

## **Comments on the Draft Western Washington Phase II Municipal Stormwater Permit**

City of Mount Vernon goals include protecting our valuable water resources and the City has policies and programs in place to achieve that goal. Our comments regarding the new draft 2013 – 2018 Western Washington Phase II Municipal Stormwater Permit (Permit), the draft 2012 Stormwater Management Manual for Western Washington, and supporting documents are made with clean water goals in mind. Our comments generally fall into two main categories; those regarding the Permit public review process and those regarding new regulatory requirements affecting City of Mount Vernon citizens and businesses. The comments below are those that we have been able to develop to date given the very short review time available. We will continue to assess the impacts of the new Permit program requirements.

### **Comments on the Public Review Process**

- Ecology is providing a concurrent public review process for the draft Permit and its Appendices, all five volumes of the State Stormwater Manual (Manual) and other significant regulatory documents. While much of this large volume of highly technical information is in the form of revisions to existing documents, significant portions are entirely new and have been available only as recently as January 10, 2011. Comments are due February 3. All of the documents together form a regulatory package and one document may change the impact of another. Insufficient time is available for meaningful review and comment.

The City of Mount Vernon urges Ecology to extend the existing Municipal Stormwater Permit already being implemented. The recently required and implemented measures of that existing Permit will continue to provide Clean Water Act protections so that that Ecology can extend the review process and also change the effective date of the new Permit to early 2015.

- The concurrent review process possibly conflicts with the state's Administrative Procedures Act for rulemaking. The Ecology Manual contains stormwater development standards that will become requirements of the new Municipal Stormwater Permit. The draft Manual is a lengthy, complex, and technical document. Typically, Ecology would have conducted a separate public review process on the draft Manual before imbedding the final standards in the draft NPDES Permit as proposed requirements. In this case, Ecology did not do so, which provides entirely insufficient time for review by local jurisdictions.

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- Municipalities are being required to review draft NPDES Permit language without Ecology providing appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment. The Regulatory Fairness Act (19.85 RCW) requires preparation of a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems. In these tough economic times such analysis is critical.

The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems. If Ecology feels it cannot perform this analysis for the local jurisdictions then it should make available additional time and funding for the jurisdictions to perform the analysis themselves. Ecology should also extend the existing Municipal Stormwater Permit and change the effective date of the new permit to early 2015 to allow for sufficient review and assessment of the new regulatory requirements and their impacts. Ecology should also conduct separate, consecutive public review processes for the draft Manual, draft Permit and supporting documents.

### **Comments on New Regulatory Requirements**

- It is only recently that full implementation of the current Permit's phased requirements has been completed. It will be a significant challenge for cities to maintain these current stormwater investments given the declining economic capacity of both local and the state government. Significant new investments will be necessary to meet the requirements of this new Permit's regulatory package, and Ecology has not provided an analysis of the expected benefits from the increased investments over the current Permit requirements.

Ecology should assess the long term beneficial impacts of the recently implemented measures of the current Permit's phased-in requirements. Ecology should then compare the cost-benefit analyses of the new draft Permit requirements to those of the current Permit so that an evaluation can be made as to the need for and the relative benefit from these new requirements.

- The new Municipal Stormwater Permit (NPDES Permit) and supporting documents making up the new stormwater regulatory package would require mandatory revision of local development-related regulations to require Low Impact Development (LID) principles. This proposed new mandate for LID principles requires municipalities to amend their development-related regulations to incorporate LID principles by December 2016. Cities would be required to review and revise, at a minimum, the Comprehensive Plans, Land Use codes, Stormwater codes, Clearing and Grading codes, Traffic codes, Enforcement and Civil Violation codes, Public Safety codes and corresponding engineering and development standards to incorporate LID principles. Amending these policies and codes is a very significant and costly work effort. In addition, costs for implementing, monitoring, and

enforcing new regulations proposed through the permit will be borne upon the phase II jurisdictions. Neither the amounts of such costs are identified nor the manner for reimbursement by the state for such costs. Washington State Department of Ecology is a state agency that may work only within the confines of that authority granted it by statute. RCW 43.135.060 prohibits the imposition of responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by the state for the costs. Proposed changes to the NPDES Phase II Permit results in a new storm water programs or increased levels of service under a jurisdictions existing program. For example, local jurisdiction shall be required to increase levels of monitoring, adopt new LID regulations, administer all new requirements, and enforce new regulations. The permit fails to determine: i) the costs of such a new storm water programs, ii) the increased levels of service under existing municipal storm water programs, and iii) how each phase II jurisdiction shall be fully reimbursed by the state for the costs of their new programs or increases in service levels either by a specific appropriation; or increases in state distributions of revenue to political subdivisions.

