



CITY OF KIRKLAND

Department of Public Works
123 Fifth Avenue, Kirkland, WA 98033 425.587.3800
www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Pam Bissonnette, Interim Public Works Director
Rob Jammerman, Development and Environmental Services Manager
Jenny Gaus, Surface Water Engineering Supervisor

Date: January 9, 2014

Subject: PROPOSED SETTLEMENT OF REMAINING 2013-2018 NPDES PHASE II
MUNICIPAL STORMWATER PERMIT APPEAL ISSUES

RECOMMENDATION:

It is recommended that City Council approves the attached resolution authorizing the settlement of the remaining issues in the 2013-2018 National Pollutant Discharge Elimination System ("NPDES") Phase II Stormwater Permit Appeal.

BACKGROUND AND DISCUSSION:

In August 2012, a Coalition of Governmental Entities ("Coalition") filed an administrative appeal of certain conditions of the NPDES Phase II 2013-2018 Permit with the Washington State Pollution Control Hearings Board ("PCHB"). The Coalition members include the following cities: Auburn, Bainbridge Island, Bellevue, Bothell, Bremerton, Burlington, Camas, Des Moines, Everett, Ferndale, Issaquah, Kelso, Kent, Kirkland, Longview, Lynnwood, Mount Vernon, Poulsbo, Renton, Sammamish, SeaTac, Snoqualmie and Sumner, as well as Cowlitz County.

The City participated in the appeal because of potential conflicts between City and state authority and the Permit. Kirkland is committed to water quality improvement and stormwater has been identified as the number one pollutant impacting the health of the Puget Sound. Kirkland has and will continue to find cost-effective and efficient means to improve the quality of the stormwater that it discharges to Lake Washington and ultimately to the Puget Sound. The concern is *how* the work will be done, rather than *whether* the work should be done to improve water quality. City staff recommended participation in the appeal because they wanted to concentrate on programs and projects that improve water quality and support economic development, rather than having to engage in expensive and time-consuming legal conflicts over land use planning.

The PCHB held a consolidated hearing on the appeal issues that both Phase I permittees and the Coalition of Phase II permittees have in common (October 2013). The Phase I permittees participating in the consolidated hearing were Pierce County, Snohomish County, Clark County, King County, the Building Industry Association of Clark County, City of Tacoma, City of Seattle, and the Washington State Department of Transportation ("WSDOT"). The Department of Ecology ("DOE") and intervenors Puget Soundkeepers' Alliance and Rosemere Neighborhood Association ("PSA") also participated in the hearing. We expect a ruling later this month.

The PCHB has scheduled the hearing on the remaining permit issues in April 2014. Over the last few months, the Coalition, WSDOT, and King County have been working with DOE to reach an

agreement on the remaining permit issues (definition clarifications and elimination of the one-acre threshold exemption) prior to the hearing in April. Agreement by DOE to the Coalition's definitions proposal will narrow the scope and cost to permit holders for monitoring; will decrease the number of potential locations for water quality violations; and will limit the possibility of third-party claims for those violations, which can be very costly to defend and involve the award of penalties and attorney fees against local governments.

The "trade-off" required by DOE to accept the Coalition's definitions proposal is for the Coalition to dismiss the remaining challenge to the Phase II Permit (elimination of the one-acre threshold exemption). WSDOT and King County joined the Coalition on the definitional concerns, but not the one-acre threshold issue. Since WSDOT and King County intend to settle with DOE, we will have no partners in the appeal hearing in April. Not only will this make our case less compelling to the PCHB with fewer appellants, but the PCHB will be under no obligation to impose the definitional amendments sought by the Coalition for our Permit.

