

A WHITE PAPER

UNDERSTANDING STORMWATER REGULATION

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STORMWATER - WHY SHOULD REALTORS® CARE AND WHAT SHOULD THEY DO?

Beginning in March 10, 2003, stormwater regulation in Washington State will impact residential development more than ever before. This date marks the deadline for compliance with the Environmental Protection Agency's (EPA) Stormwater Phase II regulations, implemented in Washington State by the Washington Department of Ecology (Ecology). To meet Phase II requirements, Ecology will be issuing two new general permits that impact residential real estate development:

Construction sites disturbing between 1 and 5 acres and discharging stormwater to surface water or a municipal stormwater sewer will be required to obtain coverage under a general permit. Under previous stormwater Phase I rules, only sites over 5 acres were required to obtain coverage under a construction general permit.

Small municipal separate storm sewer systems (MS4s) in urban areas will be required to obtain coverage under a general permit. This requirement will apply to approximately 90 local governments in Washington, as opposed to only six large local governments that were regulated under Phase I.

Ecology also recently adopted a Stormwater Management Manual for Western Washington and is in the process of adopting a similar manual for Eastern Washington. The Manuals, however, are not regulations and have no binding authority on local governments or developments. Rather, the manuals provide a source of stormwater Best Management Practices (BMPs). However, Ecology may seek to require compliance with the Manuals as a condition of compliance with stormwater general permits.

On the statewide level, REALTORS® should participate in the development of the construction general permit and municipal general permit to ensure that they are workable for both large and small sites. In addition, Ecology's Manuals should be a source of BMPs, not a condition for compliance with stormwater permits.

Locally, REALTORS® should work to ensure that the stormwater programs adopted by local governments to meet the requirements of the Phase II regulations include flexibility in the selection of BMPs and do not require incorporation of Ecology's Manual as a condition of compliance. A number of local governments have previously chosen to adopt their own local stormwater technical manuals rather than relying on Ecology's. This allows local developers and consultants to become familiar with technical standards based on particular local situations.

The following white paper provides a more detailed discussion of the impending stormwater regulations in Washington State and their likely impacts.

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I. EXECUTIVE SUMMARY

Stormwater regulation is one of the most complicated areas of environmental law, from both a legal and technical perspective. The term "stormwater" is not limited to water runoff generated only by storms, but encompasses all surface water runoff. Stormwater has become the subject of increasing regulatory action as the amount of impervious surfaces increase in urban areas. The purpose of the paper is to give an overview of where stormwater regulation came from, where it is going, and to offer some suggestions on how interested citizens can help shape the implementation of these regulations.

Stormwater regulation originates with the federal Clean Water Act, (CWA) which was amended in 1987 to classify stormwater as a point source discharge.¹ Since 1987, the federal Environmental Protection Agency (EPA) has implemented the stormwater provisions of the CWA through a series of regulations, generally referred to as Phase I and Phase II.

The EPA regulations have been implemented in Washington State by the Department of Ecology (Ecology), to which the EPA has delegated their authority to implement federal water quality programs. Implementation of stormwater requirements occurs through either individual permits, which are site specific, or general permits, which apply to general categories of activity.

In addition to the EPA's Phase I and Phase II program implemented by Ecology, Washington State has additional stormwater programs that are not required under federal law. For example, RCW Chapter 90.71 authorizes the development of the Puget Sound Water Quality Management Plan (PSWQMP). The PSWQMP includes a variety of water quality objectives for Puget Sound, and is updated every two years. One of the major provisions of the PSWQMP directed Ecology to produce a technical stormwater manual.

Under this direction, Ecology adopted the Western Washington Stormwater Manual (Manual) in December of 2001, and is currently working on a separate manual for Eastern Washington. According to their own terms, these Manuals are intended to be merely a reference guide for local governments and proponents of construction projects that are required to adopt stormwater plans.

Note: The manual is not a regulation or law, but a source of technical information. The minimum requirements and technical guidance in the manual only become required through either the adoption of ordinances and rules established by local governments or permits issued by local, state and federal authorities.

¹ A "point source" discharge, as opposed to a "non point source," discharge, is a discharge with a direct conveyance to a water body or storm drain, such as a ditch or pipe.

It remains unclear what Ecology's response will be if a local government chooses not to either adopt the Manual wholesale, or adopt what Ecology considers as an equivalent to the Manual. In ongoing negotiations over the general stormwater permits for construction activity, the proper role of the Manual, either as a mandatory requirement for permit coverage or simply a technical reference, is still hotly debated.

Stormwater Manual issues aside, there are two major stormwater programs that will impact the residential real estate industry. First, the EPA's Stormwater Phase II requires that certain local governments adopt a stormwater program including six requirements by March of 2003.² Second, Ecology is developing two general stormwater permits for construction activities.³

The first construction general permit will cover construction sites already regulated by Stormwater Phase I, which are those construction sites disturbing five or more acres and discharging water to surface waters or a municipal storm sewer. The second construction general permit will be designed specifically for construction sites between 1 and 5 acres.

While the construction general permit for sites over 5 acres will be issued during 2003, it is not likely that the construction general permit for sites between 1 and 5 acres will be issued during that time even though those sites must also obtain coverage as of March 2003. Consequently, sites between 1 and 5 acres may obtain coverage under new construction general permit until the general permit for small sites is issued.

Currently, a Construction Stormwater General Permit is being drafted by Ecology and reviewed through Ecology's Stormwater Advisory Committee (SAC). The SAC was established after Ecology's first attempt at reissuing the Construction Stormwater General Permit was derailed by permit appeals.

In addition, Ecology will convene an additional advisory committee to provide input on the development of the construction general permit for small sites. Ecology has not yet started development of the municipal general permit.

² Stormwater Phase II will impact approximately 90 local governments in Washington.

³ Ecology has stated that while it intends to issue two separate construction general permits, one for sites disturbing 1-5 acres, the second for sites disturbing 5 acres or greater, it may ultimately issue only a single construction general permit that would apply to all sites over 1 acre.

II. STORMWATER REGULATION: HISTORY AND EXISTING PROGRAMS

A. The Federal Clean Water Act

Stormwater is primarily regulated by the federal Water Pollution Control Act (FWPCA), enacted in 1972 with the broad policy objective of restoring and maintaining the chemical, physical and biological diversity of the nation's waters.⁴ The FWPCA was amended in 1977 and renamed the Clean Water Act (CWA). One goal of the CWA was to eliminate the discharge of pollutants into the nation's navigable waters by 1985. To this end, the CWA established a permit system requiring that any discharge of pollutants be pursuant to a permit issued by either the EPA or an EPA-approved State agency.⁵

In furtherance of the CWA's stated purpose of eliminating water pollution, Congress re-categorized stormwater discharge from a non-point to a point source of pollution through amendments to the Clean Water Act in 1987. Because of this, certain stormwater dischargers would be required to obtain National Pollution Discharge Elimination System (NPDES) stormwater or water quality discharge permits.⁶ As part of this new stormwater program, the EPA developed a two-phase national stormwater permit program for non-agricultural stormwater discharges to be implemented by the States with federal approval and assistance.

