



June 17, 2011

*Via Email*

*(SWPermitComments@ecy.wa.gov)*

Municipal Stormwater Permit Comments  
Washington Department of Ecology  
Water Quality Program  
P.O. Box 47696  
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Re: Comments on Ecology's May 16, 2011 "Preliminary Draft Language" for Phase I and II Stormwater Permits

Greetings:

The following comments are submitted by Earthjustice on behalf of Puget Soundkeeper Alliance and People for Puget Sound (collectively, "PSA") on the May 16, 2011 preliminary draft language relating to low impact development ("LID") requirements for the new Phase I and II permits. This comment letter is organized first as general overall comments, followed by more specific and detailed suggestions.

**I. AS A WHOLE, THE PROPOSAL FAILS TO REQUIRE LID TO THE MAXIMUM EXTENT PRACTICABLE.**

Overall, we find the draft proposal to be a significant disappointment that fails to meet the PCHB's direction to require LID where feasible and set a standard that actually protects water quality and beneficial uses like salmon. While the proposal may slow the rate of degradation in Puget Sound, it still allows new development in ways that make environmental conditions worse by removing vegetated cover and adding new effective impervious area. It does not call for the dramatic paradigm shift that is required by law, as well as by the urgency to change development practices to protect and restore Western Washington's imperiled water resources. Moreover, by emphasizing onsite infiltration to the exclusion of other approaches and underemphasizing protection of native vegetation and reduction in disturbance footprints, this proposal may actually encourage failure of LID BMPs and result in a retreat from the LID approach. We are particularly concerned that the draft has veered away from a general performance standard approach to a "mandatory list" for most sites. This is especially true given: 1) the failure of the mandatory lists to include many commonly accepted LID techniques and 2) the breadth of various exemptions provided, particularly in the name of "feasibility." We think that the draft proposal must be significantly strengthened. Our concerns can be grouped into seven categories, discussed below:

1. Lack of Emphasis on Vegetation and Imperviousness. The proposed standard is essentially a prescription to use a narrow range of engineered BMPs like raingardens and pervious concrete. It ignores (or at least de-emphasizes) the most crucial LID tools: protecting native vegetation and soils, and designing projects to protect natural drainage features and reduce impervious surface. Many commenters emphasized throughout the advisory group process that without protection of vegetation and reduction of impervious area, LID is simply a slightly less harmful version of conventional development. However, the draft proposal significantly de-emphasizes these foundational LID approaches.

We understand that Ecology's intention is that this issue is to be addressed primarily through code rewrites rather than site/subdivision-specific standards. There are two problems with relying exclusively on that approach. First, there is no standard whatsoever dictating what municipalities should seek to achieve, even a general or narrative one. For example, the permit could set a jurisdiction-wide standard of no net loss of forest cover and no net gain of effective impervious surface. Second, there should also be a directive at the site/subdivision scale to require developers to protect native vegetation and reduce imperviousness, to emphasize that this is a site-specific requirement as well as a jurisdiction-wide requirement.

While we appreciate the work done by the Puget Sound Partnership on its draft Guidance on integrating LID into local codes, it does not substitute for a clear directive in the Permit itself. The Guidance, while helpful in a number of respects, provides a number of ideas for jurisdictions to "consider," such as changing codes to allow for smaller streets and cluster development. None of these ideas are mandated by the Guidance, however, which is why the Permit must provide some standard like the one suggested above. To give just one example, techniques exist to develop streets that completely eliminate runoff in some situations (see, e.g., Seattle's "SEA Street" model). Use of the guidance does not clearly mandate use of such techniques in appropriate situations, as should be the case. Neither does the draft Permit.<sup>1</sup>

2. Failure to Require LID at Small Projects. In this proposal, small projects are exempt from all LID requirements in all situations. This is a major missed opportunity. We've previously endorsed a streamlined approach that uses some kind of checklist rather than a complex performance standard and engineering burdens for small projects, but strongly disagree that they should be exempt from LID altogether. In contrast, the City of Seattle proposal applies to all projects regardless of size. It is difficult to see how exempting small projects meets

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<sup>1</sup> If Ecology is unwilling to include standards in this regard—and it should not be, given how important they are to protecting water quality and the Sound—it should substantially increase incentives and emphasis on protecting native vegetation and reducing impervious surface throughout the permit. For example, Ecology should more clearly in the Permit (as opposed to the Manual) provide incentives to utilize 65-10-0 standards to achieve permit compliance.

