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VIA EMAIL TO  
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**PUGET SOUNDKEEPER ALLIANCE, PEOPLE FOR PUGET SOUND,  
AND WASHINGTON ENVIRONMENTAL COUNCIL COMMENTS  
ON DRAFT PHASE I AND PHASE II WESTERN WASHINGTON  
MUNICIPAL STORMWATER PERMITS**

These comments are provided on behalf of Puget Soundkeeper Alliance, People for Puget Sound, and Washington Environmental Council (collectively, “Conservation Groups”) on the Draft Phase I and Phase II Western Washington Municipal Stormwater Permits. We have appreciated the opportunity to participate in the process leading up to this draft, and recognize the hard work of Ecology staff in developing the draft Permits. There are elements of the draft Permit that we strongly support, such as the monitoring provisions and the elimination of the one-acre threshold in the Phase II Permit.

Nonetheless, the Conservation Groups believe that the draft Permits fail to capitalize on this important opportunity to protect Puget Sound by defining permit conditions that will protect the Sound and its surrounding waters from additional degradation and put it on a path towards restoration. The draft Permits also fail to meet legal requirements to mandate control of stormwater to the maximum extent practicable (“MEP”) and to employ AKART, while failing to fulfill the clear mandate of the Pollution Control Hearings Board to require low impact development (“LID”) where feasible. Most dismayingly, close to four years after the PCHB directed Ecology to amend its Permits, Ecology proposes a needlessly extended timeframe to even begin implementing these new requirements. As a result of this delay, the region continues to use outdated and harmful practices when we know we can do better.

The ongoing decline of Puget Sound health calls for a paradigm shift in how we regulate redevelopment and control stormwater runoff from the built environment. We need to shift immediately from historic development practices that further reduce native vegetation and soils and create more impervious areas, and invest in restoring a degraded landscape that destroys streams and funnels toxic pollutants into Puget Sound. To be successful in this effort the municipal stormwater Permits must play a cornerstone role in initiating that shift. The draft Permits, however, tinker at the margins of a largely failed approach to stormwater regulation and will lock in a set of complicated half-measures for the next five years at least. At worst, by requiring low impact development practices like pervious concretes without adequate protection

of vegetation and soils, the Permit risks creating failures that tarnish the public's perception of the most effective approaches to stormwater regulation.

## I. PERMIT COVERAGE AREA

We are dismayed to see that Ecology is not proposing to meaningfully expand the coverage area of the Phase II Permit, which it has ample legal authority to do. In its 2005 report to the legislature, Ecology itself emphasized that failing to regulate small cities and counties outside of certain urban growth areas would result in additional degradation of state waters. Moreover, the science consistently shows that the most dramatic impacts to beneficial uses from development occur during the earliest phases of development, i.e., conversion of a watershed from mostly native vegetation to under 10% total impervious surface. This means that the most “bang for the buck” in terms of regulating new development comes in the areas where there has been the least development. Yet Ecology has failed to take the opportunity to bring these areas within the coverage area of the Permit, meaning that there is zero state regulation of stormwater in these small cities and non-UGA counties.

While EPA Phase II regulations set a population threshold for jurisdictions that must be considered for including in the Permit, there are many other considerations required before decisions can be made regarding permit coverage area. For example, regulations require coverage of areas that result in discharges that cause or contribute to violations of water quality standards (“WQS”), which includes adverse impacts to designated beneficial uses like salmon, shellfish, recreation, and so on. Given the state of the science, it can no longer be disputed that virtually any stormwater discharge is contributing harm to salmon (a protected designated use in most of Western Washington under the WQS) and hence should be regulated under the Phase II Permit. Similarly, EPA regulations require coverage of municipal separate storm sewer systems (“MS4s”) that are physically connected to regulated MS4s. It is well known that MS4 systems cross jurisdictional boundaries in countless places across the landscape. It is arbitrary to impose stormwater controls on, say, Snohomish County but fail to regulate small cities within that County whose stormwater discharges ultimately intermingle with the County's regulated MS4. In fact, during the prior Phase II litigation, PSA submitted evidence that Snohomish County had identified close to 600 separate places where its MS4 flowed into or out of another jurisdiction. Similarly, it is senseless to impose one stormwater standard for the designated urban growth areas of Phase II counties but leave the remainder of the county completely unregulated. Many federal agencies (including the EPA, the National Marine Fisheries Service) and Indian Tribes have urged a broader coverage area for years. Many people have pointed out that regulating some areas and not others will incentivize development in the unregulated areas with no stormwater controls at all, contributing to sprawl that further undermines water quality.