In 1990, the EPA developed the first phase, Phase I of the NPDES stormwater program, which requires permits for certain industries, construction sites involving more five or more acres, and municipalities with a population of more than 100,000. In 1999, the EPA adopted final Phase II NPDES regulations, extending stormwater compliance to smaller municipalities and businesses.⁷

1. Stormwater - Phase I

Phase I NPDES stormwater permit requirements applied to certain construction, industrial, and municipal stormwater discharges:

Construction. - Phase I requires permits for stormwater discharges from construction sites disturbing five acres or more of land to surface or into a municipal separate stormwater sewer system (MS4).

Stormwater discharges from activities disturbing less than five acres also must be covered by a Phase I permit if they are part of a "larger common plan of development or sale" that is five acres or greater.

⁴ 33 U.S.C. § 1251(a).

⁵ 33 U.S.C. § 1342. In Washington, Ecology is the designated state agency for meeting the requirements of the FWPCA.

⁶ See the Water Quality Act of 1987 [P.L. 100-4] and 40 CFR Part 122.

⁷ US EPA, Phase II NPDES Storm Water Program Overview, located at: http://cfpub1.epa.gov/npdes/stormwater/swphase2.cfm?program_id=6.

Municipal. Phase I also requires all operators of MS4s in municipalities with a population of more than 100,000⁸ to obtain an NPDES permit, and develop a storm water management program designed to prevent harmful pollutants from being washed by storm water runoff into the MS4 (or from being dumped directly into the MS4), then discharged from the MS4 into local water bodies.

Industrial. Phase I Storm Water Program includes an industrial storm water permitting component. Operators of industrial facilities included in one of the 11 categories of "storm water discharges associated with industrial activity"⁹ that discharge storm water to a municipal separate storm sewer system (MS4) or directly to waters of the United States require authorization under a NPDES industrial storm water permit. If an industrial facility has a Standard Industrial Classification (SIC) code or meets the narrative description listed in the 11 categories, the facility operator must determine if the facility is eligible for coverage under a general or an individual NPDES industrial storm water permit. In some cases, a facility operator may be eligible for a conditional/temporary exclusion from permitting requirements.

2. Stormwater - Phase II

In 1999, the EPA signed into rule the final Phase II stormwater regulations. For REALTORS®, Phase II requirements will have impacts in two major ways. First, numerous cities and counties in Washington will be required to obtain coverage for their stormwater systems. Under the new Phase II rule, up to 90 additional municipalities in Washington may need coverage under a municipal stormwater permits. Phase II requirements for local governments include the following six provisions:

1. Public Education and Outreach
2. Illicit Discharge Detection and Elimination
3. Post-Construction Runoff Control
4. Public Participation/Involvement
5. Construction Site Runoff Control
6. Pollution Prevention/Good Housekeeping

⁸ Called "medium" and "large" municipal separate storm sewer systems ["MS4s"]. The Phase I program requires operators of medium and large MS4s (those that generally serve populations of 100,000 or greater), to implement a stormwater programs a means to control polluted discharge. In Washington State, jurisdictions subject to Phase I municipal requirements are Seattle, Tacoma, King County, Pierce County, Snohomish County, and Clark County.

⁹ 40 CFR 122.26 (b)(14)(i)-(xi).

Second, Phase II will apply stormwater controls to construction activities that disturb as little as 1 acre and discharge stormwater to surface water or a municipal storm sewer. Under EPA's earlier Phase I rules, only construction sites over 5 acres were required to obtain coverage for stormwater discharge. Phase II regulation of construction sites disturbing between 1 and 5 acres will dramatically increase the number of sites for which stormwater permit coverage is required.

Compliance with Phase II requirements both for local governments and developers will occur through the issuance by Ecology of general permits. These permits are currently being developed by Ecology and are discussed in greater detail below.

B. Washington State Stormwater Programs

Washington State implements a number of different programs dealing with stormwater. First, Ecology implements the requirements of EPA's Phase I and Phase II stormwater programs.¹⁰ Thus, while the regulations are adopted by EPA, they are implemented at the state level by Ecology. The components of Phase I and Phase II of greatest interest to REALTORS® are those dealing with construction sites and municipal stormwater systems. Both of these are implemented through general permits discussed in greater detail below.

In addition to the requirements in federal Phase I and II stormwater programs, there are a number of existing stormwater programs, policies, and guidance documents. The following are the major stormwater programs in Washington State:

1. Puget Sound Water Quality Management Plan (PSWQMP)

To coordinate government actions for the Puget Sound, the 1996 Legislature established the Puget Sound Water Quality Action Team (the Action Team) and the Puget Sound Council pursuant to RCW 90.71. The Action Team, with input from the Council, was directed to establish a biennial Puget Sound work plan for implementation in Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston and Whatcom counties.¹¹

Under the Plan, every city and county shall develop and implement a comprehensive stormwater management program.¹² The Plan requires city and county stormwater programs to include the following provisions:¹³

¹⁰ RCW 90.48.260

¹¹ RCW 90.71.020(2)(a).

¹² 2000 PSWQMP, SW 1.2, page 100.

¹³ Id, SW 1.2(a)-(m), p. 100-102.

- a. Stormwater Controls for New Development and Redevelopment
- b. Stormwater Site Plan Review
- c. Inspection of Construction Sites
- d. Maintenance of Permanent Facilities
- e. Source Control
- f. Illicit Discharges and Water Quality Response
- g. Identification and Ranking of Problems
- h. Public Education and Involvement
- i. Low Impact Development Practices
- j. Watershed or Basin Planning
- k. Funding
- l. Monitoring
- m. Schedule for Implementation

2. Relationship between PSWQMP and Stormwater Phase II

A key distinction between the stormwater requirements for local governments under the PSWQMP and Stormwater Phase II is that Phase II is mandatory under the EPA's regulations, while implementation of stormwater provisions under the PSWQMP is not mandatory. RCW 90.71.070 states that "local governments are required to implement local elements of the work plan *subject to the availability of appropriated funds or other funding sources.*" In practice, many local governments have implemented stormwater-related components of the PSWQMP even though no funding has been provided. Implementation of the PSWQMP components has occurred for a number of reasons.

First, local governments consider stormwater regulations to be a necessary element of the comprehensive set of development regulations that protect the environment. Second, local governments viewed implementation of PSWQMP stormwater components as an opportunity to get a jump on the mandatory Phase II NPDES requirements, as some of the elements of the PSWQMP are also included in Phase II.¹⁴

A comparison of the components required in the Phase II program in relation to the PSWQMP reveals a number of provisions that exist in both programs. The following table compares the stormwater elements in the PSWQMP with the six requirements of Stormwater Phase II program:

¹⁴ Association of Washington Cities Needs Assessment for NPDES Phase II Permit Process; Personal Conversation with AWC staff.