Ecology's obligation to require LID where feasible. All sites, including small ones, should be required to do "site assessment" and a checklist review of LID techniques.

3. Failure to Apply Performance Standard Broadly and Inadequate "Mandatory List". The hydrologic performance standard—which we spent about 80% of the time in the advisory groups talking about—is only mandatory in this draft language on development projects over 5 acres, outside the UGA. There was very little support in the advisory groups for applying the standard so narrowly, and no identifiable reason for doing so. We have argued consistently for project proponents to demonstrate compliance with a clear performance standard, acknowledging "off ramps" for technical feasibility or for environmental/public safety reasons. This approach allows for broad application of various LID techniques while still recognizing the limitations of the site and other appropriate factors.

In place of an accountable standard, the proposal instead relies primarily on a mandatory "list" that essentially only includes rain gardens, permeable pavements and green roofs (the latter for commercial projects only). As noted above, the "list" does not include protecting vegetation and minimizing impervious area, nor does it include water harvest/reuse, or other LID approaches like pin foundations. The proposal does not include a requirement to consider green roofs for residential development and may do little to encourage commercial green roofs due to a conservative cost factor.

There was support in the advisory groups for using a mandatory "list" for small projects that fell below existing flow control thresholds. However, in this case the exception has swallowed up the rule. The issue is particularly concerning in light of the broad "feasibility" exemptions discussed below: without a duty to protect vegetation, amend soils, and reduce the footprint, it could easily become "infeasible" to achieve much through permeable pavements and raingardens. We recommend that an accountable hydrologic performance standard be applied for all projects above the existing flow control thresholds.

4. Overbroad Feasibility Offramp Criteria. PSA agrees that the Permit should include feasibility criteria to avoid situations where LID could cause problems, and many of the identified feasibility criteria are appropriate. But the proposed offramps in the feasibility criteria go a lot further, and have the potential to drastically undercut even the limited gains offered by the rest of the permit. Inappropriate exemptions include situations where soil drainage is slower (this would cover most of Puget Sound); where LID is not "compatible with surrounding drainage system" (providing substantial local discretion to excuse their use); and where there is a "lack of usable space" (i.e., why not require project design so that adequate space for LID is provided?).

The most concerning feasibility loophole has to do with "competing needs," including any state and federal requirement. Would this not allow jurisdictions to declare GMA density goals as a competing need that supersedes required implementation of LID? We don't believe

that there is a conflict, and recognize that the draft permit says as much, but the language seems to invite a declaration of infeasibility and there is little oversight to ensure that permittees are applying them properly. Another vague but potentially big loophole is exempting LID where it would conflict with “an existing development layout or aesthetics” mandated by code. It is difficult to determine what may be covered by this potential exemption, and hence it needs additional clarity and limits.

Moreover, the fact that circumstances exist which make full application of LID unwise does not mean that some LID tools cannot be used. For example, even where slopes are steep or the groundwater is high, use of LID tools like proper site planning, reduction of impervious area and protection of vegetation and soils will provide significant benefits, and should be required. Where feasibility concerns are invoked, projects should still use LID tools to the greatest extent practicable consistent with those feasibility limits, rather than simply waiving all LID tools across the board.

5. Lack of Mitigation. Where an exemption is allowed due to feasibility concerns, there must be a requirement to mitigate for any adverse environmental impact that arises from the exemption. Similar requirements are part of other NPDES stormwater permits, and in this case would provide a significant additional protection for water quality as well as an incentive to ensure that LID is applied in as many situations as possible. We recommend that Ecology include a mitigation requirement for development situations where a variance or exemption is provided along the lines of the West Virginia Phase II stormwater permit (pages 15-16).

6. Excessive Timelines. Phase I and II jurisdictions would have to apply new permit requirements by August 2014 (over two years from permit issuance). Phase II jurisdictions would have until December 2015 (three and a half years). This is a highly excessive timeframe and there was very little support for moving this slowly in the advisory groups. Representatives of the regulated jurisdictions repeatedly indicated that they could move far faster than Ecology proposed. The Board’s ruling came in 2008 and directed Ecology to modify the existing Phase I permit—Ecology is already far behind in implementing this requirement. At this point it should come as no surprise to anyone that these requirements are coming. Indeed, the PCHB interprets the existing permit as requiring LID now, and there is no reason to take so much time to meet new standards.

