



February 3, 2012

Municipal Permit Comments
Ms. Harriet Beale
Western Washington Phase II NPDES Permit
Water Quality Program
Washington State Department of Ecology
PO Box 47696
Olympia, WA 98504-7696

Subject: Draft NPDES (2013-2018) Western Washington Phase II Municipal Stormwater Permit

Dear Ms. Beale,

Thank you for the opportunity to comment on the Washington State Department of Ecology's (Ecology) draft NPDES (2013-2018) Western Washington Phase II Municipal Stormwater Permit (draft Phase II Permit). The City of Bellevue appreciates the significant challenges in developing the new Phase II NPDES permit and commends Ecology staff on the work they have done to date. In particular, we appreciate the work in developing a monitoring program that addresses the differences in Phase II capabilities and resources and that will result in meaningful data to assist with improving water quality.

The City of Bellevue (City) supports the goal of the federal and state water quality acts to provide clean water and recognizes the role that municipal stormwater management plays in reaching that goal. Cities have been leading the way in investing in fighting stormwater pollution and we appreciate Ecology's recognition that municipal permittees' stormwater investments under the current NPDES Permit (2007 Permit) are delivering results.

The City has serious concerns about the draft Phase II Permit and the associated public review process. We support strong and effective stormwater management and believe that our recommendations on the draft Phase II Permit and public review process will allow Bellevue and others to better assist Ecology in developing a more effective permit program that cities can reasonably implement and communities can afford.

This letter describes primary areas of concern with the draft Phase II Permit and recommendations to address these concerns. Attachments referenced in this letter contain additional information, comments and recommendations on the draft Phase II Permit. The City of Bellevue has 5 primary areas of concern with the draft Phase II Permit:

1. Ecology's public review process;
2. New low impact development (LID) stormwater best management practices (BMPs) requirement;
3. New low impact development principles land use regulation requirement;
4. Modifications to the Illicit Discharge Detection & Elimination (IDDE) and Municipal Operations and Maintenance (O&M) program requirements; and the
5. Regional Stormwater Monitoring Program Option and the Funding Agreement

PRIMARY AREAS OF CONCERN AND RECOMMENDATIONS

1. Ecology's Public Review Process

We recognize the legislature's actions imposed challenges for the review process, and in response, Ecology implemented a concurrent public review process for the draft Phase II Permit and the draft 2012 Ecology Stormwater Management Manual for Western Washington (draft Manual) in order to meet the legislative deadline for draft Phase II Permit issuance. The City of Bellevue has expressed concerns multiple times since June 2011 with this concurrent public review process. We continue to have serious concerns with this approach.

Recommendations

Bellevue requests Ecology conduct separate, consecutive public review processes for the draft Manual and the draft Phase II Permit. In order to allow time to do this, Bellevue requests Ecology reissue and extend the current NPDES Permit to early 2015 and revise the issuance and effective permit dates for the new NPDES Phase II permit, with the effective date of the new NPDES Phase II permit beginning in early 2015.

The City's recommendations are consistent with Ecology's approach for Phase I Permits. The current Phase II Permit is Phase II municipalities' first NPDES permit. Ecology reissued the first Phase I Permit several times for a total of 12 years while Ecology worked with stakeholders to develop the second Phase I Permit. We are asking for the same consideration.

Concerns and Rationale for Recommendations

Bellevue has the following concerns with this concurrent process:

- Conflicts with Administrative Procedures Act. The concurrent process likely conflicts with the state's Administrative Procedures Act for rulemaking, Ch. 34.05 RCW. Based on documentation, including Ecology's website and focus sheets, Ecology's intent is that the draft Manual be used as an enforceable regulatory document. This requires that draft Manual's adoption comply with the appropriate rulemaking processes.
- Incomplete Regulatory Documentation. The draft Manual is incomplete and references documents that were made available late in the review process, such as a draft Low Impact Development Technical Guide for Puget Sound (draft LID Technical Guide). The over 400 page draft LID Technical Guide was released only 19 working days before the comment deadline for the draft Manual. The 40-page Appendix 1 of the draft Phase II Permit is not adequate to assess and make informed comments on the draft Phase II Permit.
- Lack of Required Economic Analysis. Ecology has not conducted the required economic impact assessment pursuant to Ch. 19.85 RCW.
- Inadequate Review Period. Municipalities are being asked to concurrently review lengthy, complex, technical, and incomplete documents in an unreasonable and abbreviated period of time. Municipalities cannot produce informed comments based on incomplete regulatory packages and unreasonable review periods.

2. New Low Impact Development (LID) Stormwater Best Management Practices (BMPs) Requirement

This section addresses proposed Condition S5.C.4.a (page 29-30), Appendix 1, and the draft Manual.

Low Impact Development stormwater best management practices (LID stormwater BMPs) are being implemented where feasible under the current Phase II Permit stormwater development requirements and through planning initiatives (Attachment A). The stormwater and development community continues to learn from successes and failures. Experience with the implementation of the various LID stormwater BMPs, especially large scale use over an extended period of time, is limited, both locally and nationally. Current research and pilot projects are providing new information about the use of LID stormwater BMPs including feasibility criteria, design, construction, performance and life safety issues, operation and maintenance requirements and life cycle costs.

Recommendations

Bellevue strongly recommends a phased approach to increased LID stormwater BMP requirements for the draft Phase II Permit. This is necessary to allow for more industry experience, better understanding of challenges with implementing LID stormwater BMPs, especially in the urban environment, economic conditions to improve, and for consistency with the Pollution Control Hearings Board (PCHB) Phase II LID decision.

Concerns and Rationale for Recommendations

- Relatively New Stormwater Tool. LID stormwater BMPs have the potential to improve water quality and flow control but, in practice, it is a relatively new stormwater management tool. As a result, there are many technical, institutional and implementation challenges and potential for unintended consequences, such as groundwater contamination, that need to be addressed before Ecology mandates their use on all development and redevelopment projects. (Attachment B).
- Urban Environment. The opportunity to use LID stormwater BMPs and their effectiveness are more limited in developed areas due to competing urban density. Appropriate use of LID stormwater BMPs in an urban environment must take into account site, engineering, and cost considerations while accommodating growth and density.
- Economic Impacts. Bellevue hired HDR Engineering to estimate the change in stormwater costs for private and public development and redevelopment projects in Bellevue based on the proposed new LID stormwater BMP requirements. The results show that the cost of the new stormwater requirements will vary significantly depending on the site-specific feasibility for LID stormwater BMPs and local requirements for implementing LID. The analysis shows that stormwater costs increase significantly for sites with marginal or poor suitability for LID for the following types of development projects:
 - Commercial development projects increase up to 248%; and
 - Transportation projects increase up to 106%.

Economic conditions make these increases a hardship. Attachment C contains more information on the stormwater costs impact analysis.

- Draft Phase II Permit Escalates LID Requirements on Par with Phase I Permit. Ecology proposes requiring Phase II permittees to implement the same LID stormwater BMP requirements as Phase I permittees even though the PCHB recognized that Phase II jurisdictions are factually and legally different from Phase I jurisdictions, thus justifying different requirements and a different time schedule for Phase II jurisdictions. [Puget Soundkeeper Alliance v. Ecology, PCHB Nos. 07-022, 07-023 (Feb. 2, 2009, Conclusions of Law 3-6)].

3. New Low Impact Development (LID) Principles Land Use Regulation Requirement

This section addresses proposed Condition S5.C.4.g (page 34-35)

In general, Bellevue supports LID principles that are defined as land use management strategies which emphasize conservation, use of on-site natural features, and site planning techniques to minimize impervious surfaces, native vegetation loss, and stormwater runoff. The Low Impact Development and Green Buildings subsection in the Environmental Element of Bellevue's Comprehensive Plan already promotes such land use management strategies. Policy EN-1 specifically calls out these principles in the context of the city's commitment to developing a compact Urban Center in a sustainable environment.

