EARTHJUSTICE

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Comments submitted via email to:

SWPermitComments@ecy.wa.gov

Re: Draft Stormwater Control Transfer Program

I. Introduction

These comments are provided on behalf of Puget Soundkeeper Alliance. Thank you for the opportunity to comment and for the extension of the comment deadline.

Overall, we are disappointed and troubled by the proposed guidance, and believe that both the fundamental premise and the specific execution of the guidance are deeply flawed. Of particular concern is Ecology's willingness to relax the hard-fought requirement to impose low-impact development ("LID") in exchange for an ecologically unsupported and readily abused out-of-basin transfer program. We predict that the ultimate outcome will be cost savings for developers and regulated jurisdictions, and an overall reduction in environmental benefit for waters protected by the Clean Water Act ("CWA"). While we appreciate the desire to fund capital retrofit programs, and believe them to be a crucial element of a water quality recovery strategy, we strongly disagree that the way to do so is by relaxing practicable and achievable standards that provide improvements to water quality.

II. Maintenance of Degraded Status Quo Causes Additional Environmental Harm

The concept of stormwater transfer arises from a number of fundamentally flawed premises. The first of these premises is that the maintenance of the status quo at a developed site avoids new environmental harm. *See* Draft at 9 ("the approach prevents further degradation in all watersheds."). This is a product of an engineering mindset, rather than one grounded in the actual response of the environment to disrupted flow regimes. This precise question was litigated in Rosemere Neighborhood Association's challenge to Clark County's flawed stormwater transfer system, which bears a lot of similarity to the draft guidance. *See Rosemere Neighborhood Association v. Dept. of Ecology*, 201 WL 62921 (Wash. PCHB Jan 5, 2011). Rosemere submitted expert testimony on the effects of maintaining the status quo where flow regimes have been altered. Dr. Derek Booth, a national authority on flow control and stormwater impacts, offered the following testimony to the PCHB:

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> Contrary to the County's apparent perspective, their flow control standard does not "preserve" the status quo. As noted above, damage to receiving waters from stormwater flow from developed areas is cumulative. Damage to a stream builds on itself each time it rains as the water flows faster, cuts stream banks and scours stream beds further, and the hydrograph becomes more extreme. In other words, a flow duration standard based on meeting only existing conditions (like Clark County's) does not freeze the environmental conditions in place, but allows for ongoing, cumulative degradation of the stream.

See Direct Testimony of Dr. Derek Booth, at ¶ 26 (included as an appendix to this letter).

In its decision finding the Clark County program unlawful, the PCHB cited Dr. Booth's testimony in this regard extensively and found: "The weight of expert testimony recognizes that streams, once degraded, can continue to degrade. *Plainly the premise that allowing developers to maintain the flow 'status quo' preserves the environmental status quo is flawed*. To the contrary, maintaining existing disrupted conditions perpetuates and amplifies environmental damage. This is simply inconsistent with the Clean Water Act's requirement to protect and restore waters using 'practicable' approaches to stormwater control." *Rosemere, supra* at ¶ 28 (emphasis added). Given the Board's sweeping rejection of this principle, Ecology's recitation of it in this guidance is unfathomable.

III. Both Retrofits and Improvements During New Development Are Required

The premise of the transfer program is that retrofitting higher priority issues can be a better use of limited resources than controlling runoff from new development in lower priority areas. But the CWA and its implementing regulations recognize that there is a need for both approaches. A century or more of development has resulted in a profoundly altered landscape and corresponding damage to water resources. By focusing on new and redevelopment controls, the CWA recognizes that each redevelopment project is an opportunity to turn this legacy around and, gradually, restore damaged waters. At the same time, priority retrofits will help speed the process along and should be maximized. In other words, both redevelopment and retrofits are critical strategies in meeting the CWA's goals. The transfer concept sidesteps this fundamental element of the statute and trades one for the other. A redevelopment project that fails to contribute to improved water quality simply perpetuates the existing degradation for another 50-100 years.

An unstated assumption of the transfer program is that achieving flow control standards, pollution control, and LID goals is impracticable, and that developers need relief from an onerous regulatory burden. Given the level of political capital that Ecology has invested in these requirements, which have withstood repeated political attacks and lawsuits, its decision to unilaterally retreat and offer a relaxation of the requirements is mystifying. The

flow control standard has now been in place for many years and has been used in countless projects. What specific evidence is Ecology relying on that it is too expensive or that it is suddenly no longer "practicable" in certain places, warranting relaxation? During the various legal challenges to the flow control standard and LID, such claims were often made but never substantiated by proponents.