The timing problems are potentially compounded by the ambiguity surrounding Ecology’s legal position about state vesting law. Ecology’s historic position is that state vesting law applies to the requirements of stormwater permits. As you know, a recent PCHB ruling held otherwise. Prior to that decision, Ecology announced that it was not going to change its approach to vesting—and it is unclear what Ecology will do in this regard. But its historic approach would allow projects to lock in non-LID approaches to stormwater even though they will not be built for many years past the deadline. The timing problems are further adverse consequences for missing deadlines. In light of the excessive time used to develop this permit,

we suggest that permittees amend codes to meet the new standards within 12 months (Phase I) and 18 months (Phase II). Ecology must include a permit provision that permittees that fail to meet deadlines must not permit development projects that fail to meet permit standards.

7. Failure to Require Basin Planning. There is universal agreement that basin planning is a crucial strategy in these permits and in the recovery of Puget Sound. In fact, this was the lead recommendation by the National Academy of Sciences panel that critiqued the federal stormwater program. The basin planning proposal in here is far different than anything that was discussed in the advisory group process. While there is nothing objectionable in the proposal itself, it does not constitute and is not a replacement for proper basin planning. Permittees should be required to identify priority basins and develop basin plans that protect water quality throughout the entire basin. This process should include identification of vegetated cover and impervious surfaces goals that apply across the entire basin and are based on best available science, and cooperation with other permittees to meet these goals. We urge you again to consider including such a requirement. While we understand that Ecology does not wish to have jurisdictions revisit past planning efforts, it is indisputable that additional measures to restore vegetation and reduce impervious area at the basin level are going to be necessary to meet Puget Sound recovery goals. Having said that, we believe that the process outlined in Section 7 has some value. But the process outlined in the permit is vague and requires more work. Additional recommendations are made below.

## II. ELEMENTS OF THE PROPOSAL THAT WE SUPPORT.

1. Elimination of One-Acre Threshold. This exemption has meant that the Phase II Permit fails to regulate the majority of new and re-development except where the jurisdiction chooses to do so. Such development is a major source of water quality problems and regulating to the Manual's standards constitutes AKART and MEP. Ecology made the correct decision in proposing to eliminate this threshold.

2. Decoupling Permit From GMA Timelines. Ecology's last LID proposal proposed to explicitly link code reviews to GMA planning deadlines. Where a permittee chooses to do this for its own purposes, it is unobjectionable, but we agree that a firm deadline should be included in this permit.

3. Elimination of Exemptions. Ecology's last proposal included exemptions for flow control exempt and highly urbanized areas. These appear to have been removed, which is appropriate. If we are mis-reading the proposal in this regard, please let us know.

### III. SPECIFIC QUESTIONS/RECOMMENDATIONS.

#### A. Preliminary Draft Language (Phase I and II).

Section 5.b.iii (Code Review). The language in this provision is vague and potentially difficult to enforce. Rather than saying that LID will be “preferred and commonly used,” the Permit must say that LID is mandatory except where infeasible. Instead of saying permittees shall “look for” opportunities to minimize loss of vegetation, etc., it should say permittees “shall” amend codes to “require” protection of vegetation and minimization of imperviousness. It should also clarify that developers may not seek to invoke “feasibility” exceptions by failing to design the project to reduce imperviousness and protect vegetation.

Section 5.c (Stormwater Planning). While we have significant concerns with the process outlined in this section in lieu of real basin planning, we have some suggestions to make it more useful. First, the permit should clarify that the analysis required in § 5.c.2 should be available for notice and comment to the public, and all final analyses should be posted on permittee websites. Moreover, the substantive standards about “compliance with water quality standards” should be clearer that the action cannot proceed if the analysis shows degradation of water quality, any increased discharges to 303(d) listed streams, or any contributions to a water quality standard violation.

#### B. Draft Revisions to Appendix 1.

Section 4.1. This provision requires application of development principles to “retain native vegetation and minimize impervious surface.” Most experts agree that retention of native vegetation and limits on impervious surfaces are the two most effective LID techniques that can be employed on a site. In the absence of a standard, this vague statement will not help developers or jurisdictions remain in permit compliance. Ed O’Brien stated at the last advisory group meeting that this standard does not place any actual limits on clearing. He later admitted that the requirement could be swallowed up by project design exemptions discussed below. What value does this “requirement” have then? Again, we think the best way to approach this issue is through application of a science-based performance standard to all but small sites, creating an incentive to retain native vegetation and reduce impervious surfaces on site, and use engineered BMPs to address the significantly reduced runoff that results.