Ecology defended its 2007 decision to leave out additional jurisdictions by pointing to the petition process in the Permit under which interested parties can petition to have additional jurisdictions covered. To the best of our knowledge, this system has failed—we are not aware of a single petition or any other expansion of the coverage area of the existing Permit. This is

surely not because no jurisdiction should be regulated, but rather because the factual and evidentiary burden of putting together a complete petition is very high. While the Conservation Groups acknowledges that the petition process is available, Ecology cannot place the burden of regulating MS4s on citizen groups.

It is past time for the antiquated system of regulated and unregulated jurisdictions to end, and for the Permit to cover all stormwater discharges that flow into Puget Sound. To ease the burden on small cities and towns without adequate resources or expertise, small municipalities can be regulated under County authorities. Counties should not have to implement separate sets of regulations for regulated UGAs and the remainder of their area. To assist in this transition, EPA regulations allow new jurisdictions to be “phased in” over time. 40 C.F.R. § 123.35(d)(3).

## II. PUBLIC PARTICIPATION

The permittee (Page 17. S5.C.4.a Public Participation) should be required to seek public participation in the decision-making processes on an annual basis and this public participation process should be included in the Annual Report submitted to Ecology. The language in the draft Permit does not ensure that there will be adequate public involvement. Our experience has been that when King County had difficulty getting public feedback, they shifted to a more public-friendly and educational method. Their new method worked well.

## III. CONTROLLING RUNOFF FROM NEW AND RE DEVELOPMENT SITES

### A. Deadlines and Vesting.

In 2008, the PCHB directed Ecology to amend the 2007 Phase I Permit to require LID where feasible. Regrettably, Ecology did not comply with that directive, instead embarking on a multi-year process to gather input on new LID standards. While the Conservation Groups agree that some amount of public and technical conversation around the new LID standards was warranted, and appreciate the opportunity to participate in that process, the timeframe was unnecessarily extended. Regardless, all Phase I jurisdictions have been on notice since 2008 that LID would be required, and indeed the existing Phase I Permit already requires steps towards implementing LID. For that reason, we find that the proposed deadline of December 2014 for adoption of new LID standards to be too generous.

With respect to Phase II jurisdictions, we are surprised to learn that some Phase II jurisdictions believe that the PCHB ruling did not mandate adoption of LID standards in this permit term. A reading of the PHCB’s final order confirms that this argument is disingenuous. The PCHB directed Ecology to put Phase II jurisdictions on a path towards adopting LID more broadly in the last permit term, and Ecology adopted new requirements related to LID in response. All Phase II jurisdictions by this point have had to review their codes to identify barriers to LID and remove them, what LID practices can be adopted during the existing permit term, and schedules for adoption of new LID standards. It is preposterous to argue that LID

should not be mandated in Phase II jurisdictions in this Permit. To the contrary, most Phase II jurisdictions have already grappled with the question of LID and how to implement it—all that is needed is a clear standard and a clear requirement with an implementation deadline. While we agree that Phase II jurisdictions can trail the Phase Is in some respects, the December 2015 deadline is unnecessarily generous in the adoption of new LID standards.

Particularly puzzling is Ecology's approach to vested development projects in this Permit. In Rosemere Neighborhood Association's appeal of the Clark County MS4 permit modification, the PCHB ruled that state vesting law does not apply to stormwater permits. Yet in the draft, Ecology proposes to exempt any vested development unless it has not started construction by 2018 (Phase I) or 2021 (Phase II). Under this approach, a massive development project can vest under existing standards (which do not require LID) with simply a pre-application conference that occurs before the effective date of the new permit requirements. Given the clear direction of the PCHB, it is hard to imagine what valid circumstances would allow new construction in 2021—thirteen years after the PCHB's decision—that does not implement any LID approaches simply because of vesting. We suggest that Ecology impose a standard similar to that used in most jurisdictions in which development projects are not exempt from the new permit requirements until they have taken substantial steps towards completion of the project in reliance on local permits.