A. Phase II Requirements	B. PSWQMP Requirements
Public Education and Outreach	Public Education and Involvement
Public Participation/Involvement	
Illicit Discharge Elimination and Protection	Illicit Discharges and Water Quality Response
Construction Site Runoff Control	Stormwater Controls for New Development and Redevelopment
Post-Construction Runoff Control	Stormwater Site Plan Review
	Inspection of Construction Sites
	Maintenance of Permanent Facilities
	Source Control
Pollution Prevention/Good Housekeeping	Identification and Ranking of Problems
	Low Impact Development Practices
	Watershed or Basin Planning
	Funding
	Monitoring
	Schedule for Implementation

While previous PSWQMPs have focused mainly on stormwater program components beyond EPA's Phase I and Phase II, the public review draft of the 2003-2005 Work Plan recognizes Phase II compliance as the primary stormwater regulatory program facing local governments. Thus, the draft 2003-2005 plan includes the following stormwater objective:

“Administer an enhanced municipal stormwater program within the Puget Sound basin, as well as statewide, which will include education on EPA's Phase II NPDES Stormwater rules. Provide technical and financial assistance to cities and counties to help them develop comprehensive stormwater programs, including development manuals, ordinances, and education.¹⁵

¹⁵ Puget Sound Water Quality Action Team Draft 2003-2005 Work Plan, SW-1, p. 39.

3. Ecology's NPDES General Permit Program

Ecology's general permit program is the heart of stormwater regulation in Washington State. In addition to implementing the requirements of EPA's Phase I and Phase II stormwater programs, Ecology's general permit program also is used to implement Washington's waste discharge permit program.¹⁶ Washington's waste discharge permit program goes beyond the requirements of the federal NPDES program. For example, Washington's waste discharge permit system regulates discharges to "waters of the state," a term more broad than the term "navigable waters" used by EPA's NPDES program.

Ecology implements this authority by issuing general permits under Chapter 173-226 WAC. Coverage under a general permit is obtained by filing a Notice of Intent with the Department of Ecology. The general permit requires the covered entity to prepare a Storm Water Pollution Prevention Plan and Erosion Control Plan (SWPPP). These plans adopt and implement BMPs for the control of stormwater. BMPs are available from a number of sources, including Ecology's Stormwater Management Manual, King County's manual, and EPA. Ecology must incorporate permit conditions that require "all known, available, and reasonable treatment methods" (AKART) to control pollutants in stormwater discharge.¹⁷ BMPs are considered the primary means for achieving compliance with state water quality standards, and the use of BMPs in general permits to meet NPDES requirements complies with state and federal law.¹⁸

In 1992, Ecology issued its baseline stormwater general permit which covered both industrial and construction activities in 1992. In 1995, Ecology reissued separate industrial and construction general permits to replace the 1992 permit. The updated construction general permit was appealed, but was affirmed by the Pollution Control Hearings Board.¹⁹ Ecology again reissued the industrial and construction general permits in 2000, and again both permits were appealed.²⁰ Ecology also issued a municipal general permit in 1995.

Because EPA's Stormwater Phase II rules made significant changes in the types of stormwater discharge requiring coverage, Ecology has been in the process of reissuing the construction, industrial, and municipal general permits. The construction and municipal permits are of greatest importance to REALTORS® and are discussed in more detailed below.

¹⁶ Chapter RCW 90.48

¹⁷ RCW 90.48.520.

¹⁸ *Save Lake Sammamish v. Ecology*, PCHB No. 95-141 (1996).

¹⁹ *Save Lake Sammamish*, at 4; WAC 173-226-070(1)(d).

²⁰ *Puget Soundkeeper Alliance et al. v. Ecology and Association of Washington Business*, PCHB No. 00-173-4 (2001)

a. Construction Stormwater General Permit

Ecology is currently working to reissue the Construction Stormwater General Permit. The effort to reissue this general permit started a number of years ago. Ecology issued a Construction Stormwater General Permit on October 4, 2000. However, that permit was appealed to the Pollution Control Hearings Board (PCHB) by a coalition of environmental groups.

In response, the Washington State Department of Transportation and the Association of Washington Business intervened in the lawsuit to support issuance of the permit. The parties subsequently reached a settlement agreement requiring that the construction stormwater general permit must be revised and reissued by December 18, 2002. However, Ecology will not meet this deadline.

In July of 2002, Ecology released a draft construction general permit for public review. Ecology's Stormwater Advisory Committee, established in 2000 as part of the stormwater permit appeal settlement, has been involved in reviewing the draft permit. During the fall of 2002, the Stormwater Advisory Committee reviewed issue papers from Ecology dealing with key aspects of the permit. As of December 2002, ecology has stated that it will develop a separate permit for 1 to 5 acre sites. While the separate permits will include provisions similar to the permit for sites over five acres, Ecology has indicated that the small sites permit will have a tiered approach to make it easier both for Ecology to implement and for purposes of compliance. In addition, it is unclear whether Ecology will deviate from provisions recently adopted in the general industrial stormwater permit, or whether that permit foretells the eventual components of the construction general permit(s).

One thing is clear: Standard Best Management Practices (BMPs) for all sites under the construction general permit have been intensified. A number of particular provisions are worth noting, including:

- Formalized monitoring and reporting for all scale of projects. Although this requirement is fairly routine for mid-to-large sized projects, it was not typically required for smaller scale construction, and thus represents an increased cost and effort (though typically minor) for small projects.
- A tighter interpretation of the obligation to maintain turbidity and pH water quality standards in the receiving water per WAC 173-201A-030, with BMP or maintenance response required after measured exceedence.
- A certification requirement was added for erosion inspectors.