Also in this section or accompanying section in the manual, there should be greater specificity that the site plan include a site assessment to identify natural features, such as vegetation and wetlands, that would be beneficial to maintain on-site. The site assessment should also identify existing impervious surfaces, lot lines, easements, and other relevant site characteristics. Site assessment is emphasized in the Partnership’s Draft LID for Local Governments Guidance and should be a mandatory part of this Permit.

Section 4.5. There are various lists of BMPs in this section for projects of various thresholds. Again, this approach fails to recognize variations between sites, applying a “one size fits all” approach to all projects of a given size. Moreover, the lists are, as discussed above, incomplete. A number of well accepted and effective LID techniques are excluded. Since all parties in the advisory groups agreed that not every site should be required to apply all LID BMP’s, the “mandatory list” approach results in the lowest common denominator approach: a requirement for pervious pavement with, in most cases, limited application of rain gardens. This approach is certain to fail in terms of achieving water quality and habitat goals. Each list should, for example, include a meaningful requirement to protect vegetation and reduce impervious surface, and apply LID site design principles to the maximum extent feasible. Both this section and § 4.7 should make clear that compliance with LID requirements and flow control requirements is presumptively achieved at any project meeting a 65-10-0 standard.

Section 6. With the addition of the LID feasibility criteria in § 8, it appears that there could now be two different mechanisms to circumvent the requirement to implement LID. We suggest that § 6 apply only to the non-LID minimum standards, and § 8 be reserved for LID feasibility. In either event, variances from requirements to protect water quality need to be mitigated by the permittee or project proponent. Information regarding exceptions or variances should be publicly available on the permittee website and annual reports.

Section 7. We do not support the use of basin planning to “tailor” the site/subdivision LID requirement. This approach has not been discussed in any forum and we are not aware of any support for the idea of waiving site/subdivision LID requirements through basin planning. We are not aware of any reason why the LID requirement should be waived or “tailored” to local circumstances, except where needed to strengthen it. Moreover, Ecology’s experience with Clark County’s failed effort to adopt a local standard demonstrates that this Permit provision needs to be significantly strengthened in order to work properly. For example, Ecology should make clear that the ONLY way to obtain a locally-tailored standard is through proper basin planning.

Section 8. A number of the feasibility criteria are poorly defined and open-ended, leaving open the possibility that permittees or individual project proponents could circumvent the LID requirement. This is, in part, why a mitigation requirement for any feasibility waivers is so crucial. We are concerned with the following:

A. It makes no sense at all to exempt sites where conductivity is less than 0.15 inches per hour. As Curtis Hinman stated at the last advisory group meeting, it is simply not a true statement to say that rain gardens don’t work in these soil conditions. Where soil conductivity is low, greater use of other LID principles will be required, including amendment of soils and larger rain gardens.

B. There should not be an exemption for “lack of usable space” for raingardens, even in redevelopment sites. If there is insufficient space, the project will have to be redesigned to meet the standard. This feasibility exemption is an invitation for project proponents to design projects with little effort at reducing impervious area.

C. The exemption where LID is not “compatible with surrounding drainage system” needs substantially greater detail. We are concerned that a feasibility exemption that is intended to be technical could be read so broadly as to include, for example, aesthetic compatibility or other non-technical considerations.

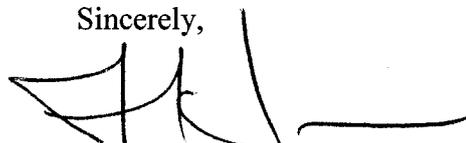
D. Use of permeable pavements should not be exempted due to soil suitability criteria. Rather, it should be mandatory to amend soils or use of other materials to meet the standard.

E. We are particularly concerned about the concept of a broad “competing needs” feasibility off-ramp. Without additional direction, permittees or project proponents could invent perceived conflicts between state and federal requirements in order to avoid LID standards. If Ecology is unable to identify what specific “competing needs” it is concerned about, there appears to be little reason to include this exemption in the Permit. Provisions such as “incompatible with an existing development layout” are vague and would likely lead to broad exemptions from LID requirements.

Additionally we strongly urge Ecology to include robust public oversight and accountability measures into §§ 6-8, by requiring public notice and comment periods where appropriate, and mandating that any proposed feasibility exemptions, variances or locally-tailored plans be posted on permittee websites (and/or Ecology’s website). Approvals by Ecology, where required, should also be posted publically. Given the lack of adequate staffing at Ecology, the public will play an important role in overseeing the implementation of these permit provisions.

If you have any questions about these comments, please contact Jan Hasselman at (206) 343-7340 ext. 1025.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jan Hasselman', with a long horizontal line extending to the right.

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