

CITY COUNCIL AGENDA MEMORANDUM

SUBJECT

Resolution No. 8686 approving a settlement of certain issues between the City of Bellevue as an appellant and member of the Coalition of Government Agencies (“Coalition”) and the Washington State Department of Ecology (“Ecology”) and Intervenor Puget Soundkeepers Alliance and Rosemere Neighborhood Association (“PSA”) in the Coalition’s challenge to the 2013-18 Phase II National Pollutant Discharge Elimination System (NPDES) Permit.

FISCAL IMPACT

Approval of the settlement will have no direct fiscal impact other than possible savings to the City on its contribution to the appeal Coalition attorney fees. The City has contributed two rounds of funding to this appeal—an initial investment of \$25,000 and a later contribution of \$12,500. Settlement of the remaining issues on appeal may result in savings because the currently scheduled hearing on the Phase II appeal by the Coalition will be cancelled. Because we do not yet have a decision from them on the consolidated issues that were the subject of the month-long hearing in October 2013, we do not know whether we will need to fund any further appeal to the superior court or defend against an appeal by intervenors PSA. For that reason, we do not currently know whether there will be any savings realized from our contributions to the appeal as a result of this settlement.

Complying with the new regulations contained in the NPDES Phase II 2013-18 Permit is expected to be costly, however this proposed settlement, which clarifies the scope of permit definitions, will provide some protection against increased costs associated with water quality monitoring and compliance as well as against potential third-party lawsuits for claimed violations.

STAFF CONTACT

Lori Riordan, City Attorney, 452-7220
City Attorney’s Office

POLICY CONSIDERATION

Should the City enter into a Stipulated Order of Settlement and Dismissal as a member of the Coalition of certain issues in the appeal of the 2013-18 NPDES Phase II Permit currently pending before the Pollution Control Hearings Board (“Board”)?

BACKGROUND

The Phase II NPDES Permit is required under provisions of the Federal Clean Water Act and requires that local government agencies in Washington develop and maintain stormwater programs. The Clean Water Act allows states to include additional and more stringent requirements for permits. Ecology has been designated as the responsible Washington state agency for administering this program on behalf of the Environmental Protection Agency. The current Coalition was formed by several cities and Cowlitz County for purposes of challenging not only the process by which the 2013-18 Permit and associated

guidance documents were developed, but also some of the substantive provisions and definitions of the Permit. In particular, Coalition members raised concerns regarding Low Impact Development requirements as well as certain definitions contained in the Permit and the elimination of the one-acre threshold for development and redevelopment exempting small sites from having to comply with the more stringent detention and water quality regulations.

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”). Ecology and intervenors PSA also participated in the hearing. We expect a ruling later this month that will address the procedural challenges brought by the Coalition as well as the challenges to some of the Low Impact Development requirements contained in the Permits.

The PCHB scheduled the hearing on the remaining permit issues for April 2014. Over the last few months, the Coalition, WSDOT, and King County have been working with Ecology 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 Ecology 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 appeal of the elimination of the one-acre threshold will be dismissed by the Coalition as Ecology has agreed to work with local governments and CTED to address concerns regarding the economic impacts of the elimination of that exemption on development and redevelopment, particularly in urban cores. Bellevue is not individually impacted by this issue as Council made a decision following issuance of the 2007-2012 Phase II Permit to forego implementing the one-acre threshold exemption in the City’s development regulations; however we support efforts to provide other local governments with adequate tools for economic development.

At the time the Coalition was created to pursue this appeal, Coalition members also entered into a Joint Prosecution Agreement which requires Council approval of this proposed settlement. Several members of the Coalition have already secured approval—the remainder have committed to taking this to their decision makers prior to the January 31, 2014 deadline agreed to by the parties.

EFFECTIVE DATE

If adopted, this Resolution will be effective immediately. Once all members of the Coalition have received approval from their legislative bodies, we will file a stipulated order of dismissal with the Board and Ecology will issue the Permit clarifications and guidance documents.

OPTIONS

1. Adopt Resolution No. ~~1086~~ approving the proposed settlement of the remaining issues on the Coalition appeal of the 2013-18 NPDES Permit.

2. Do not adopt Resolution No. 8686 and provide alternative direction to staff.

RECOMMENDATION

Move to adopt Resolution No. 8686

ATTACHMENTS

Proposed Resolution No. 8686 and Exhibit "A" thereto.

CITY OF BELLEVUE, WASHINGTON

RESOLUTION NO. 8696

A RESOLUTION approving 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 Bellevue 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 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 Bellevue and wishes to accept the proposed settlement of the remaining issues in the appeal of the 2013-2018 NPDES Phase II Permit;

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES RESOLVE AS FOLLOWS:

Section 1. The City Manager or his designee is authorized to execute a settlement of the remaining issues in the appeal of the 2013-2018 NPDES Phase II

2955-RES
1/16/2014

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

Passed by the City Council this _____ day of _____, 2014,
and signed in authentication of its passage this _____ day of _____,
2014.

(SEAL)

Claudia Balducci, Mayor

Attest:

Myrna L. Basich, 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 waters, to which a discharge occurs via an outfall or via sheet/dispersed flow. Receiving waters also include ground water 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
- "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.