70, the Funding Agreement needs to expressly state that timely payment of the consideration constitutes compliance with Sections S8.C1 and S8.D1.

Notification of Monitoring Results. To facilitate good stewardship of water resources, the Funding Agreement must require contractors to provide Permittees with copies of monitoring

results, when the monitoring indicates that discharges from a Permittee's MS4 may be in violation of water quality standards. This will allow Permittees to respond appropriately and as required under Condition S4.

Other Agreement Provisions. The Funding Agreement should include the following common provisions:

- Indemnification provision between Ecology and the Permittees because Ecology is managing the consultant's work, for which the Permittees are funding; and
- Allow revision by counterparts; and
- Define the venue and jurisdiction for resolving disputes and provide for dispute resolution (other than mandatory arbitration) between parties; and
- Provide for attorney fees and costs to the prevailing if litigation ensues regarding the terms of the Funding Agreement; and
- For clarity, the Agreement should include a definition section that defines eligible jurisdictions, terms of art, and acronyms.

Specific Comments

Prefatory Language. Appendix 10, page 1, lines 4-5. The Funding Agreement is undefined although the term "Agreement" is used throughout the document. Also consider removing archaic language to assist with readability. Revise lines 4-5 to read: "**This funding Agreement** ("Agreement") is between the State of Washington, acting by and through its DEPARTMENT OF ECOLOGY, hereafter called "~~Ecology~~" ("Ecology"), and [Jurisdiction], hereafter called "~~[Jurisdiction]~~" ("Jurisdiction").

Appendix 10, page 1, lines 27 – 28.

Agreement Purpose. The purpose section is too narrowly defined and therefore does not reflect the breadth of the Funding Agreement. This provision should be revised to also reflect that the Funding Agreement sets forth Ecology's obligations as the administrator of the regional stormwater monitoring program. Revise this section to read: "The purpose of this Agreement is to provide a share of the funding required to conduct a regional stormwater monitoring program and describe Ecology's obligations to administer the program.

Appendix 10, page 1, lines 33-34.

Effective Date and Duration. The termination provisions require defining. Lines 32-34 provide when termination will occur, and provide an exception that reads: "unless terminated sooner as provided herein." This language should be revised to include citation to where in the Funding Agreement additional termination provisions apply. We did not locate additional termination provisions. If none are intended, the exception should be deleted. Also, the provision should allow Permittees the option of opting out of the regional stormwater monitoring program if the permit is renewed and not reissued.

Appendix 10, page 2, lines 26 – 30.

Access to Records. Access to records must be consistent with the Public Records Act. Please revise this provision to include a statement that records shall be provided consistent with the Public Records Act, Chapter 42.56 RCW.

Appendix 10, page 5, lines 1-2.

Deliverables. The Agreement needs to define the required deliverables for each specified contractor task. The Agreement states the “[M]ore detailed information about each of the tasks, timelines, and deliverables is included in the following.” However no further description of required deliverables and their corresponding deadlines are described in the Agreement.

Appendix 10, page 2, lines 32-34.

Cost Overruns. Ecology states that they are not responsible for cost overruns, but the provision fails state that the Permittees, who are paying a predetermined amount for the monitoring, should also not be responsible for cost overruns. Ecology must ensure that that contractor understand they must meet the bid amounts of their contracts. The provision should be revised to read:

Neither Ecology nor [insert name of Jurisdiction] shall be responsible for cost overruns. The total project cost estimate for which [Jurisdiction]’s share has been determined includes a 10% contingency. Ecology will inform successful contracting applicants as part of the bid process that no cost overruns will be allowed.

Appendix 10, page 5, lines 22-27.

Annual Performance Evaluations. This provision needs to articulate the administrative process and performance metrics for the annual review. Metrics could include budget updates and compliance with deadlines for providing deliverables.

Appendix 10, page 6, 16

Reduce the number of sentinel sites. EPA is monitoring 10 sentinel sites. Local jurisdictions should be able to use the information collected by EPA, not add additional sites or be expected to take over these federal costs. In general, the NPDES monitoring program should leverage existing programs, not implement new collection sites or programs.

Appendix 10, page 7, line 5.

Training. The Agreement specifies training volunteers but not professional staff. The program suggests volunteers can be used, as they are in current marine monitoring programs, but the training should be appropriate for anyone collecting data. Revise sentence by deleting

“volunteer” so sentence reads: “conduct trainings and procure equipment...” Training should be appropriate for any participant.

Appendix 10, page 7, line 38.

Develop an IDDE Repository. It is unclear that the monitoring program will result in an IDDE manual that reflects local conditions. Revise sentence to read: “Develop and Illicit Discharge Detection and Elimination (IDDE) Manual repository for Western Washington including:”