



MUCKLESHOOT INDIAN TRIBE Fisheries Division

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July 22, 2015

Mr. Ed O'Brien and Ms. Anne Dettelbach
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Washington State Department of Ecology's proposed Stormwater Control Transfer Program for Western Washington Municipal Stormwater Permits

Dear Mr. O'Brien and Ms. Dettelbach:

Thank you for the opportunity to review the Washington State Department of Ecology's (Ecology's) draft guidance document regarding a Stormwater Control Transfer Program for Western Washington Municipal Stormwater Permits. In general, we understand that the intent of the proposed guidance is to provide flexibility for achieving permit requirements for municipal stormwater permittees; however, we are concerned that this guidance document would limit the State's ability to implement Clean Water Act requirements and would have serious implications for treaty fisheries resources in the Muckleshoot Indian Tribe's (Tribe's) Usual and Accustomed Fishing Area. We believe that the guidance document deviates from principles described in the "Treaty Rights at Risk" report authored by the Western Washington Tribes (2011) and does not support Clean Water Act requirements to "*achieve full attainment of water quality standards, including protection and restoration of designated uses.*" Our concerns and recommendations are summarized below by topic.

Prioritization Principles

Watershed prioritization would be extremely important to the efficacy of the transfer program. Although the proposed program could benefit impaired waters identified for active restoration efforts, the prioritization process described could also undermine existing or planned restoration measures by transferring stormwater controls and pollutant reduction potential away to other areas. This will effectively keep some places permanently degraded, while concentrating restoration in only limited areas.

Concern: While these stormwater control transfers may accelerate clean up in "priority" areas, the approach would likely prevent improvements in many areas important to tribal fisheries

resources, including watershed areas that support hatchery production, salmon migration corridors, natural spawning and rearing areas. In following the “priority” basin concept, some areas or watersheds could be explicitly excluded from improvements by allowing stormwater flow control, treatment, and low impact development requirement trade-offs, as described in the guidance manual. For example, necessary improvements could be traded away from areas that support hatchery programs that the Tribe relies upon in Soos Creek, Crisp Creek, Issaquah Creek, and the White River, for the benefit of other areas.

Recommendation:

We request that Ecology consult with the Tribe before allowing any improvements in a given area to be traded away under this program. This would insure that transfers are not inconsistent with tribal fisheries programs and objectives.

Concern: The proposed stormwater control transfer program could authorize permanent degradation by transferring away opportunities for enhanced treatment in a watershed where both pollutants and flow conditions impair fish survival. For example, this program would authorize maintaining conditions that impair coho salmon survival in urban streams, which would be the case for many parts of Western Washington.¹ Antidegradation requirements and the Clean Water Act’s requirements to protect beneficial uses both raise questions regarding the validity of these out of basin transfers.

Recommendation:

Add prioritization principles to the proposed guidance document that would prohibit the use of a stormwater control transfer program when the “sending watershed” is impaired for water quality or other parameters caused in part by the surrounding land uses. This would help to prevent the trade-offs allowed through this guidance from thwarting future cleanup efforts required under state and federal law. In order to fulfill general principle 1 (page 2), and achieve compliance with state and federal clean water law, transfers should be prohibited when the sending watershed is listed on the §303(d) list as a category 5 impairment for parameters related to pollution generated or caused in part by the surrounding land uses in the basins seeking a transfer. This approach would also be consistent with tier I anti-degradation requirements described in WAC 173-201A-310(1). Furthermore, regulations provide that when waters are not meeting standards, or designated uses are not being protected (as is currently the case with most urban coho-bearing streams), Ecology is supposed to take “*definitive steps*” to protect those uses per WAC 173-201A-310(2).

Second Recommendation:

In areas where it may be possible to consider stormwater transfers, add language to the guidance document that requires permittees to assess impacts of transfers on receiving

¹ See Feist BE, Buhle ER, Arnold P, Davis JW, Scholz NL (2011) Landscape Ecotoxicology of Coho Salmon Spawner Mortality in Urban Streams. PLoS ONE 6(8): e23424. doi:10.1371/journal.pone.0023424; see also Spromberg and Scholz, (2011) Estimating the Future Decline of Wild Coho Salmon Populations Resulting from Early Spawner Die-Offs in Urbanizing Watersheds of the Pacific Northwest, USA. Integrated Environmental Assessment and Management.

waters in the sending watershed. This information should be provided to Ecology, tribes, and federal agencies with opportunities for full participation by affected tribes and retention of existing authorities for Ecology and federal agencies prior to approval of any stormwater transfers. For this approach to work, maintenance of existing hydrological conditions and water quality discharges in the sending watershed must be demonstrated as causing no harm to designated uses or reduction of existing water quality.

Pollutant transfers

Concern: This program would allow pollutant loading in certain areas to continue, with no required improvements. Under the current stormwater permits, a permittee must comply with water quality standards at the receiving waters (See Phase I Permit S.4.B.).

Recommendation: Transfer of runoff treatment should not be authorized. At a minimum, guidance should restate permit compliance with S.4.B requirements to ensure no violation of water quality standards at receiving waters, and state law requirements to apply AKART for all discharges to surface waters. [See WAC 173-201A-300(1)(d); see also 90.48.010, RCW 90.48.520]. This is especially true for toxicants, where even the smallest concentrations can have adverse bioaccumulative effects, and state law requires evaluation of permitted discharges and application of AKART to treat those discharges.

Mitigation/Credit Equivalency

Concern: The simple arithmetic of acre to acre equivalency is not likely to fully account for the site-by-site complexity of pollutant generation and temporal differences between deforestation and reforestation activities. In addition, the guidance provides that transfers cannot occur until facilities are “on-line,” but this definition is too vague to provide assurances that there will be no lag time between development and fully effective mitigation. This is an important consideration if land purchases and easements are required, as well as construction timing for the receiving sites.

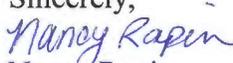
Recommendation: Provide further technical guidance on credit equivalency and accounting to provide clarity and assurances. Additionally, some regional stormwater control facilities should be prohibited from serving as a bank (the receiving watershed). Regional stormwater control facilities that are located in wetlands or in streams are clearly problematic for avoiding salmonid habitat degradation, and can contribute to violations of state water quality standards. In those instances, those facilities should not be authorized serve as credit. To do so, would further degradation and not provide accelerated environmental benefits.

Program Administration

Ecology should provide an immediate administrative appeal or review mechanism for transfer program decisions. Otherwise, in the event that affected tribes disagree with permittee prioritizations, tribes will be forced to use the more time consuming and costly court systems, when more direct administrative review could be a better use of time and resources for all interested parties.

The transfer program should establish an accessible database that allows tribes to track transfers. The program currently contemplates that permittees shall manage all data associated with transfers. This, however, would not provide affected tribes with an accessible and transparent means to evaluate program effectiveness.

We appreciate the opportunity to review this program guidance document. Based on these comments, we recommend a meeting with Ecology staff to discuss these issues further, prior to Ecology's adoption of this guidance document. Please contact me at (253)876-3128 to set up this meeting.

Sincerely,

Nancy Rapin
Water Quality Specialist

Cc: Todd Bolster, NWIFC