In the past, many if not most jurisdictions have failed to meet permit deadlines for adoption of new standards, in some cases by years. To our knowledge, no jurisdiction has suffered any adverse consequences for late adoption of mandatory standards. To the contrary, by allowing continued development and vesting of permit applications under prior standards for a longer period, these jurisdictions have obtained an advantage over compliant jurisdictions. Ecology needs to set clearer expectations in this Permit. In order to avoid citizen enforcement actions against noncompliant jurisdictions, the Permit should make clear that permittees are not authorized to issue permits for new development after the due date for new regulations, unless those projects meet the updated standards.

**B. Site and Subdivision Scale Requirements (§ S.5.C.5.a.).**

We have provided extensive comments in the past, on several occasions, regarding our views on site and subdivision requirements, and incorporate those prior comments by reference. In this letter, our comments on the Permit's site and subdivision scale provisions are contained primarily in the section below discussing Appendix 1. In addition, we suggest you provide greater clarity and direction with respect to the "alternative" plans that can be approved through basin plans or similar planning efforts. The Clark County case has revealed that this vague language can be abused to craft "alternative" programs that do not protect water quality or meet the test of equivalence to Appendix 1.

As you know, one of our chief concerns with this Permit is the lack of emphasis on protecting vegetation and reducing the amount of impervious surface. We believe the Permit can

be (and must be) strengthened to include emphasis on these factors as much as possible. For example, in § S.5.C.5.a.ii, the reference to site planning process should explicitly include a duty to “reduce impervious area and protect native vegetation to the greatest extent technically feasible.”

We are concerned that developers could interpret the draft Permit to allow removal of all vegetation and soil down into the till, bedrock or groundwater table. At this point, infiltration becomes “infeasible.” If we allow developers to make LID infeasible on each site, the entire regulation becomes a voluntary effort to the extent that the developer believes that partial mitigation is feasible. This should be more explicitly prohibited with clear requirements to retain vegetation and soil, and that LID does not become “infeasible” by development practices or project design.

C. LID Requirements for Code Revision (§ S.5.C.5.b).

While we disagree with the architecture of the Permits’ approach to LID, we agree that a clear permit requirement to revise permittee codes to require LID is an essential part of a revised approach. However, we are concerned that the proposed language is vague and insufficiently directive, leading to the possibility of confusion by permittees and the public, and half-measures by permittees who wish to avoid making significant changes.

Accordingly, we suggest that you change the language from LID being the “preferred and commonly used approach to site development” to something clearer, for example, “Code revisions will implement LID development principles and require use of LID practices in all development situations unless technically infeasible.” Rather than “identify opportunities” for minimizing new impervious areas and vegetation loss, the code revisions should “require use of all technically practicable means to minimize impervious surface and vegetation loss.” We also strongly urge Ecology to consider an enforceable, accountable metric to build into these codes, for example, mandating a specific net decrease in impervious area, and increase in native vegetation, throughout the jurisdiction during the life of the permit term.

D. Watershed Scale Stormwater Planning (§ S.5.C.5.c).

The Conservation Groups have long advocated for watershed basin planning as a core component of these stormwater permits, and so are encouraged to see some recognition of its importance in the Phase I Permit. However, the proposed permit condition is an exceedingly modest first step. For example, the timeline is unnecessarily generous, and requires only a single watershed to be analyzed in only four jurisdictions. The most significant concern is that there is nothing that makes implementation of these plans mandatory—even the most well-crafted plan is not going to improve water quality unless it is implemented. While we objected to Ecology’s preliminary draft proposal of linking planning to expansion of UGAs, at least that proposal benefited from having substantive standards associated with it.

Watershed Planning should work toward the goal of zero waters causing or contributing to violations of WQS due to stormwater, including prioritizing retrofit projects. It will take time for retrofits to be implemented but it is important to know what is needed to recover the watershed.

E. One Acre Threshold.

We strongly support the removal of the one-acre threshold in the Phase II Permit. Evidence developed for the last permit term revealed that exempting development projects smaller than one acre in size did not meet the MEP and AKART standards and would result in significant deterioration of water quality. During this permit term it became evident that the vast majority of development was falling within this exemption, meaning that updated development standards, modest as they were, simply didn't apply to most new development projects. Elimination of this threshold in the new permit term is critical to meeting governing standards and protecting water quality.

IV. STRUCTURAL STORMWATER CONTROLS

There is broad recognition that substantial investments need to be made across the landscape retrofitting existing stormwater infrastructure to reduce pollutants and protect streams. The work is expensive and difficult, and will likely take many years to complete. But it needs to start now—and the existing Permit effectively leaves it up to individual jurisdiction's discretion how much investment to make in retrofitting, leading to a widely varying level of effort in existing retrofit programs. Moreover, these programs have been targeted for broad cuts due to declining government revenues.