The City of Mount Vernon requests that Ecology identify the costs of the newly required storm water programs, the increased levels of service under existing municipal storm water programs, and how each phase II jurisdiction shall be fully reimbursed by the state for the costs of their new programs or increases in service levels either by a specific appropriation; or increases in state distributions of revenue to political subdivisions.

- The LID principles would be applied at a citywide or watershed scale. As an example of potential impacts, LID principles could result in narrower street standards (e.g., “skinny streets”) that could conflict with local goals such as those for public safety.

Ecology should amend the Permit to allow for local policies to supersede required LID principles where local policies adopted through appropriate public processes are in conflict with those LID principles.

- The proposed new mandate for LID principles may conflict with other mandates and state laws that the City is required to comply with, such as the Growth Management Act. For example, the LID principle to minimize vegetation loss could be contrary to Growth Management Act (GMA) requirements to accommodate in-fill development.

Ecology should amend the Permit to eliminate conflicts with other mandates and state laws with which the City is required to comply.

- Mandatory incorporation of LID principles will require that each Phase II jurisdiction implement a system of ordinances and regulations that would govern, control and limit the use of property within its jurisdiction. Meanwhile, it appears no cost nor impact analysis to property owners has been conducted. The implementation of land use regulations are a function of that jurisdiction’s police powers which give it the authority and responsibility to protect the public, health, safety, and welfare. In exercising such police powers, a jurisdiction is restrained from exceeding constitutional limits from forcing landowners to provide an affirmative benefit for the public, when the burden of providing that benefit is one that should actually be carried by the public as a whole. A jurisdiction implementing such regulations are further restrained from exceeding constitutional limits from conditioning development that required a property owner to extract a property interest unless the jurisdiction can demonstrate a reasonable relationship or “nexus” between the development and the condition and that the condition is roughly proportional to the impact being

mitigated. RCW 82.02.020 further restrains a phase II jurisdiction from imposing any tax, fee, or charge either direct or indirect on development unless it falls within one of the exceptions specified in the statute and that conditioning development to set aside land is reasonably necessary as a direct result of the proposed development or to mitigate a direct impact that is a consequence of the development. It is neither equitable nor sound process to pass onto local jurisdictions the liability associated with mandating such regulations without consideration or indemnification.

The Washington State Department of Ecology must weigh the impacts of such regulations and include in its analysis their objectives and the means weighed against the economic impacts from the regulations, the burden to a property owners legitimate expectations regarding the use of property, whether it is employing a highly burdensome strategy, whether it is unduly oppressive, and whether there are other less burdensome options that might achieve the same public objective. State agencies are, at a minimum, to utilize the process established by RCW 36.70A.370 (1) to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

- Resource and process requirements to review and amend City planning documents, development regulations, and engineering and development standards would be substantial. The timelines in the Permit are too aggressive, increasing the potential for noncompliance and risk of litigation. In many instances, the same staff will be overseeing the necessary code changes to implement the LID BMPs as well as the broader scale code review for LID Principles. This is on top of other mandated code reviews and updates – all at a time when staff resources have been reduced by the bad economy.

The City of Mount Vernon urges Ecology to extend the existing Municipal Stormwater Permit already being implemented. The recently required and implemented measures of that existing Permit will continue to provide Clean Water Act protections so that that Ecology can extend the review process, allow a reasonable time for code revisions, and change the effective date of the new permit to early 2015 with code revisions to be completed by 2017.

- On-site stormwater detention systems may be much larger than under the current Permit for both public CIP projects as well as private development and redevelopment projects depending on how well the soil drains in a particular area, how high the groundwater table is, etc. These larger systems will have significantly greater cost.

The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems. Ecology should extend the existing Municipal Stormwater Permit and change the effective date of the new permit to early 2015 to allow for sufficient review and assessment of the new regulatory requirements and their impacts.

- The new “hard surface” definition that includes permeable pavement and green roofs results in more area to which “flow control” is applied, thereby increasing potential stormwater detention systems and costs.

Ecology should revise the Permit and supporting documents to eliminate the flow control requirement for permeable pavement and green roofs.

- As a result of the LID performance standard, stormwater management systems, both public and private, may be harder/more expensive to maintain (being more susceptible to blockages from small material) and will require significant new inspection and maintenance efforts to insure proper function.

The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems.

- The intended requirements associated with conversion of one type of vegetation to another are unclear for example, the conversion of “lawn” to “landscaping.”

Ecology should clarify the requirements for vegetation conversion.

- Local governments will have to determine where and under what conditions LID will be feasible in their jurisdiction. This effort may be significant and costly.

