"SMT Strategic Agenda"
Briefing paper on Municipal Stormwater Permits
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Background (describe the issue, the problem that needs resolved and why, and your overall/general strategy for addressing it).

The Clean Water Act requires NPDES permits for municipal storm sewers. The largest (Phase I) jurisdictions were permitted in 1995. The phase I permit expired in July 2000 and have been administratively extended. The EPA issued rules for smaller (phase II) jurisdictions in 1999, which required permits by March 2003.

The Issue: Urban stormwater runoff is probably one of the largest water quality problems facing our state, and it is growing. Urbanization causes dramatic changes in the hydrology and water quality in a watershed. Local research has verified the severity of changes, the impact to the native biology and habitat, and the infeasibility of undoing the harm caused by those changes to the beneficial uses of those waters, e.g., salmonid survival. The permitting standard of "maximum extent practicable" for phase I and phase II is ambiguous. The expectations for municipal stormwater permits range from "protecting and restoring" the water quality in urban areas to effectively no change from the status quo. The EPA phase II regulations provide some specific requirements for phase II permits in the form of minimum requirements (six plus two). There is significant pressure by affected municipalities, the business community and others not to go beyond the federal minimum requirements.

The Problems: Need to issue phase I and phase II municipal storm water permits. Permits following the federal phase II regulations will not fully protect water quality. To fully protect water quality would require expanding the scope of the permits way beyond what is nominally called for under the federal rules. For example:

- Stormwater treatment or flow control for new development and re-development would be required at much lower thresholds,
- addressing the vesting of projects under older inadequate development standards,
- requiring the use and implementation of stormwater planning as a stormwater best management practice (this last item would tie CWA liability to GMA planning, elevate water quality as the GMA planning priority, and require implementation).

Strategy for Solution, a little history: The phase I and phase II municipal stormwater permits and the permitting requirements were subjects of legislation last session. The bills as originally introduced started out as policy bills. They were quickly revised into "study and report" bills. While a bill did not pass into law, separate bills did pass out of the House and the Senate with almost unanimous bi-partisan support. Ecology took the common elements of the Senate and House passed versions and used these common elements as the starting point for our work over the last 4 months.

We have worked with two advisory committees, the existing Eastern Washington Stormwater group and a new Western Washington Advisory Group. Both groups were asked to address a list of stormwater issues from the bills and report back to Ecology by December 1, 2003. In December, Ecology will submit the two advisory committee reports as well as a report from Ecology to the Legislature. Ecology's report to the Legislature will provide an outline or blueprint for how we plan on addressing the list of stormwater issues and writing the phase I and phase II permits.

What, specifically, does Ecology want to accomplish by the end of 2004?

1. Generate a better understanding of the difficult choices and limitations around municipal stormwater permits. This task is well underway.
2. Generate an understanding with the public and the Legislature that while these permits will not fully protect and restore water quality they will represent significant progress in improving stormwater management practices by local governments and that dealing with urban stormwater is a long term effort.
3. Begin the dialogue on what is really necessary for protection and restoration of water quality (thresholds, vesting, land use decisions, and transportation infrastructure choices), and how best to use the other regulatory and non-regulatory tools for this purpose (GMA, the PSWQMP, other Ecology permits).
4. Issue final draft permits for phase I and phase II municipal stormwater that result in improved environmental practices at the local level.

What barriers must be overcome to accomplish this goal or task?

- Strong bias towards not going beyond the federal rules overshadows the debate on what needs to be done
- In order to write the permits, we need decisions on policy issues
- In order to defend the permits, we need a strategy to address the water quality issues that are not addressed by the permits
- A funding program must be in place to support Ecology's municipal stormwater work (stormwater Phase II permit fees are already under development)

Are there any time requirements or deadlines to be considered?

Federal permitting deadlines are all past. The phase I permits expired in July 2000 and have been administratively extended. Federal phase II regulations called for the issuance of phase II permits by March 2003.

Some in the environmental community have raised the prospect of lawsuits if timely progress is not made on permit issuance.

Another consideration is the interest on the part of the Legislature and others, that the Legislature have the opportunity to review Ecology's proposed phase II (and phase I) approach and if necessary to provide Legislative direction or re-direction to Ecology on these permits.

Who are the stakeholders (e.g., authorizing environment) and what are their views on this topic (e.g., pro, con, neutral, etc.)? (Be specific with names of individuals or organizations, where possible.)

Local governments (Primarily Cities, and Counties) are very concerned with an additional unfunded mandate, particularly one that comes with the specter of citizen suits and third party CWA liability. They are very concerned that the permit is one they can comply with and one that does not "break the bank". Association of Washington Cities has said they will accept (and pay for) a program that meets the federal minimum requirements (what ever they are, but AWC views them as minimal) and anything beyond the federal minimums must come with money.