The lack of metrics or prescribed level of effort for the retrofit program was also behind Clark County's illegal effort to weaken its standards for new and redevelopment. During that hearing, Ecology staff told the PCHB that they were considering including a clear metric in the next permit term. However, the current draft contains no such level of effort. In fact, the draft Permit appears to make a weak permit provision even weaker by removing any deadline for submission of retrofit programs, and any Ecology review and approval. The proposed permit language does not resolve the PCHB's finding that Ecology's approach to the retrofit program constitutes "impermissible self-regulation."

Additionally, we oppose Ecology's failure to impose a retrofit obligation on Phase II permittees. Many Phase II jurisdictions have the resources to implement their own programs. Smaller jurisdictions can contribute and participate in County retrofit programs.

V. SOURCE CONTROL PROGRAM

The PCHB upheld the last permit's source control program because of Ecology's review and approval role. For this reason, it is puzzling that Ecology has chosen to eliminate that role in

this draft Permit—in the absence of oversight and clean, enforceable metrics, the program risks granting an impermissible level of discretion to permittees. We also believe that permittees should provide much more extensive information to the public about their source control efforts, and the results of these efforts, in their annual reports. As with the retrofit program, we believe that source control is just as important in Phase II jurisdictions, where there are currently no permit obligations. Phase II jurisdictions should participate in county or joint programs to address source control.<sup>1</sup>

## VI. PUBLIC EDUCATION PROGRAM

This section (Page 43. S5.C.10.d Education and Outreach Program) does not provide for assurance that the highest priority audiences and behaviors are selected under this requirement with regard to ecological threat/pressure. We recommend that additional clarity be included so that Ecology reviews and approves the selected new audience and behavior before implementation.

In the draft Permit, Ecology proposes to eliminate the requirement that public education activities be tracked and records kept. In the absence of some kind of tracking and reporting, the permit condition is largely unenforceable. If Ecology and the public cannot determine what permittees have done to meet this permit condition, there is no way to assess whether they are in compliance, and no opportunity to measure the effectiveness. It appears that Ecology remains unfamiliar with EPA's "measurable goals guidance" which provides extensive information and direction on how to assess the results of programs like public education.<sup>2</sup>

## VII. COMPLIANCE WITH TMDLS

It is well-settled law that MS4 NPDES "permits must also include . . . any more stringent effluent limitations based on an approved total maximum daily load ("TMDL") or equivalent analysis . . ." *Puget Soundkeeper Alliance v. Ecology*, 2009 WL 434836, at \*4 (PCHB Feb. 2, 2009); 40 C.F.R. § 122.34(d)(1). However, the Permit does not require permittees to comply with TMDLs that are issued after the issuance date of the permit. This is a significant missed opportunity, as TMDLs can potentially constitute the clearest roadmap towards resolving site-specific water quality problems associated with stormwater.

While Ecology has in the past taken the position that requiring compliance with latter-enacted TMDLs requires a formal permit modification, that is simply not the case. In fact, the

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<sup>1</sup> Additionally, the use of the word "representing" (Page 27. S5.C.7b.ii.1) does not clearly define the inventory as including all sites that are potentially polluting. We recommend that this be rephrased as (additions in all caps): "Inventory or listing of ALL sites representing WHICH FALL UNDER the categories of land uses and businesses in Appendix 8..."

<sup>2</sup> <http://cfpub.epa.gov/npdes/stormwater/measurablegoals/>

PCHB has explicitly rejected such an argument. Associated Gen. Contractors of Wash. v. Ecology, 2007 WL 1050341, at \*7-8 (PCHB Jan. 30, 2007). In that case, the Board specifically held that “[b]ecause the TMDL approval process requires public notice and the opportunity for comment, . . . it is not necessary to require a permit modification to use a TMDL that has been approved before the date of application for coverage.” Id. at \*8 (footnote omitted).

Moreover, in the stormwater permit for the Washington State Department of Transportation (“WSDOT”), Ecology included a permit provision under which it would establish new TMDL-related requirements every 18 months either by permit modification or via administrative order. If Ecology remains unwilling to simply require compliance with latter-enacted TMDLs in the Permit, we request that it adopt a permit condition like the WSDOT provision in both the Phase I and Phase II Permits.