- Concrete work can result in stormwater that is very alkaline (high pH), so pH control (i.e., acquiring authorization to discharge to sewer or more expensive treatment) may be mandatory. Neutralization with dry ice and/or infiltration to uplands (away from immediate drinking water well proximity under some circumstances) are other solutions typically employed.
- The new permit adds stormwater detention as a requirement during construction. This is a large and potentially significant difference. Depending on the site and amount of grading, the water control necessary to remove sediments probably brought some (larger) sites close to detention requirements, but this requires that detention facilities be built first. Many medium to large-scale projects were doing this routinely, and for those projects the practical difference may be little more than outlet orifice control.
- For projects where temporary ponds need to be used prior to full construction of permanent facilities, this is a large potential cost difference for construction phasing and site access. This also raises questions for what detention means on a changing construction site that is being graded (i.e., how modeled and detention criteria). If it becomes necessary to assume the whole worked site is effectively impervious, the construction detention could exceed developed detention volume requirements, which would also be a big impact on all projects.
- The new permit adds within-site maintenance requirements. Daily cleanup interior to the site, even under the driest weather conditions, will add time and cost to any project, both at the plat infrastructure stage and for builders of individual lots.
- Wet/Dry season definition and cover measures under the new permit and 2001 Manual's required Best Management Practices [or their functional equivalents] are very similar to BMPs routinely required and/or implemented by most contractors today, so these provisions likely will make little practical difference to any scale of project. Their implementation and maintenance will be made more visible by the monitoring requirement.
- The new General NPDES permit will formalize mass grading restrictions to the dry season unless it can be proved there will be no impact under the proposed construction and its BMPs, but leave the final decision up to the local jurisdiction. This restriction was effectively already in place through SEPA and most local grading

permits. Those jurisdictions that shared this concern were already free to impose a limitation to “mass grading” to the dry season, and were already doing so.

In addition, the Pollution Control Hearings Board's (PCHB) partial stay of the construction general permit affects any project directly discharging to a portion of a receiving water with a Total Maximum Daily Load (TMDL) program in place, or listed as 303(d) limited, or having a local management plan for, any one of four water quality parameters. These are pH, sediment, phosphorus, or turbidity. In those cases, the SWPPP for the construction project must demonstrate it can do one of the following:

- Avoid discharge to the triggering reach of the receiving water (through diversion or infiltration); or
- Offer compelling reasons why practices other than diversion would prevent adverse impact.

One of the results of intensifying standards under the general permit is that Ecology is increasingly likely to issue Individual Permits rather than General Permits to larger scale projects, particularly those lasting more than one construction season. Individual Permits have advantages to developers over General Permits for large projects that should not be overlooked, and thus generally should not be considered adverse. These advantages include assignment of a project manager by Ecology. That person becomes familiar with the site and its conditions and will consequently be more subjective (and less reflexive) in evaluating permit compliance and reasonable response to conditions which arise, relative to an Ecology inspector responding to a citizen complaint with no prior project history.

b. Stormwater Construction General Permit for Small Sites

As noted above, Stormwater Phase II reduces the threshold size of construction sites that are subject to stormwater regulation. While Phase I applied to sites disturbing over 5 acres, Phase II applies to sites disturbing over 1 acre and discharging stormwater to a surface water or municipal storm system. The impact of stormwater general permit coverage on small construction is of great concern due to potential cost impacts. Ecology has been made aware of the cost and complexity of stormwater regulation for such small sites by a number of groups involved in the Stormwater Advisory Committee.

While Ecology has stated that it will issue a permit specifically for such small sites, it is unclear whether Ecology will actually do so or instead would make modification to the construction general permit for sites over 5 acres. However, Ecology has the authority to issue a separate general permit for construction sites between 1 and 5 acres that is more simplified than the general construction permit applicable for sites over 5 acres.

c. Stormwater Municipal General Permit (Phase I and Phase II)

Stormwater Phase II rules will require local governments to develop stormwater programs that include six main elements:

1. Public Education and Outreach
2. Illicit Discharge Detection and Elimination
3. Post-Construction Runoff Control
4. Public Participation/Involvement
5. Construction Site Runoff Control
6. Pollution Prevention/Good Housekeeping

In sum, Phase II extends mandatory stormwater compliance to smaller local governments.²¹ These municipal stormwater systems are frequently referred to as MS4s, for “municipal separate storm system.” Nationwide, about 3,500 municipalities will be included under the small MS4s program. As part of the Phase II program, small MS4s located in “urbanized areas” are required to develop, implement and enforce a stormwater management program.²² To comply with Phase II federal regulations, Ecology intends to require those jurisdictions to adopt Ecology’s Manual or a technically equivalent manual.

To at least partially fulfill Phase II requirements, Ecology intends to require the Phase II municipalities in Western Washington to adopt ordinances, minimum requirements, and BMPs equivalent to those in this updated manual. Essentially, this would be the same permit condition as currently required of Phase I municipalities. However, a different schedule for compliance may be necessary for some municipalities. Municipalities within the Puget Sound Basin may have already completed these tasks based on the Puget Sound Water Quality Management Plan or as encouraged by the State’s strategy for salmon recovery.²³

The new Phase II rule also requires an evaluation of cities outside of urbanized areas that have more than 10,000 people to determine if a permit is necessary for some or all of these cities.²⁴ In Washington, 78 municipalities will likely be subject to the Phase II requirements while up to 13 additional municipalities may be subject to the requirement, depending upon the analysis Ecology will perform.²⁵

²¹ US EPA, Phase II NPDES Stormwater Program Overview, located at: http://cfpub1.epa.gov/npdes/stormwater/swphase2.cfm?program_id=6.

²² Id.

²³ Department of Ecology, Water Quality Program, *Revised Stormwater Management Manual for Western Washington*, Volume 1, 1:11-1:12. (August 2001).

²⁴ Id.

²⁵ Department of Ecology, Water Quality Program, *Stormwater Management Manual for Western Washington*, Volume 1-Minimum Technical Requirements, 1:11 (August 2001).

According to EPA rules, Ecology must issue permits for all of Phase II by December 2002, and permit holders must have permit coverage by March 2003. Those requiring coverage under Phase II of the NPDES program may either chose to apply for individual permit coverage under Phase II requirements or may apply for general Phase I permit coverage until Phase II is developed. Ecology has stated that it will not begin developing a Phase II general permit until sometime in 2003, so it is likely that Phase II municipalities will seek coverage under the Phase I municipal permit or work with Ecology individually to develop an interim procedure to comply with Phase II requirements.

d. Other General and Individual Stormwater Permits

While the Construction General and Municipal General Stormwater Permits are of greatest importance to REALTORS®, there are also numerous other stormwater permits issued by Ecology. General permits are required for industrial activities, sand and gravel operations, boatyards, and other industry groups. A number of facilities also apply for individual stormwater permits.

Recent actions on the Industrial Stormwater General Permit should be understood as they may impact future action on the Construction Stormwater General Permit. In September 2002, Ecology issued a revised Industrial Stormwater General Permit (ISWGP), as required by the settlement agreement to the appeal of the previous ISWGP in 2000. This permit was appealed by Snohomish County, the Boeing Company and the coalition of environmental groups that appealed the 2000 permit. The appeal includes a claim relating to the provision requiring compliance with the Stormwater Manual as a condition of complying with the ISWGP. While the procedural course for the appeal is uncertain, its eventual outcome could impact the Construction Stormwater General Permit, including how the Stormwater Manual is used as a permit condition.

