



City of Seattle

Gregory J. Nickels, Mayor

Seattle Public Utilities

Ray Hoffman, Acting Director

April 30, 2009

Municipal Permit Comments

Attn: Ms. Julie Lowe

WA Department of Ecology

Water Quality Program

PO Box 47696

Olympia, WA 98504-7696

Subject: City of Seattle written comments on the Phase I Municipal Stormwater NPDES and State Waste Discharge General Permit Modification dated March 18, 2009

Dear Ms. Lowe:

Thank you for the opportunity to comment on the modifications made to the 2007 Phase I Municipal Stormwater NPDES and State Waste Discharge General Permit Modification. The City of Seattle appreciates the efforts by Ecology to modify the permit. The City also appreciates Ecology's initiative to invite comments on ways to provide greater flexibility in meeting permit requirements under challenging economic conditions.

Please consider the City of Seattle's proposal in response to Ecology's request for extending interim deadlines and compliance with the permit, or better, at a lower cost (Attachment 1) and the City's comments on the modified permit (Attachment 2). We look forward to continuing to work closely with Ecology and other jurisdictions, organizations, and the public to continue to protect and improve our valuable aquatic ecosystems and Puget Sound. If you have any questions regarding these comments, please feel free to contact Kevin Buckley of my staff at (206)733-9195 or kevin.buckley@seattle.gov.

Cordially,

A handwritten signature in blue ink that reads "Nancy Ahern".

Nancy Ahern, Director
Utility Systems Management Branch
Seattle Public Utilities

Attachments: 1. Proposal in response to Ecology's request for extending interim deadlines and compliance with the permit (or better) at a lower cost.

2. Comments on the March 18, 2009 Modified 2007 Phase I Municipal Stormwater NPDES and State Waste Discharge General Permit.

cc: Ray Hoffman, Acting Director, Seattle Public Utilities
Martin Baker, Acting Deputy Director, SPU Corporate Strategies and Communications
Bruce Bachen, Director, SPU Drainage and Waste Water Quality Division
Theresa Wagner, Seattle Attorney's Office
Ingrid Wertz, SPU Drainage and Waste Water Quality Division
Kevin Buckley, SPU Drainage and Waste Water Quality Division

Attachment 1. City of Seattle's proposals in response to Ecology's request for extending interim deadlines and compliance with the permit (or better) at a lower cost

Proposal 1

p. 13 of 74, S5.C.5.b.vi – Compliance with the above inspection requirements shall be determined by the presence of an established inspection program designed to inspect all sites involving land disturbing activity that meet the thresholds in S5.C.5.b.i., and achieve inspection of 95% an average of 80% of such sites annually starting 18 months after the effective date of this permit and ending on February 15, 2012. In the event that the permit term is extended past February 15, 2012, Permittees shall inspect 80% for each year thereafter that the permit remains in effect. The inspections may be combined with other inspections provided they are performed using qualified personnel.

Basis for Proposal – Most Permittees are in the process of adopting updated programs for runoff controls for new development, redevelopment and construction sites and are engaged in training staff and modifying inspection programs to implement the new permit requirements. It is anticipated that the Permittees' inspection staff will spend additional time during inspections educating and working with permit holders to understand and implement the new requirements for controlling runoff from new development, redevelopment and construction sites. The time spent educating permit holders, while of great value, increases the time spent on each inspection and reduces the number of inspections that can be conducted in the first year. The proposed language allows for greater flexibility in the timing of inspections over the permit period as it is expected that efficiency will improve and additional resources will become available in the future. It is anticipated that Permittees will be able to use the data collected during the initial years to prioritize inspections in future years to focus inspection efforts where the greatest benefit is achieved thereby achieving the intent of this requirement.

Proposal 2

p. 16 of 74, S5.C.7.b.iii –All identified sites with a business address shall be provided, by mail, telephone, or in person, information about activities that may generate pollutants and the source control requirements applicable to those activities. This information may be provided all at one time or spread out over the last three years of the permit term to allow for some tailoring and distribution of the information during site inspections. Businesses may self-certify compliance with the source control requirements at the discretion of the Permittee. The Permittee shall inspect an average of 20% of these sites annually per year starting 24 months after the effective date of this permit and ending on February 15, 2012 to assure BMP effectiveness and compliance with source control requirements. In the event that the permit term is extended past February 15, 2012, Permittees shall inspect 20% for each year thereafter that the permit remains in effect. Businesses that participate in the self-certification program can be used towards partial compliance with the annual

inspection requirement. The Permittee may select which sites to inspect each year and is not required to inspect 100% of sites over a 5-year period. Sites may be prioritized for inspection based on their land use category, potential for pollution generation, proximity to receiving waters, or to address an identified pollution problem within a specific geographic area or sub-basin.