## VIII. MONITORING

The inclusion of a strong regional monitoring program in the draft Permit represents a paradigm shift and we applaud the new approach. It is important that the Permit includes status and trends monitoring in receiving waters. This is part of a strong overall monitoring program and will allow for a determination that our stormwater dollars are indeed making a difference.

While we support the inclusion of a regional monitoring program, we are concerned that it is not fully funded by the cost allocations included in the draft Permit. The amount and frequency of status and trends monitoring has been scaled back in the proposed regional program in the draft Permit to levels that are not adequate and will serve to lengthen the time to obtain statistically useful data or to ensure that seasonal or other variables are reduced so that credible data is assured. For example:

- rather than funding an adequate stream gauge network, the proposed plan will only cover the development of a stream gauge plan rather than the needed installation of stream gauges;
- musselwatch sampling is scaled back from what was proposed by the scientists;
- one year rather than five years of status and trends sampling of wadeable streams is included;
- only one round instead of every other yearly sampling of stream benthos and habitat assessment is proposed;
- the total amount of sampling for sediments does not match the statistical threshold.

During the development of the Permit, local municipalities wanted to limit the total combined annual funding for effectiveness studies to \$1.5 million whereas the environmental representatives and many federal agency representatives felt that the annual funding needs were closer to \$6 million annually. The draft Permit includes \$1.75 million annual funding for years 2 to 5.

Appendix 12: Ecology acting as the administrative entity to manage the pooled funds during the 2013-2018 permit term creates an awkward dynamic and the situation may cause a potential conflict in that the same entity that acts as the regulatory authority is also responsible for administering the contracts for the very work that fulfills the requirements of the Permit. We understand that many stakeholders do not think there was another option at this time. The Puget Sound Partnership or another entity might develop an alternative option for an administrative entity and therefore we recommend that the permit language be modified so that Ecology is not listed as the administrative entity for the full 5 years, but that there be more flexible language included.

## IX. REPORTING

We ask for a significantly more transparent, accountable and simplified reporting regime for these Permits. It is often very difficult for the public to locate or obtain annual reports, and reporting often fails to provide useful information to evaluate the level of permittee compliance. We ask that Ecology post all annual reports (including past years' reports) on its website or, alternatively, require permittees to place reports on their own municipal websites along with other NPDES compliance information.

We further ask Ecology to include a permit requirement that any missed deadlines or other failures to comply with permit conditions be specifically identified along with a comprehensive explanation justifying what steps were taken to comply, why the violation occurred, and what steps will be taken to come into compliance and ensure that future violations do not occur. We also are puzzled by the proposal to remove permit requirements related to S.4.F compliance actions and TMDL implementation actions. These reporting requirements should be part of the new Permit.

## X. STORMWATER MANAGEMENT PROGRAM FOR SECONDARY PERMITTEES

We are concerned that the draft Permit adds an off-ramp for Secondary Permittees for activities on their properties. This will lead to gaps in accountability for activities that could generate pollution or other problems associated with stormwater management on these properties. The added text in this sentence (page 51, S6.C.6.a) "Implement a municipal operation and maintenance (O&M) plan to 18 minimize stormwater pollution from activities *under the functional control of* ~~conducted by~~ the Secondary Permittee" should be modified back to the original language. In addition, the sentence (page 51, S6.C.6.a.i) "Secondary Permittees shall properly 31 maintain stormwater collection and conveyance systems owned ~~or~~ *and* operated by the Secondary Permittee..." should also be modified back to the original language.

## COMMENTS ON APPENDIX 1 TO PHASE I AND PHASE II PERMIT

### I. DEFINITIONS

The definition of LID “best management practices” should explicitly include site planning to reduce impervious area, protect native vegetation, and mimic the site’s natural ability to prevent the generation of stormwater runoff. While we recognize that Ecology has placed these concepts in the definition of “LID Principles,” we think that this distinction is flawed and potentially confusing. While these LID Principles can and should be built into local codes for widespread application across the landscape, they can also be used effectively at the site and subdivision scale. Indeed, over-reliance on infiltration BMPs like raingardens and pervious concretes, in the absence of LID “principles” like proper site design and protection of vegetation, risks failure.

### II. MINIMUM REQUIREMENT 1: STORMWATER SITE PLANS

We appreciate that Ecology restored proposed language in this section regarding retention of native vegetation and minimization of impervious area. However, we suggest that to avoid confusion, we suggest use of stronger language such as “to the maximum extent technically feasible” rather than simply feasible. There should be additional clarification that a particular desired size for the project does not render minimization of impervious area technically infeasible.