IV. LID Standards Should Not be Waived

Perhaps the most disappointing element of the transfer program is Ecology's willingness to allow the Permits' LID requirements to be transferred. In other words, developers would be allowed to build new projects that do not use LID but instead fund flow control projects in another place. As Ecology has repeatedly found, LID is practicable and provides extensive benefits to receiving waters and the environment. The PCHB agreed in 2008 that LID should be a mandatory feature of the Permits. Ecology conducted years of technical and policy input to develop the current LID standard, which is far more modest than Soundkeeper advocated. The inclusion of LID requirements in the current version of the Permits were sustained by the PCHB. *Pierce County v. Dept. of Ecology*, 2014 WL 1262544 (Wash. PCHB March 21, 2014) (LID provisions "are consistent with our prior rulings, constitute AKART and MEP, and advance the protection of beneficial uses and compliance with water quality standards"). Having finally, after years of effort, imposed a modest LID requirement in the Permits, Ecology cannot now relax it by offering speculative offsite transfer of LID benefits.

Moreover, the guidance is unclear on whether LID-based requirements under other provisions under the Permits are also relaxed. Specifically, S.5.c.5.b of the Permits requires adoption of jurisdiction-wide LID requirements that "shall" make LID the "preferred and commonly-used approach" to site development. It is unclear how the program could excuse the LID requirements of Appendix 1 but leave this requirement in place.

V. Ecology Lacks Authority to Authorize Out of Basin Transfers

The authority for this program appears to derive from Appendix 1, Section 7 of the Permits. What is surprising is that none of the features of Section 7 are included in the Guidance. Most notably, Section 7 appears to contemplate a basin planning process that would allow alteration of standards based on the specific needs *of the basin*. Ecology's proposal, in contrast, is to transfer stormwater benefits out of the basin altogether, something that does not even appear to be within the contemplation of Section 7 at all. Moreover, this provision includes a number of highly specific requirements that are not included in the Guidance. For example, "Basin planning will require the use of continuous runoff model and field work to verify and support the models." App. 1 at 32. Basin plans must be formally adopted by all jurisdictions, as well as Ecology, and all ordinances or regulations in the plan "must be in effect." *Id*. These requirements—intended to ensure that Section 7 alternatives do not yield lesser environmental benefits—are absent from the guidance. In the challenge to Clark

County's alternative plan, the PCHB found that the County's transfer system was not based on basin planning or anything that looked like basin planning, further undermining its legality. Order, at ¶ 19.

In other words, it appears that Ecology lacks authority to relax standards in the Permits in exchange for out-of-basin transfer of benefits. In the absence of a valid permit modification, failure to comply with Permit standards would be a violation of the Permits. Clark County paid a heavy price for adopting a similar transfer approach when its alternative program was set aside by the PCHB, and Clark County was ultimately liable for $3.5 million in penalties and fees for violating the CWA.

VI. Environmental Justice Considerations

We also have significant concerns that Ecology has failed to consider the impact of this guidance on environmental justice and communities that suffer from reduced water quality and compromised fishing and other uses. The goal of the CWA is the protection and recovery of beneficial uses, which in many places regulated by the Permits includes fishing and contact recreation. In this guidance, Ecology appears to be endorsing the idea that the most disrupted and polluted waters of the region can remain that way while we focus on protecting the higher quality watersheds. There are significant concerns that this means a transfer of pollution control benefits from economically and politically disadvantaged communities to more advantaged ones (where elected officials can steer environmental restoration projects where they will benefit wealthier or more powerful constituents). Ecology needs to analyze and address whether the claimed benefits of the proposal will come at a cost to disadvantaged communities, in violation of environmental justice principles.

VII. Significant Risk of "Double Counting" Retrofit Projects

A further critical problem with the concept of stormwater transfer is that jurisdictions will use the transfer process to fund retrofit projects that would have happened anyway. Appellants in the *Rosemere* case were able to demonstrate, through painstaking development of the specific facts, that this was occurring with Clark County's transfer program. The PCHB agreed that this was a critical flaw. Order, at ¶ 53 ("The Board finds that the Agreed Order allows a reduced level of effort in meeting the stormwater management goals of the Phase I Permit. The lack of any requirement to maintain a level of effort in the structural retrofit efforts, the ability to shift retrofit projects to the mitigation obligation, and the total discretion afforded the County in the implementation of the Agreed Order allow such an outcome.").

It is plain that Ecology has not figured out how to avoid this problem here. Part of the problem lies in Ecology's failure to set any meaningful metric for retrofits for Phase I permittees, or any obligation at all for Phase II permittees. As such, there doesn't appear to be any mechanism to ensure that the "receiving" projects would not have happened anyway, nor

does Ecology propose one in the Guidance. As such, the program becomes simply a way for permittees to fund projects that they would like to have done (and which they will presumably trumpet as providing benefits for the environment) by relaxing standards elsewhere. The predictable result is that the total level of stormwater control will decrease, and redevelopment projects will be built that do not use practicable approaches to regulating stormwater.