Recommendations

The Clean Water Act is not the appropriate vehicle for land use regulations. The Growth Management Act (GMA) Ch. 36.70A RCW is the appropriate statute to manage land use.

Bellevue does not support inclusion of this proposed condition in the Phase II Permit. Bellevue recommends that Ecology work with the Department of Commerce and if necessary the Legislature to use the GMA to develop and implement the LID principles land use regulations. Many municipalities, including Bellevue, are already doing this (Attachment A).

If Ecology persists in including LID principles land use regulations in the federal Clean Water Act permits, then Bellevue recommends amending the proposed condition's challenging deadlines (Attachment D).

Concerns and Rationale for Recommendations

- Clean Water Act is Not Appropriate Vehicle for Land Use Regulations. The LID principles proposed by the Department of Ecology (Ecology) are land use management strategies, unlike LID stormwater BMPs which are engineered flow control and water quality treatment facilities developed to specifically address stormwater runoff and that are appropriate components of a water quality permit. Regulating land use through this permit places jurisdictions in the untenable position of being liable to third parties for regulating land use under statutes adopted to regulate and protect water quality. This is unnecessary when the Legislature has already provided a proven tool for land use planning through the Growth Management Act, Ch. 36.70A RCW.
- Legislature Placed Land Use Planning Under Purview of Local Jurisdictions. The proposed condition can be viewed as usurping local government authority over land use decisions. The Legislature recognized that local jurisdictions are best situated to implement development regulations that fulfill community vision and values while also ensuring consistency with GMA requirements. Cities and counties planning under the GMA are required to balance the 13 planning goals set forth in RCW 36.70A.020 which include protecting the environment and enhancing water quality (Goal 10).

Attachment D contains additional information on concerns and rationale for the recommendations.

4. Modifications to IDDE and Municipal O&M Program Requirements

This section addresses proposed Conditions S5.C.3 (pg. 21) and S5.C.5 (pg. 35).

Bellevue, along with other Phase II municipalities, has only recently completed full implementation of the current Permit's Stormwater Management Program (Program) requirements, including the IDDE and Municipal O&M Program requirements. Staff estimates that the costs associated with implementing modifications to the current Permit programs are likely in excess of \$500,000 annually, primarily due to increased inspection frequencies for municipal stormwater facilities and expanding the IDDE screening program requirements.

Recommendations

The City recommends providing additional time for Ecology and municipalities to work together to determine if proposed program modifications are providing benefits commensurate with increased costs or if other alternatives can achieve improvements while minimizing fiscal impacts to municipalities. Attachment E contains additional comments and recommendations for these proposed conditions.

5. Regional Stormwater Monitoring Program Option and the Funding Agreement

This section addresses proposed Condition S8 (pg. 50) and Appendix 10 – Funding Agreement between Ecology and municipal Stormwater Permittees (Funding Agreement).

Bellevue commends Ecology staff and their 5-year multi-stakeholder process in developing a regional stormwater monitoring option.

Recommendations

The draft Phase II Permit language needs to state that payment of the fees for the regional stormwater monitoring program constitutes compliance with Condition S8 to provide regulatory certainty. Specifically, Bellevue recommends revising proposed 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 Permit conditions S8.C1, S8.C1.a, S8.D1, and S8.E1 constitutes compliance with Condition S8." Attachment F contains additional comments and recommendations for condition S8 and the proposed Funding Agreement.

Additionally, Bellevue is concerned with certain revised definitions and the new watershed-scale stormwater planning requirement. These concerns, along with technical comments on the remainder of the draft Phase II Permit, are addressed in Attachment E.

In closing, 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 Manager, at 425-452-7683 or pvarner@bellevuewa.gov.

Sincerely,



Nav Otal
Director
Bellevue Utilities

Attachments enclosed

cc: Coalition of Phase II municipalities