

October 14, 2005

Karen Dinacola
Water Quality Program
Washington State Department of Ecology
P.O. Box 47696
Olympia, WA 98504

Re: Preliminary Draft Phase II Municipal Stormwater Permit for Eastern Washington

Dear Karen:

The City of Spokane takes stormwater management and environmental protection seriously. Most of our municipal separated storm sewer system (MS4) was built in the 1980s to reduce Combined Sewer Overflow volume to the Spokane River and Latah Creek by over 85%, prior to EPA's CSO goal. The resulting MS4 has about 80 outfalls, roughly half of which serve land basins; the rest are bridge drains. Grassy swales have been installed with redevelopment, new development and street projects since the early 1980s to protect the region's sole source aquifer and the Spokane River and Latah Creek. The City is committed to achieving Ecology's CSO reduction goal by 2017 at an estimated cost of \$250 million. In addition, approximately \$150 million is anticipated for sewage treatment upgrades and wastewater reclamation facilities by 2015.

The City established its Stormwater Utility and Wet Weather Program nearly six years ago to formalize the stormwater activities already underway and to enable us to expand and improve our stormwater management and CSO reduction efforts. City staff participated regularly in Ecology's stakeholder process that developed the Eastern Washington Model Program and Stormwater Management Manual and we adopted an Ecology-approved Stormwater Management Plan in 2004. Several City departments work together routinely on stormwater issues and are achieving some of the requirements and recommendations outlined in this draft Permit. Illicit discharge program, stormwater ordinance, design standards, plan reviews, pollution prevention, MS4 maintenance activities, facilities mapping, public outreach and education are all in place to varying degrees.

Staffing levels and funding are always an issue in local government, but the City is currently facing the third year of a budget shortfall that has resulted in public safety layoffs, reduced library hours, and decreased park maintenance. Despite our high priority on environmental protection, increasing staff and funding to comply with the Phase II Permit poses a monumental challenge. In addition to the financial hurdles are concerns about potential responsibilities and liabilities of monitoring third parties' activities to comply with Ecology's requirements and regulations in addition to our own. It is imperative that we focus on how Ecology can and should require the City to develop and implement programs and procedures, at least with respect to third party activities.

We have appreciated Ecology's collaborative approach to implementing the Phase Two rule in Eastern Washington. Thank you for the opportunity to review this preliminary draft Permit and accompanying Appendices and Fact Sheet. Below please find the City of Spokane's comments, both general and specific, for Ecology's consideration and response.

GENERAL COMMENTS

Responsibility for Third Party Activities. The Permit should focus on requiring municipal owners and operators of MS4s to develop and implement programs and procedures rather than requiring the municipal owners or operators of MS4s to be responsible for the acts of third-parties that may or may not comply with adopted programs and procedures. For example, if the City adopts and implements a robust public information campaign to prevent individuals from dumping used motor oil into storm drains and adopts and enforces an ordinance prohibiting individuals from dumping used oil into storm drains, but nonetheless this occurs, the Permit should not be written in such a way as to suggest that the City is in violation of the Clean Water Act, the Permit, or the water quality standards (although clearly the individual who dumps the motor oil has violated those requirements along with the City's ordinance). The same is true for discharges from industrial activities and construction sites. However, the Permit as currently drafted, especially Sections S4 and S5, might be interpreted as imposing such liability on the City for the activities of third parties.

The issue of responsibility for third-party acts or omissions is also troubling in light of some of the "general conditions." Section G2 requires the Permittee to operate and maintain "all facilities and systems." This might be misinterpreted as requiring the City to inspect and repair any BMP or other device that is used or installed by third parties, such as construction contractors or industrial activities, to prevent contaminants from entering the City's stormwater system. Section G4 prohibits the intentional bypass of "all or any portion of a stormwater BMP" and Section G6 requires the City to act "to minimize or prevent any discharge in violation of this permit." Again, given the way Sections S4 and S5 are written, the permit might be misinterpreted such that the City is considered to be in violation of the Clean Water Act, the Permit or the WQS if a third-party intentionally bypasses a BMP or otherwise discharges to the City's MS4 in a manner that is inconsistent with the City's programs or procedures. It is important that the Permit is clear in this regard not only because of potential enforcement activities by Ecology and EPA but because of so-called "citizen suits" which allege violations of NPDES Permits or the Clean Water Act.