III. ECOLOGY'S STORMWATER MANUAL

A. Overview and Authority for the Stormwater Manual

The Legislature established the Puget Sound Water Quality Action Team and directed the Team to develop rules to coordinate local governmental efforts to protect water quality in the Puget Sound Basin. This resulted in the Puget Sound Water Quality Management Plan (PSWQMP). This Plan directed Ecology to develop and maintain the region's technical stormwater manual for new development and redevelopment.²⁶

²⁶ Id 1-9, authority from RCW 90.71, specifically RCW 90.71.005 and .070.

The Plan directs every city and county in the Puget Sound Basin, federal, state, tribal and local governments in Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston and Whatcom counties; in total, 122 cities and counties and hundreds of special districts, to develop and implement a comprehensive stormwater management program.²⁷ The PSWQM plan states city and county adoption of local stormwater management plans shall be implemented to the maximum extent possible²⁸ and as soon as practicable.²⁹ The timeline for implementation of the recommendation and best management practices in the Manual vary depending on the type of discharge, the activity within the local government area and when a local government or individual business will need a permit or a renewed permit.

While the Manual offers technical resources to local governments and developers, it has no independent legal authority.³⁰ The legal requirements relating to stormwater are found in EPA's Phase I and II regulations and Ecology's general and individual permits. While compliance with the Manual is not an absolute legal requirement, a few local governments in Washington state have adopted Ecology's Manual by reference, making it a requirement for complying with local stormwater or surface water management requirements. Other local governments, such as Seattle, Tacoma, King County, Pierce County, and Kitsap County have developed their own stormwater management manuals.

The 2000 plan states that all city and county stormwater programs "adopt and require the use of the Department of Ecology's stormwater technical manual (or an alternative manual) . . . "³¹ The 2000 Plan describes the Stormwater Manual as follows:

Ecology shall maintain a stormwater technical manual for new development and redevelopment with overall goals of protecting and restoring aquatic species and habitat, water quality and natural hydrology and processes, including achieving no net detrimental change in natural infiltration and surface runoff, particularly for new development sited outside of urban growth areas."³²

²⁷ Id at 1-7, authority based in RCW 90.71.07(1)-(2).

²⁸ RCW 90.71.005.

²⁹ Under the Puget Sound Water Quality Protection Act (RCW 90.71). Specifically, "it is... the policy of the state to implement the Puget Sound water quality management plan to the maximum extent possible" (RCW 90.71.005) and "Local governments are required to implement local elements of the work plan subject to the availability of appropriated funds or other funding sources" (RCW 90.71.070).

³⁰ Washington State Department of Ecology, Water Quality Program, *Stormwater Management Manual for Western Washington*, Volume I, pg 5, Olympia, WA. (August 2001).

³¹ PSWQMPSW 1.2(a), p. 100.

³² Id. at 101-102.

The Manual was also referenced in Ecology's Construction General Permit issued in 2000:

BMPs [Best Management Practices] shall be selected from the most recent published edition of the SWMM, that has been available for at least 120 days prior to BMP selection, or other equivalent manuals available at the time of BMP selection or when the selection of additional BMPs is necessary.³³

The Manual is also referenced in Ecology's July 2002 draft of the revised Construction General Permit:

BMPs shall be selected from the most recent published edition of the appropriate regional or local SWMM that has been available for at least 120 days prior to BMP selection.³⁴

The draft permit eliminates references to "other equivalent manuals," which has raised the question of whether Ecology is attempting to make compliance with the Manual an absolute requirement of coverage under the construction (and perhaps other) general permits. The issue of whether Ecology can require compliance with the Manual as a condition of compliance with a general permit is part of the appeal filed by Snohomish County in September 2002 over the Industrial Stormwater General Permit.

When Ecology issued the revised Stormwater Management Manual in August 2001,³⁵ they made some significant changes to the Manual including: expansion of the scope of the Manual to all of western Washington, creation of a Manual for eastern Washington, and updating technical material as a result of changes in federal stormwater regulation and proposed and actual Endangered Species Act listings over the last decade.

Most significantly, the geographic scope of the Manual has expanded from the Puget Sound Basin to the entire state. As noted, Ecology has already published the western Washington version of the Manual, and is currently drafting, and intends to complete, a Stormwater Management Manual for eastern Washington by May 2003.

In addition to Ecology's general and individual stormwater permit program, agencies could attempt to require compliance with Ecology's Manual through other regulatory programs. Recently, the Governor's Salmon Recovery Office sent a letter to the Independent Science Panel, established to review issues relating to salmon recovery in Washington State, seeking input on the Manual and how it is consistent with scientific objectives in the state's salmon recovery strategy.

³³ Ecology NDPEs and State Waste Discharge Permit for Stormwater Discharges Associated with Construction Activities, October 4, 2000, Condition S9.B.7.

³⁴ Draft Ecology NDPEs and State Waste Discharge Permit for Stormwater Discharges Associated with Construction Activities, July 2002, Condition S9.B.7.

³⁵ Washington State Department of Ecology, Water Quality Program, *Stormwater Management Manual for Western Washington*, 1:1- 1:3, Olympia, WA. (August 2001).

This has created concern that the manual will be applied in permitting situations for which it was not intended. For example, the adoption of BMPs in the Manual could be included as a requirement for issuance of a Hydraulic Project Approval (HPA) by Washington Department of Fish & Wildlife or by the National Marine Fisheries Service or U.S. Fish & Wildlife Service through an Endangered Species Act (ESA) § 7 consultation.

In addition to the changes in the revised Manual, it is also important to understand the distinction between Phase II requirements and recommendations outlined in Ecology's Manual. In the Manual, Ecology has listed the Puget Sound Water Quality Action Plan requirements in bold font while other suggestions or recommendations are listed in standard font.

It cannot be overstated that the Manual has no independent legal authority.

However, the Manual could become a regulatory requirement in a number of ways. First, compliance with the Manual could be a condition in the reissued Construction Stormwater General Permit. If that is indeed part of Ecology's revision, then the Department of Ecology may be required to undertake rule making for the Manual to become mandatory.³⁶ Second, local governments could adopt the Manual and its standards by reference as part of its Phase II program or to meet the Puget Sound Plan. More specifically, under the Puget Sound Water Quality Management Plan, local government officials shall either adopt or apply the requirements of the Manual directly or adopt and apply the requirements of an equivalent manual.

Statutory authority requires city and county adoption of local stormwater management plans be implemented to the maximum extent possible³⁷, as soon as practicable.³⁸ Third, other agencies such as Department of Fish & Wildlife or local governments could use the Manual in other permitting contexts.

Cities and counties that choose to develop an alternative technical manual are directed to submit their manual to Ecology, including an outline of the significant difference between the manuals and demonstrate how the alternative manual is substantively equivalent to Ecology's. The Plan directs Ecology to work with jurisdictions to ensure that all alternative manuals meet or exceed the standards in Ecology's technical manual.