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- The LID Permit condition requires municipalities to amend their development-related regulations to incorporate the requirement for Mandatory use of (LID) stormwater where feasible by December 2016. Property owners will have two options to meet the proposed new requirement. The first option is that the owner can implement measures from a prescribed list of LID BMPs where feasible. In the City of Mount Vernon this option will be applicable to a limited area due to generally poorly draining soils and areas where high ground water is common. The second option is to demonstrate compliance with an LID Performance Standard using owner-selected LID BMPs based on a significant amount of engineering analysis.

The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs

for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems. Ecology should extend the existing Municipal Stormwater Permit and change the effective date of the new permit to early 2015 with new LID requirements to be implemented in 2017 to allow for sufficient review and assessment of the new regulatory requirements and their impacts.

- Low impact development techniques are a relatively new set of stormwater management tools and are not effective in many areas due to soil and groundwater conditions. There is little long term experience with LID implementation, particularly on a wide landscape scale. There are many potential problems associated with LID implementation and the potential for unintended consequences needs to be addressed.

Ecology should postpone implementing mandatory LID to give time to collect and analyze monitoring data and the performance of LID pilot projects to better understand the potential impacts, unintended consequences, and costs associated with this new technology.

- The cost of the new stormwater requirements will vary depending on site-specific feasibility for LID BMPs and the City's policies and plans for implementing LID. More detailed analysis is required to better understand those costs, including costs for analysis and design, initial capital investment, construction and ongoing maintenance inspections, operations and maintenance, replacement and refurbishment, full life cycle costs and costs of system failures.

The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis site soils testing and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems. Ecology should postpone implementing mandatory LID to give time to collect and analyze monitoring data to better understand the potential impacts and costs associated with this new technology.

- It appears that the intent of the Permit is to exempt certain LID requirements when conditions dictate that LID is infeasible and that, in some cases, economics may constitute infeasibility. The draft Permit language as it now exists does not make this intent clear enough.

Ecology must add clarifying language to the Permit (Appendix I p.24 and 25 and Section 8) to make clear that when LID measures are infeasible, the LID performance standard need not be met. Ecology should develop a standard economic analysis format to be used in assessing LID feasibility.

- The new NPDES regulatory package will place additional burdens on local government to provide additional inspections on both new stormwater system construction as well as on these new systems after they are installed to insure proper function over time. These new inspections will need to be performed not only on publically managed stormwater facilities, but on a multitude of privately owned and maintained systems as well. The inspection and

maintenance enforcement work efforts are on top of other mandated Permit requirements at a time when staff and other resources have been reduced by the bad economy.

Ecology should make allowance for these fiscal realities by delaying implementation of these new work efforts and/or allowing commensurate reductions in other stormwater program areas. The City of Mount Vernon urges Ecology to perform appropriate technical and cost-benefit analyses of the new Permit requirements, including those for system inspections and associated local government operations as well as for land development and redevelopment and to prepare a small business economic impact statement. The economic analysis should include not only increased costs for engineering, technical analysis and specialized initial installation costs associated with new stormwater controls, but also the new inspections, maintenance and replacement (life cycle) costs for long term operation of these newly required systems.

- The Permit definitions could be interpreted as defining sanitary sewer inflow and infiltration (I&I) as an illicit discharge to the storm sewer system. Furthermore, other legacy materials such as plumes from leaking underground storage tanks may infiltrate into storm sewer systems and may be interpreted as illicit discharges covered by the Permit.

The Permit definitions need to be made clear that sanitary sewer inflow and infiltration (I&I) is not to be covered by this municipal stormwater permit, but rather is covered by the wastewater NPDES Permit to avoid confusion and duplication. The Municipal Stormwater Permit language needs to be modified to make clear that those groundwater pollutant legacy loads, over which a municipality has no control and which may be covered by another state or federal permit program, are not covered by this municipal stormwater permit.

- New Illicit Discharge and Detection Elimination (IDDE) requirements in section S5 of the permit require a change from outfall screening to monitoring inside the stormwater system and for permittees to respond “immediately” to a finding of an illicit discharge.

The City of Mount Vernon urges Ecology to revise the Permit to concentrate on outfall monitoring rather than trying to monitor within the drainage system itself and to change the “immediate” response requirement to language that is more reasonable such as “as soon as practicable.”

- It is currently unclear how the information gathered from the new stormwater monitoring programs will be used.

Ecology should make clear in the Permit how monitoring results may affect local stormwater management programs both in the near and long term. Expectations need to be understood with respect to local priorities and local response times should regional efforts discover local water quality issues. It should also be made clear as to how monitoring data may result in water bodies being listed as noncompliant with the federal Clean Water Act (“303(d) listed”) and how collected data may trigger establishment of total maximum daily load (TMDL) allocations for specific pollutants in specific water bodies.