Basis for Proposal –The proposed language allows for greater flexibility in the timing of business inspections by allowing the Permittees to inspect an average of 20% of these sites annually between 24 months after the effective date of this permit and the end of the permit on February 15, 2012. This change will allow Permittees to build a program over time and achieve the permit standard by increasing the percentage of businesses inspected in years when staff and resources are available. It is anticipated that Permittees will be able to use the data collected during the initial years to prioritize inspections in future years to focus inspection efforts where the greatest benefit is achieved thereby achieving the intent of this requirement.

Self-certification is suggested by the Permit in S5.C.7.b.iii as a way for businesses to establish compliance with the source control requirements. Allowing Permittees to use a self-certification program, which counts towards a portion of the proposed permit requirement to inspect an average of 20% of sites annually, will result in compliance with the permit (or better) at a lower cost. There will be low risk to water quality because the self-certification program will target businesses with a low potential to pollute. The self-certification program will be used in addition to in-person inspections, and only those businesses that return the self-certification form will be counted towards the proposed annual average of 20% requirement. Without this program, it is unlikely that businesses with low potential for pollution generation would receive an in-person business inspection during the term of this permit. The self-certification program will educate businesses that there are enforcement penalties for non-compliance and require the business to certify that they have implemented and are maintaining source control BMPs at their business. The enforcement information and signature form will better motivate businesses to implement BMPs and comply with the Permittees' local ordinance, which will achieve control of pollution sources.

Proposal 3

p. 20 of 74, S5.C.8.b.vi.(1)- Each City covered under this permit shall prioritize conveyances and outfalls and complete field screening for at least 60% of the conveyance systems within the Permittees incorporated area no later than 4 5 years from the effective date of the permit.

Basis for Proposal – The proposed language gives greater flexibility in the timing of IDDE inspections over the permit period to allow an alternative implementation strategy to be developed and implemented. Changing the requirement to “complete field screening for at least 60% of the conveyance systems ...no later than 5 years from the effective date of the permit” reaches the same level of compliance intended in the permit and does not extend the deadline beyond the term of the permit. The interim deadline

change will provide the Permittees with greater flexibility over the term of the permit to account for uncertainties around budget and staff resources.

Proposal 4

p. 20 of 74, S5.C.8.b.vii.(1)- Investigation: Upon discovery or upon receiving a report of a suspected illicit connection, Permittees shall initiate an investigation within ~~21~~ 90 days, to determine the source and nature of the connection, and the responsible party for the connection. Permittees shall notify Ecology immediately and begin the investigation within 21 days or less in cases where an illicit connection is discovered that presents a severe threat to human health or the environment.

Basis for Proposal – Extending the deadline from 21 days to 90 days would increase both the efficiency of IDDE work and the amount of work that can be completed each year. Investigations use the same resources that are used to conduct screening, so more IDDE work can be accomplished by focusing on screening during the summer dry period and shifting resources to investigations after the dry weather period ends. In cases where an illicit connection is discovered that presents a severe threat to human health or the environment, Permittees will notify Ecology immediately and begin the investigation within 21 days or less.

Proposal 5

p. 21 of 74, S5.C.8.b.vii.(2) – Termination: Upon confirmation of the illicit nature of a storm drain connection, Permittees shall use their enforcement authority in a documented effort to eliminate the illicit connection within ~~6~~ 12 months. All illicit connections to the MS4 shall be eliminated.

Basis for Proposal –In most cases, the appropriate method to correct an illicit connection is complex and requires coordination and permitting that may exceed 6 months. Residents or businesses that are found to have an illicit connection must obtain a side sewer permit from Seattle’s Department of Planning and Development to correct the problem, which may take longer than 6 months. The following information is required to obtain a side sewer permit: preparing as-built plans; preparing agreements, such as easements; connecting side sewers to adjoining private side sewer systems; coordinating work with other agencies, such as the Seattle Department of Transportation for street backfill and surface restoration; and SPU for core tap scheduling. If the resident or business fails correct the illicit connection, the City will use its enforcement authority to require compliance. The enforcement process may take up to 12 months or more if the court system is involved.