³⁶ *General Electric Company v. E.P.A.*, 290 F.3d 377, 382 (2002)(if a document expresses a policy which the agency intends to make binding, the agency must observe legislative rulemaking procedures).

³⁷ RCW 90.71.005 states, "It is... the policy of the state to implement the Puget Sound water quality management plan to the maximum extent possible."

³⁸ Pursuant to RCW 90.71.070 of the Puget Sound Water Quality Protection Act, "local governments are required to implement local elements of the work plan subject to the availability of appropriated funds or other funding sources."

Although the Manual itself states that “adoption of either Ecology’s Manual or a ‘technically equivalent’ manual is required for all individuals or municipalities currently covered under the NPDES municipal stormwater permit,” the Manual does not outline the timeline or procedure for adoption of the Manual. Ecology’s assertion that the Manual may become a legal requirement through permit coverage is currently subject to appeal in the Industrial Stormwater General Permit, and may similarly be appealed if such a requirement is included in other permits.

B. Minimum Requirements for Local Governments and Developments

1. Generally

Volume I of the Manual identifies ten Minimum Requirements for stormwater management applicable to all new development and redevelopment sites. The minimum requirements are triggered to varying degrees by criteria described below. The minimum requirements are:

1. Preparation of a Stormwater Site Plan

A plan describing the existing water quality condition and the proposed management of stormwater.

2. Preparation of a SWPPP

A written construction phase plan to prevent surface water pollution and erosion, following 12 general requirements.

3. Source Control of Pollution

A requirement to apply best management practices as operational and structural practices to minimize pollutant entry to stormwater or maximize its removal, as defined by AKART (all known, available, and reasonable treatment).

4. Preservation of Natural Drainage Systems and Outfalls

Utilize existing drainage patterns while preventing erosion.

5. On-site Stormwater Management

Manage stormwater within the property boundary to extent feasible.

6. Runoff Treatment

Requires water quality treatment for greater than 0.75 acres of pollution generating pervious surface from which there is surface discharge, or greater than 5,000 square feet of pollution generating impervious surface (excludes roofs), and requires onsite stormwater BMPs for all projects.

7. Flow Control

Provide detention control except to the Columbia River, Lake Sammamish, Silver Lake, Lake Union, Lake Washington, and Whatcom Lake, or to marine waters, or to wetlands under some circumstances.

8. Wetlands Protection

Requires protection of wetland hydrologic condition and vegetation; some flexibility for modification following specific criteria.

9. Basin/Watershed Planning

Where applicable, projects in areas subject to basin or watershed plans must use any more stringent measures imposed by those plans.

10. Operation and Maintenance.

An operations and maintenance manual must be provided for all proposed stormwater facilities and BMPs, with responsible party identified.

However, Ecology considers the above descriptions to be generic to proper stormwater management in any region within the state of Washington, and has outlined such minimum requirements in the Manual for use throughout the State, not just the Puget Sound region. Depending on the type and size of the proposed project, different combinations of the minimum requirements above apply to development or redevelopment projects.

In general, small sites are required to control erosion and sedimentation from construction activities and to apply simpler approaches to treatment and flow control of stormwater runoff from a development site. While large sites must also provide erosion and sedimentation control during construction, large sites must also develop permanent control of stormwater runoff from the developed site through selection of appropriate BMPs and facilities, and other measures to reduce and control the onsite and offsite impacts of the project.

Sites being redeveloped must generally meet the same minimum requirements as new development for the new impervious surfaces and pervious surfaces converted from natural vegetation to a lawn or landscaped area. Redevelopment sites must also provide erosion control, source control, and on-site stormwater management for the portion of the site being redeveloped. In addition, if the redevelopment meets certain cost or space (as applied to road) thresholds, updated stormwater management for the redeveloped pervious and impervious surfaces must be projected. There must also be situations in which additional controls are required for sites, regardless of type or size, as a result of basin plans or special water quality concerns. Development and redevelopment sites must demonstrate compliance with these requirements through the preparation of Stormwater Site Plans (SSP).

Two major components of these plans are 1) a Construction Stormwater Pollution Prevention Plan (SWPPP), and 2) a Permanent Stormwater Control Plan (PSCP). The Construction SWPPP shall identify how the project intends to control pollution generated during the construction phase only, primarily erosion and sediment. In contrast, the PSCP shall identify how the project intends to provide permanent BMPs for the control of pollution from stormwater runoff after construction has been completed. Sites must submit these plans for review by the local government if they add or replace 2,000 square feet or more of impervious surface, or disturb a minimum of 7,000 square feet of land.

2. Applicability of Minimum Requirements

Not all of the Minimum Requirements apply to every development or redevelopment project. As previously stated, the applicability varies depending on the type and size of the project. Volume I of the Manual outlines which requirements apply to any given project. Volumes II through V of the Manual present Best Management Practices (BMPs) for use in meeting the Minimum Requirements. The 2001 Manual's list of construction-related BMPs is nearly identical to the list in the 1992 version of the same manual. Those few new types of BMPs that are listed are routinely employed at construction sites and thus may not represent a change in level of effort during construction.

In general, applicability of requirements in the manual are as follows:

The triggers for when the Ecology Manual provisions are required, or their functional equivalents, are set very low. The trigger for preparation of a construction SWPPP (minimum requirement 2) applies to any new or redevelopment project, regardless of size.

Minimum requirements 1 through 5 are triggered low enough to include even one moderate-sized single family home. Minimum requirement 1 through 5 provisions of the Manual for new development or redevelopment are triggered by:

- Greater than 2,000 square feet of new, replaced, or impervious surface, or
- Land disturbing activity for landscaping or construction or utilities greater than 7,000 square feet total.

New Development Manual Triggers

Even the smallest of subdivisions are likely to trigger all of the Manual minimum requirements. All Manual minimum requirement provisions are triggered by new development that proposes:

- Greater than 5,000 square feet of new impervious surface, or
- Greater than 0.75 acres (32,670 square feet) of native vegetation converted to lawn/landscaping, or
- Conversion of 2.5 acres or more of native vegetation to pasture.

Redevelopment Manual Triggers

Redevelopment triggers all minimum requirements of the Manual if:

- The monetary value of the proposed improvements (including interior improvements) exceeds 50% of the assessed or replacement value of existing site improvements, AND
- The total of new (plus replaced) impervious surface is 5,000 square feet or greater.

For redevelopment, the local jurisdiction's requirement to retrofit to current stormwater standards must be as stringent as in Ecology's Manual. Ecology would measure this by equivalence between the results of the local jurisdiction's and Ecology's requirements in requiring retrofit. Retrofits only apply to the re-worked or new impervious surface under Ecology's manual; existing unworked impervious surfaces are managed as "off-site inflow" for the purposes of sizing facilities.

