

# PACIFIC NORTHWEST DESIGN PROFESSIONAL LEGAL UPDATE

WASHINGTON OREGON ALASKA IDAHO

Summer  
2009

—Part Two—

Design and  
Construction  
Attorneys

Beth M. Andrus

William J. Bender

David K. Eckberg

Kara R. Masters

Peter A. Offenbecher

Lindsey M. Pflugrath

Terence J. Scanlan

Pamela S. Tonglao

## Spotlight on Stormwater: Anticipating Low Impact Development Requirements in Washington State

**N**ew municipal stormwater permitting requirements are on the horizon. Keeping abreast of these changes is necessary to provide accurate advice to clients, to avoid permitting delays and to keep projects on schedule and within budget.

Stormwater pollution is the number one urban water quality problem in the Pacific Northwest. Both the United States Environmental Protection Agency and the Washington State Department of Ecology (“Ecology”) recognize that pollutants in stormwater pose a significant threat to water quality. These agencies have responded to this threat by making stormwater an enforcement priority. As regulators devote greater attention to protecting and healing the waters of Washington, they are implementing a new paradigm for stormwater control.

Historically, the management of stormwater depended on engineered detention and conveyance facilities to modulate the runoff from storms of a certain magnitude. Runoff from smaller and more frequent storms, however, was left largely unregulated. “Low impact development” (“LID”) techniques represent a shift in focus from controlling flow volumes to increasing the capacity of devel-

oped sites to absorb rainwater through on-site infiltration. By reducing the amount of runoff, LID techniques also reduce the transport of pollutants into receiving waters. LID practices have proven to be technologically superior to and more cost-effective than conventional stormwater controls. Because of these attributes, LID practices are a good fit with the cost-conscious ethos shared by businesses and governmental entities alike.

In 2008, the Washington Pollution Control Hearings Board (“Board”) ruled that Ecology is legally required to mandate the use of LID techniques on new construction projects and redevelopment projects in areas covered by the Phase I Municipal Stormwater Permit (“Phase I Permit”). This article examines the options that Ecology is likely to consider as it promulgates regulations for making LID practices mandatory in certain new development and redevelopment projects.

### What is LID?

LID principles emphasize protection of the natural vegetated state and rely upon the natural capacity of soil and vegetation to attenuate flow and filter out pollutants. LID techniques minimize the discharges that would otherwise need to be conveyed off site through man-made struc-

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tures. In addition to maintaining natural vegetation on-site, LID practices include:

- Reduction of impervious surfaces on rooftops and at ground level
- Protection of natural drainage patterns
- Minimizing use of excavation foundations
- Construction of vegetated swales, rain gardens, green roofs
- Storage and reuse of runoff

LID techniques offer additional benefits in the form of temperature regulation and reduced energy use, enhanced aesthetics in the built environment, reduced flooding and increased groundwater recharge. Further, by retaining stormwater on-site, LID techniques help reduce combined sewer overflows.

### Washington State's New LID Mandate

Several local jurisdictions already require the use of LID techniques for specific kinds of projects. For example, Snohomish County requires LID in new developments that are “fully contained communities.” Other communities require LID in ecologically sensitive areas.

Although LID is hardly a new concept, the litigation before the Board represented a tipping point. Ecology was directed to do more than merely promote the voluntary application of LID principles; the state must affirmatively require that large municipalities and counties mandate the use of LID techniques where feasible at the individual parcel and subdivision levels. As a result of the Board's order, Washington is the first state to implement such a sweeping LID mandate.

On June 17, 2009, Ecology responded to the Board's order by publishing a modified Phase I Permit. The LID provision in the modified permit imposes the following requirement on each covered municipal permittee:

The [municipal stormwater management] program must require non-structural preventive actions and source reduction approaches, including Low Impact Development Techniques (LID), to minimize the creation of impervious surfaces, and measures to minimize the disturbance of soils and vegetation where feasible.

The LID requirement is not self-executing, because the municipal stormwater permit must ultimately contain clear, measurable and enforceable provisions for implementing the LID requirement. This means that Ecology must complete another round of rule-making to adopt substantive LID standards. In the Phase I Permit, Ecology stated that it will initiate a process for identifying LID techniques that must be considered by project proponents, criteria for determining whether reliance on LID is not feasible and a LID performance standard. Ecology plans to spend the next eight to ten months working with two advisory groups to develop recommendations regarding technical and policy issues. At the end of the regulatory development process, Ecology will again revise the Phase I Permit to incorporate enforceable performance criteria and an implementation schedule.

Ecology will convene two advisory groups to make recommendations regarding technical and implementation issues. Nominations for advisory committee membership may be submitted to Ecology through July 27, 2009. Nomination packets and criteria are posted on Ecology's municipal stormwater webpage. It is expected that each advisory committee will be comprised of approximately 12 members, including cities, counties, academic scientists, development industry representatives, environmental groups, engineers and LID practitioners, including consultants. Beginning in September 2009, each committee will hold monthly meetings that will be open to the pub-

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lic. All schedules, agenda, minutes and technical documents will be posted on Ecology's stormwater webpage. Relevant information will also be disseminated through Ecology's stormwater list-serve.