The proposed settlement will significantly resolve concerns raised by Coalition members about the definitions. In addition, the Coalition will continue to negotiate with DOE, as well as the Department of Commerce and the Puget Sound Regional Council, to address the elimination of the one-acre threshold exemption and the economic impacts of a one-size-fits-all requirement for stormwater detention, and to develop effective solutions to balancing equally critical growth management and water quality objectives in urban growth centers. At this time, DOE is willing to work with the Coalition on these issues and to develop guidance and/or issue papers with options. The settlement of these issues does not in any way impact the challenges to the other Permit conditions that have already been presented to the PCHB in the consolidated hearing (ruling expected later in January).

RESOLUTION R-5030

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND ACCEPTING THE PROPOSED SETTLEMENT OF THE REMAINING ISSUES IN THE ADMINISTRATIVE APPEAL OF THE 2013-2018 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PHASE II PERMIT.

WHEREAS, in September 2012, the City Council authorized the City of Kirkland to join a coalition of local governments in filing an administrative appeal of the 2013-2018 National Pollutant Discharge Elimination System (NPDES) Phase II Permit with the Washington State Pollution Control Hearings Board (PCHB); and

WHEREAS, in October 2013, the PCHB held a consolidated hearing on appeal issues held in common by both appealing Phase I and Phase II permittees and a ruling is expected on those issues within the month; and

WHEREAS, the PCHB has scheduled a hearing on the remaining appeal issues in April 2014; and

WHEREAS, in anticipation of the next hearing, the Coalition along with Washington State Department of Transportation and King County explored settlement opportunities with the Washington State Department of Ecology (DOE); and

WHEREAS, DOE has agreed to either issue new guidance documents and make modifications to the 2013-2018 NPDES Phase II Permit language to clarify or amend definitions at issue; and

WHEREAS, the proposed settlement includes clarifications that will: narrow the scope and cost to permit holders; decrease the number of potential locations for water quality violations; and limit the possibility of third-party claims for water quality violations; and

WHEREAS, the City must notify DOE by January 31, 2014, as to whether it will accept the settlement proposal; and

WHEREAS, the City Council finds that the proposed settlement is in the best interest of the City of Kirkland and wishes to accept the proposed settlement of the remaining issues in the appeal of the 2013-2018 NPDES Phase II Permit;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is authorized to execute a settlement of the remaining issues in the appeal of the 2013-2018

NPDES Phase II Permit including changes to definitions substantially in the form shown in Exhibit A, and incorporated by this reference.

Passed by majority vote of the Kirkland City Council in open meeting this ____ day of _____, 2014.

Signed in authentication thereof this ____ day of _____, 2014.

MAYOR

Attest:

City Clerk

**Exhibit A: Proposed Changes to Definitions for Outfall & Receiving Waters and
Addition of Discharge Point Definition
As Agreed To by Phase II Coalition/Appellant and Ecology Representatives 12/9/13
With accompanying explanatory notes**

- A. “Outfall” means a point source as defined by 40 CFR 122.2 at the point where a discharge leaves the permittee’s MS4 and enters a receiving waterbody or receiving waters. Outfall also includes the permittee’s MS4 facilities/BMPs designed to infiltrate stormwater.

Explanatory notes for “outfall” (to be converted into guidance):