Projects that require road widening also have a lower threshold set to invoke manual provisions. For example:

- Roadway paving that replaces a gravel shoulder is no longer exempt and is considered a "new impervious surface;"
- Upgrading from chip seal to asphalt or concrete is considered new impervious surface.

IV. KEY STORMWATER ISSUES FOR REALTORS®

A. Stormwater Phase II Implementation

Of greatest importance to REALTORS® are Ecology's general permits that apply to construction activities and operation of municipal separate storm sewer systems (MS4). EPA's Stormwater Phase II rules made changes to the stormwater regulations applicable to both construction sites and MS4s that take effect in March 2003. Consequently, Ecology is in the midst of reissuing both the construction and municipal general permits.

At the local level, REALTORS® should become familiar with the current status of their local jurisdictions' stormwater programs. For example, most cities have already adopted stormwater programs, even before being required to do so by Stormwater Phase II. Local governments around Puget Sound have used the direction of the PSWQMP and available funding sources to adopt stormwater provisions. In addition, local governments have undertaken a number of planning actions on stormwater (whether done under the PSWQMP or not) to prepare themselves to meet Stormwater Phase II requirements.

Implementation of Stormwater Phase II by local governments should be the primary focus of REALTORS® efforts to be involved in the stormwater issue. REALTORS® can then work with appropriate local government staff to determine what stormwater provisions in addition to those already adopted will be necessary to meet the requirements of Phase II.

Of key importance to REALTORS® will be the Phase II requirements governing Construction Site Runoff Control, Post-Construction Runoff Control, and Pollution Prevention/Good Housekeeping. Local governments should be encouraged to review Ecology's stormwater management manual, EPA materials, and other sources of technical information to determine what types of stormwater control and BMPs will most cost-effectively meet Phase II requirements.

B. NDPES Construction General Permit Program

While implementation of municipal phase II stormwater regulations will occur at the local level, the development of the Construction General Permit and Construction General Permit for small sites will occur at a statewide level. REALTORS® and others concerned about stormwater regulations should closely monitor the development of the Construction General Stormwater Permit for sites over 5 acres, the Construction General Permit for sites between 1 and 5 acres, and the Municipal General Permit.

Ecology's Stormwater Advisory Committee is currently being used to obtain input on the Construction General Permit, and a new committee will be established to address issues particular to the general permit for small sites. REALTORS® should participate in the development of these general permits, as they will govern the stormwater controls applicable to any construction site disturbing over 1 acre and discharging to a surface water or municipal storm sewer.

In addition, Ecology must issue a small MS4 general permit for local governments subject to Stormwater Phase II. In some cases, this type of general permit can have impacts on developments that are already covered under a general permit. While local governments will be most active in developing this permit with Ecology, development interests should also participate in this process.

C. Administrative Law Considerations

An unanswered question is whether Ecology must subject components of its stormwater program to rulemaking. Thus far, Ecology has not submitted its Stormwater Management Manuals and General Permit Program to rulemaking procedures under Washington's Administrative Procedures Act, RCW Chapter 34.05. In order for rule-making procedures to apply, an agency action or inaction must fall into the APA definition of a rule.³⁹ Rule-making procedures under the APA involve providing the public with notice of the proposed rule and an opportunity to comment on the proposal.⁴⁰

The purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies that affect them. The remedy when an agency has made a decision that should have been made after engaging in rule-making procedures is invalidation of the action. Rules are invalid unless adopted in compliance with the APA.⁴¹

Under the APA, "rule" means

any agency order, directive, or regulation of general applicability ... (c), which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.... The term ... does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public...⁴²

For purposes of determining whether agency action is "rule" under state Administrative Procedure Act, action is of general applicability if applied uniformly to all members of class.⁴³ Therefore, when Ecology sets out priorities and establishes prerequisites to those decisions on water permits, the agency should engage in rule making so the public has some input into those decisions.

A strong argument exists that portions of Ecology's stormwater program constitute a "rule" and would therefore be valid only upon compliance with the rulemaking procedures of the APA. For example, in Ecology's draft Construction Stormwater General Permit, a turbidity standard is established that would be an effluent limitation. The establishment of such a standard in the general permit clearly becomes a rule of general application for all construction sites operating under the general permit and thus APA rulemaking would be required.

³⁹ *Failor's Pharmacy v. Department of Soc. & Health Servs.*, 125 Wash.2d 488, 493, 886 P.2d 147 (1994).

⁴⁰ See RCW 34.05.320, .325.

⁴¹ *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash.2d 640, 649, 835 P.2d 1030 (1992).

⁴² RCW 34.05.010(16).

⁴³ *Failor's Pharmacy v. Department of Social and Health Services* (1994) 125 Wash.2d 488, 886 P.2d 147.

Similarly, adoption or compliance with Ecology's Stormwater Manuals cannot be an absolute requirement for coverage under the Construction Stormwater General Permit unless the Manuals are adopted through rulemaking.

D. Federal Permits, the ESA, and Ecology's 2001 Stormwater Manual

Projects with any federal nexus (a federal decision, such as a permit authorization or funding; i.e., a US Army Corps of Engineers wetland fill permit [Section 404 of the Clean Water Act], Federal Highway Administration funding, federal low income housing grants) will require the federal entity involved to perform an evaluation of the entire project under the Endangered Species Act (ESA). That evaluation could result in the federal entity requesting formal or informal consultation under ESA (Section 7) from the US Fish and Wildlife Service (USFWS) and/or the National Marine Fisheries Service (NMFS).

These consultations will generally focus on detention standards and criteria with regard to stormwater management where ESA-listed fish species are concerned. Local jurisdictions have varying requirements for detention. If local requirements are less restrictive, it is wise for projects affected by a federal nexus to consider a higher standard, such as those contained in the 2001 Ecology Manual.

At issue is whether development on any site could have (independent of federal nexus) adverse impact to ESA-listed species, wetland bogs, "sensitive streams", steep slopes, aquifer recharge or protection zones, TMDL basin plan areas, shorelines, watershed or basin plans, or Washington Department of Natural Resource (DNR)-owned lands. For many of these categories, especially in unincorporated King, Snohomish, and Pierce Counties, local jurisdiction regulations may dictate particular protective measures. DNR is likely to use the Ecology Manual to evaluate proposals affecting lands under its control. Often these take the form of conditions of approval based on applicant information supplied in a SEPA Checklist (most projects) or an Environmental Impact Statement (larger projects or those in very sensitive areas).

In these cases, the newer 2001 Ecology Manual guidelines are more likely to become one of the evaluation criteria for project approval or conditions of approval. This is especially true for projects requiring a Section 401 (Water Quality) Certification from Ecology. Projects in unincorporated King County will be evaluated through the 1998 King County Surface Water Design Manual (SWDM), and are less likely to trigger discussion of the 2001 Ecology Manual unless there is a Section 401 Certificate application.