Ecology must also work to remove regulations that restrict or interfere with LID use. Common code requirements for curbs and gutters, prohibitions against open channel conveyances, minimum sidewalk widths and all-weather surfacing material requirements for driveways run counter to key LID practices, which provide for infiltration of rainwater close to the source in order to minimize runoff. Many cities have ordinances that restrict planting material in public spaces to species that do not exceed a specific height limit. Vector control ordinances and rodent harboring prohibitions may also limit the height of plantings and preclude the use of LID practices like "no mow zones" or "butterfly gardens." Plumbing codes that require runoff to be directed to a storm sewer system must be revised. The need to resolve various cross-cutting issues implicated by LID means that future development will be governed by more flexible parameters.

### What to Look for in New LID Regulations

While we are several months away from knowing the substance of the new LID requirements, we can look to regulations and permits adopted by other jurisdictions for clues as to some common programmatic elements. In California, San Diego and Ventura Counties have introduced mandatory LID provisions into their municipal stormwater permits.

As an initial matter, Ecology will need to define the universe of projects that will be required to use LID techniques where feasible. The San Diego and Ventura County municipal stormwater permits contain good examples of scoping provisions. Both target the following categories of new development and redevelopment:

- Automotive repair shops
- Restaurants

- Hillside developments
- Projects located in or directly adjacent to environmentally sensitive areas
- Parking lots
- Streets, roads, highways and freeways
- Retail gasoline outlets
- Commercial and industrial developments

Minimum size thresholds – 5,000 to 10,000 square feet in many cases – apply to each category. The scope of the San Diego permit automatically expands three years after the issuance of the permit to encompass all pollutant-generating development projects that result in the disturbance of one acre or more of land.

In Ventura County, independent mitigation requirements apply to redevelopment projects that do not fall within a listed category. Those requirements are dictated by the degree to which existing impervious surfaces are altered. If a project affects more than 50 percent of the existing impervious surfaces, the entire project must be mitigated. If redevelopment involves altering less than 50 percent of existing impervious surfaces, then mitigation is required only as to the alteration, as opposed to the entire redevelopment. Under the Ventura County permit, "redevelopment" does not include routine maintenance activities that are undertaken to maintain original line and grade, hydraulic capacity, original purpose of the facility, or emergency redevelopment activity to protect public health and safety.

### Substantive LID Practices

Once Ecology defines the scope of the permit, it will need to set performance standards. Performance standards can take many different forms, as the Pollution Control Hearings Board recognized in its Phase I order:

The standards can impose specific minimum technical requirements for buildings or roads, require protection

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of a specific amount of native vegetation at a site slated for new development, limit the amount of impervious surface, require maintenance of a certain percentage of predevelopment evapotranspiration capacity or minimize or eliminate surface runoff, or require that developers prioritize LID practices as the first choice before conventional stormwater management tactics.

Our review of LID performance standards in other jurisdictions shows that, typically, a combination of standards is available. Providing a suite of options is one way for Ecology to ensure that LID parameters are rigorous enough to satisfy the legal standard, yet flexible enough to be applied under different site conditions. In San Diego, all regulated projects that have pervious areas must comply with two baseline requirements : (1) draining a portion of impervious areas into pervious areas prior to discharge into the storm sewer system, and (2) designing and constructing pervious areas to effectively receive and infiltrate runoff from impervious areas. In addition, the regulated projects must implement the following five LID practices where applicable and feasible: (1) conservation of natural areas and vegetation, (2) construction of streets, sidewalks and parking areas to the minimum widths possible without compromising public safety, (3) minimization of impervious footprint, (4) minimization of soil compaction, and (5) minimization of disturbance to natural drainages.

Permit conditions are often used by regulators to effect greater implementation of preferred site design practices. For example, the San Diego permit contains language that is intended to increase the prevalence of permeable surfaces. Toward that end, projects with low traffic areas and appropriate soil conditions must construct a portion of walkways, trails, and low-traffic areas using permeable surfaces.

### Numeric standards

Numeric standards are central to the enforceability of LID requirements. Numeric infiltration and on-site retention standards appear in many LID regulations and permitting provisions. For example, in Chicago, regulations require the capture of the first one-half inch of runoff from impervious surfaces. In Washington D.C., all projects must retain the first inch of rainfall onsite. The same requirement is found in West Virginia's draft stormwater permit.

Infiltration requirements are but one way of expressing LID performance requirements through numeric standards. A number of jurisdictions have adopted other types of numeric standards. In Atlanta, new development projects are subject to the constraint that the maximum discharge post-development shall not exceed 70 percent of the runoff from the unbuilt site. The City of Portland, Oregon, has required green roofs covering 70 percent of the total roof area on government-owned buildings.

### Standard for Determination of Infeasibility

Under what circumstances will LID techniques be deemed infeasible? This is a question of great importance to developers, regulators, environmental groups and consultants. The experience of other communities has shown that determinations of infeasibility should not be entirely committed to the discretion of the Phase I permittees, and that mandatory LID requirements are best effectuated by a system of checks and balances.