The City should not be deemed in violation of the Act, the Permit or the WQS if the owner of an industrial activity or a construction contractor fails to follow City programs and procedures intended to prevent or reduce the discharge of contaminants into the City's storm drains. If the City has adopted and implemented the required programs, then the City should be deemed to be in compliance with the Act, the Permit and the WQS. If there is evidence to demonstrate that the programs or procedures are not adequately protecting water quality despite diligent implementation, then the programs should be supplemented or revised and strengthened but the City should not be deemed in violation of the Act, the Permit or WQS. Sections S4 and S5 in particular need to be rewritten and simplified to clearly indicate that the owners and operators of MS4s are responsible for adopting and implementing programs and procedures to protect water quality and are not responsible for the acts or omissions of third parties who fail to comply with those programs and procedures.

Discharges to Groundwater. The federal Phase II rules do not require Ecology to regulate discharges to groundwater. However, Ecology has included the state requirements for the protection of groundwater in the Permit. This is not part of the legal responsibilities delegated to Ecology under the federal Clean Water Act, but it is an important policy decision by the agency and needs to be very carefully considered. Requiring cities and counties to regulate discharges to groundwater increases the complexity of compliance with the Permit may increase a municipalities' liability for groundwater discharges and will increase the costs of complying with the Permit. Given that the costs of compliance will already challenge many communities' stretched budgets, Ecology should remove groundwater discharges from the Permit's scope.

Monitoring. The Permit is inconsistent with respect to water quality monitoring. Section S8A.4. says a Permittee is not required to conduct water sampling or other testing (unless such sampling and testing is specifically required in a TMDL applicable to stormwater). However, Section S8.A.2.a. requires annual reporting of stormwater and receiving water quality data and Section G9.A. requires representative sampling. At a minimum, Section G9.A. should state that no sampling or testing is required by the Permit (except in accordance with a TMDL which is applicable to stormwater and specifically requires stormwater sampling).

The Permit does not appear to regulate or limit flows and it does not include flow-based effluent limits. Section G9.E. should either be removed or it should clearly state that this Permit does not require flow measurements or the installation of flow measurement devices.

Permit Modification. Section G9.G. should be clarified. As currently written, it suggests that the Permittee is consenting in advance to unilateral modification of the Permit by Ecology. This section should clearly state that Ecology may only modify the Permit consistent with the procedures and standards in the WA Administrative Procedures Act (RCW 34.05), the WA Water Pollution Control Act (RCW 90.48), and the federal Clean Water Act.

Manual Use. The Eastern WA Stormwater Manual (Sept. 2004) is a useful guide for municipal and private entities who want technical assistance in developing site-specific BMPs. The Permit, including Appendix 2, however, appears to be written in a way that forces everyone to comply with the Manual or risk being deemed in violation of the Permit, the Clean Water Act, or the WQS. Since the Manual is not a rule, and was not intended to function as a rule, the Permit should make it clear that strict compliance with the Manual is not a requirement of the Permit.

Compliance Deadlines. Many of the deadlines in the Permit are unrealistic given the level of detail Ecology is requiring for City programs and procedures to minimize stormwater pollution, the size and complexity of the City's MS4, and the City's limited resources.

SPECIFIC COMMENTS

RE: SPECIAL CONDITIONS

Page 6 , line 20 – Reference to S7.D.4 is invalid.

Page 7, line 12 – The term “maximum extent practicable” is used; please add MEP to the glossary.

Page 7, line 32. – The reference to “the State’s narrative criteria for water quality” should be more specific, e.g. WAC 201A -xxx..

Page 8, line 3 – Typo, should be: “supports”

Page 8, line 23 – The reference to S7.B is erroneous; apparently it should be S4.B

Page 9, line 17 – Typo, should be “...discharges to water...”