- “a point source as defined by 40 CFR 122.2” = limits outfalls as “discernible, confined and discrete conveyances”
 - “at the point where” = further modifies “discernible, confined and discrete conveyances” to a discernible, confined and discrete point; excludes stormwater conveyances that have no outlet, such as dispersion BMPs
 - “a discharge” = applies not only to stormwater but also to illicit discharges
 - “leaves the permittee’s MS4” = intentionally possessive to a single MS4 permittee, not a group MS4 of permittees; excludes private and unregulated public stormwater systems for the purposes of its use in this permit. It is likely that municipalities will want to identify private or unregulated public outfalls in order to have a comprehensive understanding of drainage within their jurisdiction.
 - “and enters a receiving waterbody or receiving waters.” = see definition of receiving waterbody and receiving waters (e.g., surface water and groundwater)
 - “Outfall also includes the permittee’s MS4” = intentionally possessive to a single MS4 permittee, not a group of MS4 permittees; excludes private and unregulated public stormwater systems for the purposes of its use in this permit. It is likely that municipalities will want to identify private or unregulated public outfalls in order to have a comprehensive understanding of drainage within their jurisdiction.
 - “facilities/BMPs” = broad use of the term “facilities/BMPs” to accommodate a wide range of infiltration facilities including any pre-existing facilities and retrofit facilities; not limited to “stormwater treatment and flow control BMPs/facilities” as defined in the permits.
 - “designed to infiltrate stormwater.” = limits applicable infiltration facilities/BMPs to those that are designed to infiltrate; excludes facilities/BMPs that inadvertently infiltrate, such as ditches and swales. For the purposes of this permit, UIC facilities are categorically excluded; however it is likely that municipalities will want to identify UIC facilities as a form of an outfall in order to have a comprehensive understanding of drainage within their jurisdiction.
 - Outfall does not include [the points where] pipes, tunnels, or other constructed conveyances which connect segments of the same receiving waters and are primarily used to convey receiving waters (for example: stream culverts). = excludes in-stream culverts that convey the stream under roadways; excludes the outlets of streams that have been piped under development areas.
- B. “Receiving waterbody” or “receiving waters” means naturally and/or reconstructed naturally occurring surface water bodies, such as creeks, streams, rivers, lakes, wetlands, estuaries, and marine

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waters, to which a discharge occurs via an outfall or via sheet/dispersed flow. Receiving waters also include ground water to which a discharge occurs via facilities/BMPs designed to infiltrate stormwater.

Explanatory notes for “receiving waterbody” or “receiving waters” (to be converted into guidance):

- A receiving water body is not defined by the type of discharge it receives. For example, an illicit discharge of non-stormwater can occur to receiving water. Thus, the definition does not specify what is discharged.
- It is acceptable to retain the last use of “stormwater” because it is referring to what the facilities/BMPs were designed to do.
- This definition does not refer to MS4 either, because a receiving waterbody is not defined by who discharges to it.
- The definition does not indicate that the discharge must be intentional (i.e., to which a discharge is directed) because a receiving waterbody is not defined by an intention to discharge.

- C. “Discharge point” means the location where a discharge leaves the permittee’s MS4 to another permittee’s MS4 or a private or public stormwater conveyance. “Discharge point” also includes the location where a discharge leaves the permittee’s MS4 and discharges to ground, except where such discharge occurs via an outfall.

Explanatory notes for “discharge point” (to be converted into guidance):

- “the location” = avoids circular use of “point” in the term and the definition; avoids confusion with 40 CFR 122.2 point source
- “where a discharge” = applies not only to stormwater but also to illicit discharges
- “leaves” = the use of discharge point in the permit is always referring to a permittee’s discharge from their MS4 to something else.
- “the permittee’s MS4” = intentionally possessive to a single MS4 permittee, not a group MS4 of permittees
- “to” = the use of discharge point in the permit is always referring to a permittee’s discharge from their MS4 to something else.
- “another permittee’s MS4” = applies to permitted regulated MS4s
- “or a private” = applies to private stormwater infrastructure
- “or public” = applies to non-permitted and/or non-regulated publicly owned or operated stormwater infrastructure
- “stormwater conveyance” = broadly used to indicate stormwater infrastructure
- “and discharges to ground,” = the discharge need not reach groundwater to be considered a discharge to ground

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- “except where such discharge occurs via an outfall.” = ties back to revised outfall definition to prevent a situation where something is both an outfall and a discharge point; does not limit discharge points to ground to infiltration facilities/BMPs that are designed to infiltrate; includes facilities/BMPs that inadvertently infiltrate, such as ditches and swales; includes stormwater conveyances that have no outlet, such as dispersion BMPs
- The permit does not need to specify “connection point” as it uses the word “connections” in a basic dictionary use.