### III. MINIMUM REQUIREMENT 5: ONSITE STORMWATER MANAGEMENT

#### A. Performance Standard and Project Thresholds

We have consistently stated a preference, one that is almost universally shared, for a rigorous and environmentally-protective performance standard that provides flexibility in determining which LID approaches to use to meet that standard. As others have documented, the proposed performance standard is not based on sound science and does not do enough to address small storms. Our preference for a performance standard has been a more aggressive variant of the federal LID standard, which prohibits all runoff except in certain extreme rainfall events.

After spending months discussing the proposed performance standard, we continue to be dismayed that it only is required in the most unusual development situations. Development projects that are larger than five acres outside of the urban growth area should rarely if ever even exist—yet those are the only situations in which compliance with the performance standard is mandatory. Additionally, no provision in the Permit (in contrast to earlier proposals) requires these boundaries to be held static. In other words, even in the rare instance in which a project was subject to the performance standard, it could be avoided simply by expanding the UGA boundary to encompass the project.

The problem is compounded by what we believe to be a significantly inadequate alternative to meeting the performance standard, specifically, the “mandatory lists” which are discussed in greater detail below. We continue to believe that the Permit needs to either dramatically increase the kinds of projects subject to meeting the performance standard, or define an alternative that is sufficiently proscriptive that it will ensure maximum application of LID principles and BMPs.

We also believe (as we’ve previously emphasized) that some LID practices should apply to all development projects regardless of size. The thresholds allow construction of two or even three houses without water quality treatment, flow control, addressing discharges to wetlands or maintenance. Exempting small projects from any LID obligations does not control stormwater to the MEP and is a missed opportunity, particularly in urban areas. The City of Seattle proposes to require green infrastructure at all projects, even small ones. We concur that use of a simpler checklist is appropriate for small projects.

B. Mandatory Lists.

Perhaps the single most significant, and avoidable, flaw in the draft Permit is the brevity of the proposed mandatory lists. The list does not explicitly require minimization of impervious area and protection of vegetation to the maximum extent feasible, as it should. If Ecology believes that this is already required under Minimum Requirement #1, than there is little harm—and potentially significant benefit—in emphasizing the importance of these approaches by including this in the mandatory lists.

We strongly disagree with the inclusion of the statement in the mandatory list that only the first feasible BMP is required.<sup>3</sup> The core principle of LID is to integrate multiple small-scale BMPs across a site to reduce the generation of stormwater and infiltrate what remains. These assist in achieving the goal of no net runoff for even large storm events. Under Ecology’s proposal, roof or driveway runoff could be routed into a raingarden with no assurances that the rain garden is adequately sized to handle the runoff in all storm events. We urge you to include some kind of enforceable or accountable metric to the mandatory lists (if you choose to adopt them rather than a performance standard) that directs that BMPs be chosen and implemented to eliminate as much runoff from the site as technically feasible.

We also have sought to emphasize that the mandatory lists should include other LID BMPs, most notably water reuse, which is now economically feasible in Western Washington, and green roofs for appropriate projects. Again, the preferred approach is to define a metric that jurisdictions and developers have flexibility to meet through whatever BMPs they choose (i.e., no surface water runoff for a defined design storm), but if Ecology prefers to give the option of lists, the lists should be comprehensive.

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<sup>3</sup> We acknowledge and appreciate that Ecology placed “full dispersion” as the first BMP in this list.

C. Phosphorous Treatment.

Phosphorous treatment under this draft Permit appears completely voluntary. This should be mandatory if the site discharges to fresh water, and possibly to marine waters as development in the region continues.

D. Exceptions/Variances.

We are primarily concerned that the draft Permits give two separate avenues for exemptions from the duty to require LID: the feasibility criteria (discussed further below) and these exceptions/variance criteria which allow exemptions for the LID standards as well as any other requirements. The obvious way to resolve that approach is to ensure that this section (exceptions/variances) does not apply to the LID requirements, which would be governed by the feasibility criteria. As discussed further below, we also strongly urge Ecology to impose a mitigation requirement for any exception or variance from a condition to ensure that the environment does not suffer, and to act as a disincentive to over-generous reliance on these provisions. Finally, it is crucial that all exceptions and variances be reported in the Annual Reports so that the public can determine if any permittee is abusing this process and to ensure that additional permit conditions are imposed in the future if so.