V. CONCLUSION

As noted at the outset, stormwater regulation has become one of the most complicated and far-reaching areas of environmental law. While the possibility exists that the more onerous aspects of stormwater regulation can be ameliorated through negotiations among interested parties, it is equally possible that it may take years of litigation to finally resolve all the disparate issues.

In the meantime, citizens who are concerned about how their local jurisdictions are implementing stormwater regulations must stay involved in the process to ensure that stormwater ordinances do what they are intended to do, without placing an unnecessary burden on the residential, commercial and industrial development that serves as our state's economic engine.

Appendix A – Municipalities Subject to Stormwater Phase II

<p>Mandatory Coverage <i>(Census Urban Areas)¹</i> The Phase II regulations require coverage for communities in Urban Areas, as defined in the 2000 Census</p> <p>Algona Auburn Beauz Arts Bellevue Bellingham Bonney Lake Bothell Bremerton Brier Burien Clyde Hill Covington Des Moines DuPont Edgewood Edmonds Enumclaw Everett Federal Way Fife Fircrest Gig Harbor Hunts Point Issaquah Kelso Kenmore Kennewick Kent Kirkland Lacey Lake Forest Park Lakewood Longview Lynnwood Maple Valley Marysville</p>	<p>Medina Mercer Island Mill Creek Milton Millwood Mountlake Terrace Mukilteo Newcastle Normandy Park Olympia Pacific Pasco Port Orchard Puyallup Redmond Renton Richland Ruston Sammamish SeaTac Selah Shoreline Spokane Steilacoom Sumner Tukwila Tumwater Union Gap University Place Vancouver West Richland Woodinville Woodway Yakima Yarrow Point</p> <p><u>The Urban Area of the following counties:</u> Benton County Cowlitz County Franklin County Kitsap County Spokane County</p>	<p>Thurston County Whatcom County Yakima County</p> <p>Potential Designation: <i>(Communities with greater than 10,000 population must be evaluated for coverage).</i> In addition to those communities that require mandatory coverage Ecology must evaluate communities with more than 10,000 population and a density of 1,000 persons per square mile or greater Note: Some of these communities could be designated as Urban Areas in 2000 Census</p> <p>Aberdeen Anacortes Arlington Bainbridge Island ² Camas Centralia Chehalis Ellensburg Enumclaw Monroe Moses Lake Mount Vernon Oak Harbor Port Angeles Pullman Sunnyside Walla Walla Wenatchee</p> <p>¹ These areas are listed as Urban Areas in the 1990 Census or are new cities incorporated within existing Urban Areas after the 1990 Census. The 2000 Census may include cities not listed here. ² Bainbridge Island is over 10,000 but does Not currently exceed 1,000 per sq. mile density threshold</p>
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Appendix B – Additional Resources

1. Ecology websites -

General - www.ecy.wa.gov/

Stormwater - www.ecy.wa.gov/programs/wq/links/sw.html

2. Environmental Protection Agency website -

www.epa.gov/ebtpages/water.html

3. Puget Sound Water Quality Action Team websites -

General - www.wa.gov/puget_sound/

Stormwater - www.wa.gov/puget_sound/programs/stormwater.html

4. King County Surface Water Management website

Stormwater - dnr.metrokc.gov/wlr/pubs/water-and-land-mangement.html

Appendix C - Status of General Stormwater Permits Impacting the Development Industry

<p>Construction Sites Over 5 Acres – Construction General Permit</p>	<p>EPA Stormwater Phase I rules require all construction sites disturbing over 5 acres discharging to surface water or municipal storm system to have coverage under a general construction permit. Ecology issued a Construction General Permit in 1995 to meet EPA Phase I requirements.</p>	<p>The existing 1995 construction general permit is still in effect because the reissued 2000 permit was appealed in <u>Puget Soundkeeper Alliance et al. v. Ecology et al.</u> Original 5-year permit term (1995-2000) coverage extended administratively by Ecology until new permit is issued. Appeal now stayed before PCHB pending issuance of the final permit. Final permit being drafted according to certain conditions in settlement. Based on PCHB stay, reissuance was expected by December 18, 2002. Now, issuance is not expected until June 2003. Ecology released draft permit for review in July 2002, and will produce a series of issue papers on permit topics during summer/fall 2002. Permit review conducted through Stormwater Advisory Committee established under PCHB stay.</p>
<p>Construction Sites Between 1 and 5 Acres – Small Sites Construction General Permit</p>	<p>EPA Stormwater Phase II rules require coverage by March 2003 for construction sites disturbing between 1 and 5 acres and discharging to a surface water or municipal storm system.</p>	<p>During the process underway to rewrite the Phase I large construction (5+ acre) general permit, Ecology is going to work with the Construction Stormwater Advisory Committee to address EPA's Phase II requirement for permitting "small" construction (1-5 acre) sites. It has not yet been determined if there will be a separate permit for 1-5 acre sites or if it will be a combined permit to cover all sites over one acre. A timeline for Phase II small construction permitting has not been developed yet, but coverage may be available as early as July 2003, with the reissuance of the current construction general permit. Ecology has stated that it will not require construction sites between 1 and 5 acres to obtain coverage under the general permit for sites over 5 acres, even though Phase II rules require discharge from such sites to be covered under a stormwater permit. If 1-5 acre operators wish to comply with the EPA Phase II deadline of March 10, 2003, they may seek coverage under the current construction stormwater general permit for sites larger than 5 acres.</p>
<p>Large Municipalities Municipal Stormwater General Permit</p>	<p>EPA Stormwater Phase I rules require certain large municipalities to obtain coverage for municipal separate stormwater systems. In Washington, municipalities subject to Phase I are: Seattle, Tacoma, King, Pierce, Snohomish, Clark, and WSDOT within those jurisdictions. Ecology issued 3 municipal general stormwater permits in 1995.</p>	<p>3 general permits under Phase I were issued by Ecology in 1995 and expired in 2000. Permit term extended administratively by Ecology until issuance of new permit. Draft permit not yet available for public review, and Ecology has delayed development of the new permit indefinitely due to lack of resources.</p>
<p>Medium and Small Municipalities Phase II Municipal Stormwater General Permits for Eastern & Western Washington</p>	<p>EPA Stormwater Phase II rules require +/- 90 medium and small local governments to obtain coverage for municipal separate stormwater systems. These jurisdictions must obtain coverage by March 2003. EPA phase II rules require compliance with the permit by the end of the first permit term, which lasts 5 years.</p>	<p>In Eastern Washington a model phase II stormwater program is being developed which will become the basis of a phase II permit. The model program should be completed in the spring of 2003. Western Washington permit development has not started. Because the EPA Phase II deadline for medium/small jurisdictions will occur prior to the issuance of general permits by Ecology, medium/small jurisdictions may apply for coverage for a Phase II permit on a form Ecology is developing for that purpose.</p>