Page 10, line 27 – Question: is Permittee required to update SWMP annually?

Page 10, lines 27 and 33 – Recommend replacing “from” with “after”

Page 11, line 33 – The statement “This provision does not include charity car washes” is unclear and needs to specify whether charity car washes are prohibited, or are exempt from this list of disallowed discharges.

Page 11, lines 33, 37 and 38 – Recognizing that these discharges need not be addressed in the SWMP if not identified as a significant contributor of pollutants to the MS4, control of many of the discharges listed, if so identified, would be very difficult to enforce, such as individual residential car washing, lawn watering and landscape irrigation, and irrigation water.

Page 12, lines 7 thru 11 – Outreach and education are required in regard to residential car washing, street wash water, and lawn watering / landscape irrigation, yet those sources have not been identified as significant contributors of pollutants to the MS4. Please delete this requirement.

Page 12, lines 24-31 – Enforcement regarding swimming pools may not be feasible.

Page 15, lines 16 thru 21 – This section should make it clear that the Permittee is not required to provide this training.

Page 17, lines 30 thru 33 – This section should make it clear that the Permittee is not required to provide this training.

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Page 18, line 4 – The acronym “AKART” is used; please add it to the glossary.

Page 18, line 33 – Please clarify whether there is a minimum area threshold for parking lots to be addressed in this section, or if it is Permittee’s discretion when developing the O&M Plan.

Page 26, line 10 – Change “PDF format” to “PDF” or spell it out, since “format” is redundant.

Page 27, line 4 – Ditto ... this could be a global change in Permit and perhaps Appendices.

RE: GENERAL CONDITIONS

Page 31, line 13 – Is this a water quality plan that would have been developed by the Permittee, or a third party? Please clarify.

Page 32, line 8 – Recommend “All applications, reports and other information formally submitted in connection with this permit. ...” Please clarify what kinds of information this refers to in order to distinguish it from more general information provided to the Department, or information provided on an informal basis.

Page 33 – MEP, AKART, and QLP should be added to the glossary.

Page 36, line 7 – Is Ecology responsible for accrediting the content or certifying the provider of this professional training?

RE: FACT SHEET

Page 2, second para, first line: Delete “:”

Page 2, second para, seventh line: Delete “of” prior to “...the effectiveness...”

Page 6, third and fourth para, and Page 15 re: Appendix 1: The term “bubble cities” is ok verbally but not so good in print. This official document behooves a descriptive term for those entities that will stand the test of time. If retained, it needs to be in the glossary and termed “the so-called bubble cities” in the text.

Page 10, re: Section S5.B.4, last bullet – Issues of regulatory responsibility and compliance liability associated with a Qualified Local Program need to be worked out to mutual benefit and satisfaction of Ecology and Permittees.

Page 16, second bullet, first sentence – Notwithstanding the need for further discussion with

Permittees regarding Ecology's intent, recommend changing wording to "... the minimum requirements..." Minimum requirements must be treated in such a way as to avoid imposing requirements that may not be applicable in a particular entity, yet also protect any entity's ability to establish additional or stricter standards.

The above concludes City of Spokane comments on the referenced Preliminary Draft Permit. We appreciate Ecology's effort in basing the draft Permit on the Model Program to a large extent. Many of the elements are written clearly with a practical understanding of how a Permittee would implement them, and are scheduled to enable us to comply. Because of the potential for changes resulting from comments, the City conducted only a cursory review of the Reporting Forms and will review them in detail in the second round.

Thank you again for the opportunity to comment. We look forward to Ecology's responses and I would be glad to talk with you about any of our comments or provide more information. I can be reached at (509) 625-7929 and lhendron@spokanecity.org.

Sincerely,

Lars H. Hendron, P.E.
Principal Engineer – Wastewater Management

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cc: Dale Arnold; Director – Wastewater Management
Tom Arnold; Director – Engineering Services
Brad Blegen; Director – Water & Hydroelectric Services
Scott Egger; Director – Streets
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