The business/development community have two concerns which are somewhat in conflict. The first concern is that costs for new development/redevelopment not be increased. The second concern is the standards for municipal stormwater not shift the burden and the costs of water quality protection to other permittees, particularly industrial stormwater permittees. Specifically for waterbodies where both industrial stormwater and municipal stormwater sources are a factor, industrial stormwater sources should not be disproportionately regulated or controlled.

The environmental community, primarily People for Puget Sound and the Puget Sound Keepers Alliance) are interested in a more expansive and comprehensive phase I and phase II municipal stormwater permits for Western Washington to more fully protect water quality. This is also the perspective of the Puget Sound Water Quality Action Team.

The shellfish growers associations are becoming increasingly active in stormwater because they see it as a growing threat to shellfish harvesting. They would like a permit that will reverse or at least halt the trend of closing shellfish beds.

Who stands to gain or lose if Ecology's goal is accomplished? How will they be affected, have they been contacted yet, and have there been any attempts to gain consensus?

There is a difference between the way municipal elected officials view the permit and the way municipal staff view the permit. In general municipal elected officials are in no hurry for the permit. As long as no one files a citizen suit for lack of a permit, the longer a permit is delayed, the longer municipalities can postpone meeting the requirements. This is in contrast with municipal staff who are interested in more certainty and predictability in terms of what will be expected so they are able to plan for the new stormwater requirements.

Business interests in general see a delay in the permit as beneficial since they are concerned that municipalities will pass cost and requirements on to them. The two exceptions to this are the shellfish growers and businesses subject to TMDLs. They want municipalities to begin addressing their share of urban stormwater immediately.

Environmental groups want to see a permit in place, but they want it to require much more than the federal guidelines. They are willing to see the permit process go slower if they think their final endpoint is possible.

What other actions or reactions might this trigger? (e.g., legislative or initiative backlash, lawsuits, etc.)

There is significant legislative interest in this issue. Legislative staff have attended all of the Eastern and Western Washington advisory group meetings, and there are several Legislative work sessions either planned or in the planning stages for the first week of December alone.

There may be an attempt to have the Legislature clarify that ground water should not be addressed in the municipal stormwater permits. This perspective is most strongly held by the Cities and Counties in Eastern Washington.

Given the high degree of interest, and the widely divergent expectations for the phase I and phase II permits it is likely that these permits will be appealed. It is also possible that there will be pressure to initiate ESA section 7 consultations over whether the permit is compliant with ESA requirements.

Other considerations

What is the program's (or lead's) recommendation(s) or options for proceeding? (Include pro/con analysis, if appropriate.)

1. Target the requirements for the phase I and phase II permits in a way that selectively goes beyond federal requirements.
   - This mutes what otherwise would be a brutal battle over the details of the permits which clearly go beyond the federal requirements. Regardless of where Ecology ends up with these permits there will be controversy, disagreement, and likely litigation. By not pushing the envelope and stretching the use our authorities Ecology is much more likely to be viewed as "reasonable". This increases our credibility with local governments and the Legislature and makes it more likely that the message about the real solutions to urban water quality problems will be heard and not lost in the rhetoric.

2. In general terms, scale the level of effort at the adequate-to-good level.

   - Doing this will mean there will be jurisdictions which are largely meeting our requirements and for some requirements may be exceeding them. These jurisdictions become allies in improving general stormwater management and will help pull the less sophisticated or advanced jurisdictions up. Local Governments and others are much more likely to implement an effective stormwater program if they support the requirements. Effective implementation of municipal stormwater permit requirements is very much dependent upon how the local government views the

permit requirements. This does carry the risk that some local governments that are currently exceeding permit requirements would scale back their programs to only meet the permit minimums.

- The down side of this approach is we are not aggressively pursuing a permit which would contain the thresholds we developed in our stormwater manuals, and other actions we know are necessary elements of effective stormwater management. By not pursuing these elements now it may make it more difficult to do so in the future, and it may under cut or restrict local governments ability to "go beyond the minimum". Since many of the impacts from improperly managed stormwater are irreversible this approach may lead to the faster loss of resources than would occur under more aggressive permitting approach. However, even under the most aggressive permitting approach realistically possible, the permits would fall short of what is required to protect water quality.

- Another possible down side of this approach is the increased likelihood of more waterbodies added to the 303(d) list, since this approach may lead to the faster loss of resources than would occur under a more aggressive permitting approach. This would result in Ecology trying to force the correction of problems through the TMDL program, and much more expensive attempts to retrofit solutions at public expense.

FOR AFTER THE SMT MEETING

Results/decisions from SMT briefing and discussion. Note any "next steps" and communication needs.

Next steps:

- Advisory groups are putting the finishing touches to their reports to Ecology
- Legislative briefings are being scheduled for the first week in December
- Completion of Ecology's legislative report and submittal to the Legislature in December