If Ecology provides an option for variances for any permit condition, it also needs to include measures that prevent their inappropriate application. These measures should include a variance appeal process that specifies procedures for public review and comment. The public should also be granted the authority to appeal a variance if the review process is inadequate. In addition, there should be a trigger that mandates Ecology review of a Permittee's repeated use of variances. The trigger should define the minimum number of variances issued by a Permittee that triggers Ecology review of the projects receiving variances and their associated site conditions. For example, the trigger might be defined from the number of stormwater projects by a Permittee annually, if 10% of that number are granted variances in one year, a review would be required. Outcome of the review, if Permittee is found to be inappropriately granting variances, might include: Permittee cannot grant variances without Ecology approval for a specified duration; Permittee authority to grant variances cannot be used for specific circumstances for the remainder of the permit period; citizen review and approval of variances are mandated for a specific locality or condition; or other measures.

E. Basin Planning (App. 1, § 7).

Ecology included a similar provision in the last permit term, and it remains unclear whether and to what extent this provision is necessary. Few if any "alternative" programs have been adopted, with the exception of Clark County's deeply-flawed approach. We are particularly concerned about excusing any permittee from the LID requirements, such as they are, on the basis of basin planning. We are not aware of any technical basis on which to sidestep

LID requirements but are concerned that it could be abused by jurisdictions seeking to relax environmental controls. We also suggest a clearer statement that in order to be approved, the proposed “tailored” stormwater controls must be equivalent or stronger to the default requirements of the Permit.

F. Feasibility Criteria for LID.

These criteria are a major area of concern for us: while in many places they are appropriate and acceptable, in others they are overbroad and dangerously vague. First, we recommend a statement in this section that there are no circumstances under which retention of native vegetation and reduction of impervious area are infeasible. Second, we have serious concerns with the proposed soil infiltration standard, which is not technically supported by any research that we are aware of. This feasibility criteria alone will render much of the Permit’s LID requirements irrelevant since it is a common condition in Puget Sound. Repeated experience shows that soil amendment significantly increases the capacity of soil to retain runoff. Moreover, poor soil conductivity simply highlights the need for more aggressive application of other LID BMPs like protecting vegetation and re-using water. Infiltration will virtually always be “infeasible” if developers are allowed to remove vegetation and soils.

We are also concerned about the lack of requirement to conduct extensive soil investigation before invoking this exception. The fact that soil drains poorly in one area does not mean that it will just a few feet away. The use of underdrains also appears voluntary and it appears that this section simply excuses the use of bioretention where the first field test reveals low conductivity.

We are confused by the proposed feasibility limit for pervious concrete relating to “soil suitability criteria for providing treatment.” If soil is unsuitable it can be amended to provide treatment: this should not be optional but rather mandatory.

We have additional concerns about the potential breadth of the “competing needs” feasibility criteria—the “special zoning district” exemption for example should be eliminated. Under the CWA and the PCHB’s decision, LID is required wherever it is feasible technically. While presumably well-intentioned, this exemption opens the door to abuse by permittees, for example, by adopting broad special purpose districts solely for the purpose of avoiding rigorous stormwater controls. Abuse could be avoided by identifying in the Permit which specific kinds of districts, already in existence, could potentially be subject to this exception.

While we certainly agree that the protection of public health and safety is paramount, there is no conceivable situation that we are aware in which a LID requirement would present such a risk. This proposal seems to provide an invitation for permittees to seek to override LID with contrived concerns about mosquitoes or ponded water. We also seek additional explanation around the proposed transportation regulations exemption, as we are unclear what it is and why it is necessary.

Additional concerns with the feasibility as follows:

- Section 8.1.A. page 36: Second paragraph from the bottom: The developer is allowed to strip native vegetation and soils. Then if the vertical separation from an impervious surface and the water table is less than one foot, bioretention is not feasible. This makes bioretention voluntary. This standard should only apply to undisturbed conditions. The developer should be required to replace the disturbed soils to attain the necessary separation even if it requires a different grading plan.
- Section 8.1.B: The exemptions for “arterial or collector,” “high use” and “industrial activity” are not supported. These exemptions should be re-written to address specific limiting factors related to these land uses.
- Page 38, 3rd paragraph: Importing an infiltration layer should not be an “option,” it should be required.
- Page 38, 5th paragraph: The developer should be required to address the source through stabilization or diversion rather than determining that permeable pavements are not feasible.
- Page 38, 7th paragraph: This should only apply to undisturbed conditions. Otherwise, permeable pavement becomes voluntary. If site preparation activities reduce the necessary separation, the developer should be required to import suitable soil material to replace the necessary separation.
- Page 38, 3rd paragraph from the bottom: Why would this be any different from the infiltration that occurred prior to development? This requirement is unnecessary.
- Page 38, 2nd sentence from the bottom: Permeable pavements can be designed to support heavy loads. This exemption is not necessary.
- Page 39 last paragraph: An infiltration rate of 0.2 inches provides adequate infiltration to meet the infiltration requirements. If vegetation is adequately installed and maintained, infiltration rates tend to increase with time as the vegetation roots and associated micro-organisms become established.
- Section 8.1.C: This standard effectively makes vegetated roofs voluntary by allowing project design to trump water quality protection. Why not simply say roofs cannot have a slope greater than 20%?

Finally, since it will be difficult to avoid all potential for abuse up front in this Permit, we strongly urge you to include a permit condition requiring mitigation for the environmental impacts of any development practices that is found exempt from the LID requirements. Simply put, if there is an adverse water quality impact arising from the exemption it should be mitigated. This will require some additional guidance and direction from Ecology but it will provide a significant incentive towards ensuring that these feasibility exemptions are applied as narrowly as possible and that the environment does not suffer.

## COMMENTS ON APPENDIX 12

In Attachment C – Recommended list of stormwater effectiveness study topics and questions (page 12) – the Potential Questions for Request for Proposals should include an inquiry for solutions or improvements. For example, “Are the temporary erosion and sediment control Best Management Practices (BMPs) required during development or redevelopment adequate to control erosion and sediment from construction sites?” should include the question of what improvements need to be made. Similarly, in assessments of educational programs, if the existing programs are not working, there should be a discussion of what changes are needed to improve them.

## COMMENTS ON FACT SHEET FOR PHASE I PERMIT

Page 10. Section 3.1. Given that Fact Sheets are part of the official record, all statements need to be accurate and fact-based:

- This clause is inaccurate: “Also, since stormwater does not infiltrate during the wet season...”
- The summary of the toxicity associated with pre-spawn coho mortality should include the new information about the association spawner mortality with the relative proportion of local roads, impervious surfaces, and commercial property within a basin. Nat Scholz and the NOAA team have now published updated studies related to the Coho pre-spawning mortality and these references should be used in the Fact Sheet:
  - Scholz NL, Myers MS, McCarthy SG, Labenia JS, McIntyre JK, et al. (2011) Recurrent Die-Offs of Adult Coho Salmon Returning to Spawn in Puget Sound Lowland Urban Streams. PLoS ONE 6(12): e28013. doi:10.1371/journal.pone.0028013.
  - Spromberg JA and Scholz NL (2011) Estimating Coho Population Decline in Urbanizing Watersheds—Integrated Environmental Assessment and Management—Volume 7, Number 4—pp. 648–656.
  - Feist BE, Buhle ER, Arnold P, Davis JW, Scholz NL (2011) Landscape Ecotoxicology of Coho Salmon Spawner Mortality in Urban Streams. PLoS ONE 6(8): e23424. doi:10.1371/journal.pone.0023424.

Page 13. Section 3.2. Recent Regional Efforts. The reference to the report by the Sediment Phthalates Work Group should be caveated or should be removed from the Fact Sheet. This report was not credible and scientists/technical experts from the environmental community were excluded from the Work Group. We had strong objections to the committee’s recommendations. Dischargers were allowed to be included on the committee. It was a biased effort.

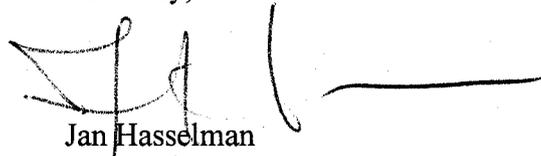
February 3, 2012  
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Page 14. Section 3.2. Toxic Loading Study for Puget Sound. The description of this study should include mention that another one of the limitations of the study (due to limited funds) is that it was limited to sampling in only two watersheds.

Page 16. Phthalates Working Group. Same comment as above. This section should be either eliminated or heavily caveated.

Thank you for the opportunity to comment on the draft Permits and associated documents.

Sincerely,

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

Jan Hasselman  
*Attorney for Puget Soundkeeper Alliance, People  
for Puget Sound, and Washington Environmental  
Council*