Because all of these activities can take longer than 6 months, the proposed revised Stormwater Code allows for up to 12 months for installation of structural source controls for an existing discharge to correct a known or likely violation of the NPDES permit.¹ Extending the interim deadline from 6 months to 12 months will align the illicit

¹ Proposed Seattle Municipal Code (SMC) 22.800.080 (H), updated from current SMC 22.802.013(C).

connection elimination process with the revised Stormwater Code, enforcement and permitting process required for these types of activities.

Proposal 6

p. 23 of 74, S5.C.9.b.ii(5) – Compliance with the inspection requirements of S5.C.9.b.ii.(2), (3), and (4), above, shall be determined by the presence of an established inspection program designed to inspect all sites, and achieving inspection of 95% an average of 80% of such sites annually starting 18 months after the effective date of this permit and ending on February 15, 2012. In the event that the permit term is extended past February 15, 2012, Permittees shall inspect 80% for each year thereafter that the permit remains in effect.

Basis for Proposal– Most Permittees are in the process of adopting updated programs for inspection and maintenance of stormwater facilities regulated by the Permittee and are engaged in training staff and modifying inspection programs for implementation of the new requirements. It is anticipated that the Permittees’ inspection staff will spend additional time during inspections educating and working with property owners to understand and implement the facility inspection and maintenance requirements. The time spent educating property owners, while of great value, increases the time spent on each inspection and reduces the number of inspections that can be conducted. The proposed language allows for greater flexibility in the timing and combination of inspections over the permit period as it is expected that efficiency will improve and additional resources will be available in the future. It is anticipated that Permittees will be able to use the data collected during the initial years to prioritize inspections in future years to focus inspection efforts where the greatest benefit is achieved thereby achieving the intent of this requirement.

Proposal 7

p. 24 of 74, S5.C.9.b.iii(3) – Compliance with the inspection requirements of S5.C.9.b.iii.(1), and (2) above, shall be determined by the presence of an established inspection program designed to inspect all sites, and achieving inspection of 95% an average of 80% of such sites annually starting 18 months after the effective date of this permit and ending on February 15, 2012. In the event that the permit term is extended past February 15, 2012, Permittees shall inspect 80% for each year thereafter that the permit remains in effect.

Basis for Proposal – Most Permittees are in the process of adopting updated programs inspection and maintenance of stormwater facilities owned or operated by the Permittee and are engaged in training staff and modifying inspection programs for implementation of the new requirements. It is anticipated that the Permittees’ inspection staff will spend additional time during inspections learning to implement the revised stormwater facility inspection and maintenance requirements. The time spent learning to implement the new requirements, while of great value, increases the time spent on each inspection and reduces the number of inspections that can be conducted in the first year. The proposed language allows for greater flexibility in the timing and combination of inspections over

the permit period as it is expected that efficiency will improve and additional resources will be available in the future. It is anticipated that Permittees will be able to use the data collected during the initial years to prioritize inspections in future years to focus inspection efforts where the greatest benefit is achieved thereby achieving the intent of this requirement.

Proposal 8

p. 54 of 74, S8.G.2.c- Full i Implementation of the monitoring program shall begin no later than ~~2 years after the effective date of this permit~~ October 1, 2009. Toxicity testing under S8.D.2.d shall begin no later than 4 years after the effective date of this permit. Permittees may propose alternative studies to toxicity testing requirements and these may be approved by Ecology on a case by case basis.

Basis for Proposal –Independent monitoring programs developed under S8.G are required to begin monitoring 2 years after the effective date of the permit. The Permit allows Permittees that intend to meet all or part of the monitoring requirements through a collaborative process to begin monitoring 2.5 years after the effective date of the permit. The Phase I Permittees negotiated with Ecology to modify the reporting requirements in S8.H from an annual to a water year, October 1 to September 30. Reporting on the water year is more in line with the wet and dry season requirements in the Permit and allows enough time for the Permittee to analyze these data and develop the annual report. Using October 1, 2009 as a common implementation date for all Phase I Permittees will align the reporting requirement among Permittees. The change will not result in any loss of ability by the Permittees to characterize stormwater runoff quantity and quality at a limited number of locations in a manner that allows analysis of loadings, changes over time and generalization across the Permittees MS3. The Permittees will be able to provide a full water year of monitoring data rather than a partial first year report.