Relatedly, nothing in the draft would prevent a jurisdiction from partially funding receiving basin projects (that could then be used to "offset" relaxed flow control for new development) with grant funds intended for restoration. The guidance should strictly prohibit use of grant funds for receiving basin projects. Such funds are intended to provide an additional environmental benefit, not be used to offset environmental harm elsewhere to achieve at best a zero sum gain.

VIII. Lack of Scientific Support for Transfer Principles

Another feature of the Clark County proposal that was rejected by the PCHB, and mysteriously perpetuated here, is that the "transfer" concept did not account for any of the specifics of the sending and receiving streams, including soil type and slopes. Again, this was the subject of extensive unrebutted expert testimony. Dr. Booth opined as follows:

> Specifically, the "acreage" metric is largely if not entirely divorced from how the landscape responds to flow alteration. As explained above, soils and conditions are highly variable from site to site, and those variables have consequences for how alteration to the site impacts the stream. Soil types, slopes, vegetation, stream morphology, and aquatic life (e.g., the presence or absence of salmon spawning and rearing habitat) are all relevant factors. The same development in two different sites—even nearby sites—could have dramatically different impacts on receiving waters; and since the mitigation is not constrained to any but the broadest landscape feature (i.e., a Water Resources Inventory Area or "WRIA") the damage caused by the initial activity will likely not be mitigated at all.

Booth Testimony at ¶ 34. The PCHB agreed:

> The Board finds that the Agreed Order *rests on no science as to the comparability of its mitigation metric* in relation to the Phase I Permit's flow control approach, and has no requirement on a going forward basis that calls for a comparison of the benefits gained at a mitigation site, compared to the detrimental effects at a new development site where a lesser control standard is utilized. …. While the mitigation obligation is measured and tracked by acres for each of three land-cover types, it does not require the County to track or account for either the soil

> type or the slope of the new or redevelopment project site triggering the mitigation obligation, and it does not require the mitigation sites to have the same soil type or slope as the site of the new or development project. As discussed below, the acreage metric set forth in the Agreed Order, and the siting of flow control mitigation projects without any requirement for Clark County to address equivalent impacts to the environment and beneficial uses, *lack a scientific basis and is inconsistent with directives to protect beneficial uses.*

Order at ¶ 25 (emphasis added). Surprisingly, nothing in the guidance appears to address or even acknowledge this problem. The fundamental premise of the program is that the benefits of controlling stormwater can be picked up and moved around the landscape without regard for any of the ecological specifics of the receiving streams. That premise has been rejected repeatedly for good reason.

One element of the proposal that we do agree with is the importance of ensuring that receiving end projects are in place and providing benefits before development is allowed. This is yet another issue dealt with by the PCHB. See Rosemere, at ¶ 32 ("The majority of the Board finds that the terms of the Agreed Order are insufficient to protect beneficial uses. Under the terms of the Agreed Order, Clark County can allow an important spawning reach to be impacted by application of the old flow control standard, *and then, a few years later*, mitigate the same number of acres in a watershed area that may not be occupied by fish or that does not have as important spawning or rearing habitat."). Plainly, the benefit must precede the harm (as long as the "benefit" was not something that the permittee had already planned, funded or was required to do).

IX. Process Going Forward

In terms of the process going forward, our suggestion is to abandon this guidance in its current form. While the Permits contemplate adjustments to permit requirements based on basin planning processes, this draft is so far divorced from those standards as make them meaningless. Should Ecology choose to proceed, we understand that there will be another draft of this document that includes additional input and that may be substantially different. Ecology should ensure that there is another opportunity for public comment on any revised drafts. Finally, should Ecology choose to finalize this guidance, the actual use of the guidance by any permittee to relax standards must be an appealable permit modification subject to public comment. Failure to obtain a permit modification means permittees are potentially out of compliance with the Permits.

X. Conclusion

In sum, the draft guidance endorses an out-of-basin accounting system that is flawed in both concept and execution. It will not achieve its general principles of fully attaining water

quality standards and protection and restoration of designated uses, and in fact it is likely to retard those goals. The predictable result will be a reduction in the total amount of stormwater benefits within regulated entities and a weakening of Ecology's position that the flow control, pollution reduction and LID requirements constitute the "maximum extent practicable." Jurisdictions that accept the invitation to follow this path will expose themselves to legal challenges and potential CWA liability.

Thank you for the opportunity to provide these comments.

Sincerely,

Jan Hasselman

cc: Heather Trim, Futurewise
John Palmer, U.S. EPA