There are many potential grounds for finding LID to be wholly or partially infeasible for a particular project. These include:

- Physical constraints, such as buried utilities, problems with neighbors' basements, and similar concerns in urban infill projects
- Shallow water tables or highly impermeable soils, such as soils with high clay content

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- Geotechnical hazards, such as steep slopes
- Proximity to a drinking water well, brownfields or other sites where additional infiltration of water could promote the migration of pollutants.

On the issue of infeasibility showings, Ecology's Phase I Permit may ultimately track the provisions in some of the California permits. In San Diego, for example, Phase I stormwater permittees may grant a project proponent a waiver of infeasibility, but only with notice to the regional board. Project proponents cannot receive an exemption from LID requirements unless they demonstrate infeasibility, and the infeasibility demonstration must be attested by a licensed professional, such as a professional engineer, registered geologist, registered architect or registered landscape architect.

### Offsets

Offsets provide an alternative method of compliance in situations where it is not feasible for a developer to manage stormwater onsite. Offsets are off-site measures for reducing stormwater runoff within the same watershed. Environmental regulators have successfully used offsets in the area of wetlands protection and air quality permitting, and offset requirements are increasingly seen in stormwater regulations and permits. However, it is unclear whether Ecology will adopt offset provisions at this juncture, because offsets, by definition, do not involve the use of LID practices at an individual parcel or subdivision.

In general, where offsets are used to secure environmental benefits beyond the boundaries of the project site, the regulatory agency must approve the developer's proposed offset measure, and the on-site runoff volume must be offset by a ratio greater than 1:1 in order to preserve the preference for on-site management techniques. In the District of Columbia, the Anacostia Waterfront Corporation may satisfy the on-site retention requirement by implementing approved physical offsets to address the volume of water that cannot be contained on-site. Approved physical off-

sets must be sufficient to manage 1.5 times the volume of water not retained on-site. Financial offsets, akin to payments to mitigation banks, are also available for twice the cost of obtaining an equivalent reduction of the stormwater flow that is required to be offset.

### Conclusion

Low impact development techniques are now the preferred method of stormwater management in new development and redevelopment projects. Under Ecology's forthcoming municipal stormwater permit, project proponents will be expected to identify an appropriate combination of techniques to prevent runoff and encourage infiltration closer to the source to the maximum extent possible. Ecology intends to provide technical guidance to permittees and developers through an update to its Stormwater Management Manual for Western Washington.

In the meantime, developers, contractors, engineers and consultants have an opportunity to become familiar with LID techniques and metrics. Learning the LID vernacular now will enable firms to apply LID practices where feasible and, where appropriate, to prepare sound arguments justifying a determination of infeasibility. For those who are already well-versed in LID practices, there will be ample opportunity to weigh in as Ecology develops LID performance standards and an implementation plan. Any firm providing advice and design work on stormwater management should become familiar with LID requirements and be prepared to integrate these concepts into the work of the firm.

## Skellenger Bender Welcomes Pam Tonglao to the Team



Pamela Tonglao has joined Skellenger Bender as an attorney in the commercial litigation group. Most recently, Pamela practiced environmental law at United States Department of Justice, Environment and Natural Resources Division. As a Justice Department Honors Attorney, she litigated cases under the Clean Air Act, Clean Water Act, RCRA, CERCLA, Oil Pollution Act and the Safe Drinking Water Act. She defended EPA in challenges to agency actions involving greenhouse gas emissions, visibility in na-

tional parks and wilderness areas, and emission standards for small spark-ignition engines. Pamela has extensive experience handling permitting challenges and wetlands enforcement actions under section 404 of the Clean Water Act. In addition, she negotiated several favorable resolutions for clients in CERCLA cost recovery actions. She is well-versed in administrative law and appellate practice and has presented argument in several federal circuit courts, including the Second, Ninth, Eleventh and District of Columbia Circuits. Pamela received her J.D. from the University of Washington School of Law and a bachelor of science in engineering and public policy from Washington University. Prior to entering law school, Pamela worked as an environmental engineer for a major engineering consulting firm.

## Events and Announcements

### Skellenger Bender Participates in Food Lifeline Food Frenzy!



Food Frenzy is a creative competition held for two weeks each July to raise food & funds for Food Lifeline. Law firms, accounting firm, design firms, and other professional organizations compete to raise funds and food to end hunger for children in Western Washington.

Skellenger Bender is participating in the frenzy by holding a *color of the day* food drive, two silent auctions and bake sales. With so many participating we should achieve our goal of 100% participation.

### Skellenger Bender Participates in Guest Chef on the Waterfront

FareStart is a culinary job training placement program for homeless and disadvantaged individuals. Guest Chef on the Waterfront partners over 70 local chefs and businesses as a innovative fundraising opportunity for FareStart's job training program.

Skellenger Bender attorneys Kara Masters and Pam Tonglao volunteered with the NW Chapter of the Professional Liability Underwriting Society Foundation.

FareStart Presents the 2009  
**Guest Chef on the Waterfront**  
July 15, 6-9pm



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