Requiring Permittees to begin toxicity testing two years after implementation of the stormwater characterization should result in a cost savings in both staff time and lab analysis. The change would allow the Permittees to better determine the runoff and sample pacing requirements of each stormwater monitoring site, which may increase the likelihood of collecting a successful toxicity sample.

Allowing Permittees to propose alternative studies to the toxicity testing requirements may allow Permittees to use alternative ways to obtain information on the potential toxicological effects of stormwater on aquatic organisms that could meet the intent of the permit. In some cases, Permittees are currently engaged in monitoring that may serve to evaluate the seasonal first-flush storm that Ecology has stated should “give us a general annual worst case scenario”². An example of alternative monitoring that might be considered for screening the potential toxicity of stormwater is the work that the City of Seattle is currently engaged in with the National Oceanographic and Atmospheric Administration (NOAA) on embryo toxicity studies associated with coho pre-spawn mortality.

² Ecology Phase I Permit Fact Sheet, dated March 22, 2006, p. 51.

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Attachment 2. City of Seattle Comments on the March 18, 2009 Modified 2007 Phase I Municipal Stormwater NPDES and State Waste Discharge General Permit.

Phase I Permit, p. 6 of 74, S4.F.3.f.

“The adaptive management process provided under Section S.4.F is not intended to create a shield for the Permittee from any liability it may face under 42 U.S.C. 9601 *et seq.* or RCW 70.105D.”

Comment: The proposed language should be omitted.

The Pollution Control Hearings Board (“PCHB”) did not order it. In fact, the PCHB ruled that the question of a shield from CERCLA liability was “beyond the scope of the hearing and outside the PCHB’s jurisdiction to determine.” (PCHB S4 Final Order, p. 46 n.18, August 7, 2008.) Further, an NPDES permit issued under federal Clean Water Act authority should not comment upon whether defenses or liability may exist under a separate, independent federal or state statute. It is the role of the courts to decide how statutes interact, including the legal effect of an NPDES permit on a dispute under a different law.

If, despite this comment, Ecology includes any language on this subject, Ecology should include all the language Ecology put into WSDOT’s 2009 permit, which better reflects the law: *“Whether the process in Section S4.F provides WSDOT a shield from liability under 42 U.S.C. 9601 et seq. or RCW 70.105D is a matter of state and federal law which Ecology does not intend to alter. The adaptive management process provided under section S4.F is not intended to create a shield for WSDOT from any liability it may face under 42 U.S.C. 9601 et seq. or RCW 70.105D.”* The City considers the second sentence inappropriate. However, having both sentences is preferable to the language in the draft proposed permit.

Phase I Permit, p. 11 of 74, S5.C.5.b.iii(2), footnote 1.

“In order to implement the Pollution Control Hearings Board’s language in S5.C.5.b.iii, Ecology will initiate a process to define the scope of LID techniques to be considered, criteria for determining the feasibility of LID techniques, and a LID performance standard. When the process is complete, Ecology will incorporate the results and a deadline for implementation of S5.C.5.b.iii(2) into the permit through a permit modification.”

Comment: The City of Seattle supports Ecology's proposal to initiate a multi-stakeholder process to determine the scope, criteria, and performance standards for LID and looks forward to participating in the process. The City is interested in assigning staff to participate on both the technical and policy groups that Ecology described at the April 8, 2009 permit modification workshop.

Phase I Permit, G20.A p. 66 of 74,

Comment: Please change G20.A to read as follows for ease in implementing in the unique context of a municipal stormwater system:

"A. Notify Ecology of the failure to comply with the permit terms and conditions in writing within 30 days of becoming aware ~~of that~~ the non-compliance has occurred."

The change would clarify that noncompliance must be reported within 30 days after becoming aware that it has occurred.

Phase I Permit, Appendix 10, p. 2 of 3, B, footnote 3

Comment: Please change footnote 3 to read as follows for clarity:

"If any substantive changes are made to the City of Seattle's March 16, 2009, version of the listed enforceable documents during Seattle's 2009 legislative or administrative adoption process that could result in these documents being no longer equivalent, the City must submit those specific changes for Ecology review and approval. See Fact Sheet Section IV.B."