Northwest Indian Fisheries Commission

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February 3, 2012

Mr. Ted Sturtevant, Director
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Comments and concerns regarding updating and reissuing the phase I and II municipal stormwater permits

Dear Director Sturdevant:

On behalf of the Northwest Indian Fisheries Commission (Commission), we would like to provide the following comments and concerns on the updating and reissuance of the phase I and II municipal stormwater permits. We understand that this final comment period marks the end of a long and arduous process. Nonetheless, we would like to take this opportunity to impress upon you the imperative of protecting our treaty-reserved resources by better protecting water quality from the impacts of stormwater runoff.

As you are aware, the Commission is comprised of the twenty treaty tribes of western Washington, who have constitutionally protected rights to harvest and co-manage various natural resources. It is important to note, however, that the collective comments of the Commission do not supplant the individual voices of the member tribes. The tribes are sovereigns who reserve the right to provide their own positions and statements. Pertinent to the municipal stormwater permit issues before us, the treaty tribes have treaty-reserved rights to manage and harvest salmon and shellfish – each of which has been adversely impacted in one form or another by stormwater runoff and its attending deleterious effects.

As sovereign nations, 20 treaty Indian tribes in western Washington signed treaties with the United States, ceding most of the land that is now western Washington, but reserving rights to harvest these natural resources. For those rights to have meaning there must be salmon and clean and healthy shellfish beds for the tribes to harvest. Unfortunately, today these rights are at risk because salmon habitat is being damaged and destroyed faster than it can be restored. Salmon populations have declined sharply because of the loss of spawning and rearing habitat and the stresses associated with poor water quality. As a result, tribal harvest levels have been reduced to levels not seen since before the 1974 *U.S. v. Washington* ruling. As the salmon disappear,

tribal cultures, communities and economies are threatened as never before. Some tribes have lost even their most basic ceremonial and subsistence fisheries – the cornerstone of their tribal life.

Protecting water quality is synonymous with protecting salmon, and salmon habitat, and it is integral to the overall salmon recovery effort. It also essential to keeping shellfish beds clean, safe, and harvestable. It is therefore no surprise that the federal Clean Water Act set as an explicit goal – *fishable waters*.[1] It is also worth noting that state law protects salmon as a beneficial use under the state's water quality standards.[2] And in accordance with the regulatory scheme of state and federal clean water laws, *permits,* such as the phase I and II municipal stormwater permits are the primary vehicles for accomplishing these important goals.

Despite permitting efforts, the impacts from stormwater runoff continue to take their toll.[3] Even where habitat gains have been accomplished due to expansive cooperative restoration efforts, the impacts associated with stormwater runoff contribute to undermining what gains have been made.[4] For example, the Nisqually River is one watershed in Puget Sound where we have made significant habitat gains in recent years. Yet, despite the massive cooperative salmon habitat restoration effort, research shows that young ESA-listed salmon and steelhead from the Nisqually River are dying before they leave Puget Sound. Less than 7% of the steelhead are making it past Seattle. Pollution problems associated with stormwater runoff are believed to be a major contributing factor to the salmon's demise.

In order to protect the salmon resource and honor constitutionally protected treaty rights, it is our expectation that the Department of Ecology, as the federally delegated Clean Water Act agency, will develop and apply permits that fully address the many facets of stormwater pollution. This must be done in a manner that fully protects the beneficial uses, including salmon and salmon habitat, and ultimately implements the goals of the authorizing statutes and the treaty-reserved obligations– to recover and maintain fishable waters.

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[1] See for example 33 USC §§ 1251 & 1313

[2] See for example WAC 173-201A-200(1) & 210(1)

[3] See e.g. Moscrip, A., and Montgomery, E. (1997) Urbanization, flood frequency, and salmon abundance in Puget Sound lowland streams, Journal of the American Water Resources Association, vol. 3 no. 6 pp 1289-1297; Mcintyre, J., Baldwind, D., Meador, J., and Scholz N. (2008) Chemosensory deprivation in juvenile coho salmon exposed to dissolved copper under varying water chemistry conditions, Environmental Science and Technology vol 42 no 4 pp 1352–1358.

[4] Booth, D., Karr, J., Schauman, S., Konrad, C., Morley, S., Larson, M., and Burges, S. (2004) Reviving Urban Stream: Land Use, Hydrology, Biology and Human Behavior, Journal of American Water Resources Association, vol.40 no. 5, pp. 1351-1364.

To this end, we strongly support Ecology's removal of the one acre exemption in the Phase II permits, and support requirements that permittees engage in a robust water quality monitoring program. We also support and appreciate the effort, time, and expertise that Ecology has devoted to developing these permits.

Yet over the course of the last four years, since the Pollution Control Hearings Board mandated the implementation of more stringent water quality protections (i.e., Low Impact Development (LID) principles) in the permit, we remain concerned that the lengthy process surrounding these permits has unduly subjected water quality protection decisions to the sway of political pressures, and ultimately to the detriment of resource protection.

These undue influences are best illustrated by: 1) the lengthy timelines provided for permit compliance and implementation; 2) excessive discretion granted to the permittee to self-determine compliance with state and federal obligations; and 3) the de-emphasis of the most practical and effective stormwater controls – retention of native vegetation and soils.

1. **Protracted implementation of stormwater controls will not provide timely protection of treaty reserved resources.**

Although we recognize that the postponement of permit implementation is in part due to legislative intervention, we also note that there are numerous permit conditions which unduly delay and lengthen compliance timelines for permittees.[5] Timely implementation of the federal Clean Water Act is a requirement to successful delegation and must be done in accordance with federal obligations, which include the obligation to protect treaty-reserved resources. However, by delaying implementation of stormwater controls these obligations may not be met. For example, allowing "grandfathered" development proposals to proceed, despite the PCHB's ruling that state vesting law doesn't apply to these Clean Water Act requirements,[6] allows permittees to continue with development that does not adequately protect beneficial uses. Under the proposed approach, these pollution sources may proceed with development under outmoded standards until 2021 (according the draft phase II permit). This is simply not acceptable.

Another component built into the permit that will allow delay, is the requirement that the permits need not be updated to comply with Total Maximum Daily Loads (TMDLs) until the complete reissuance of the next round of permits.[7] Under a best case scenario, this timeline is too long, and given the example set by this round of permits, we fear that implementation of TMDLs will be unduly delayed beyond the five year permit cycle. Failing to adopt new permit conditions to

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[5] For example see phase I permit S.5(C)(2)(b), S.5(C)(5)(a)(iii), S.5 (C)(5)(c)(iv)(1), S.5(C)(8)(b) & (c)

[6] *Rosmere Neighborhood Assoc., et al v. Dept. of Ecology, et al.* PCHB No. 10-013 (January 2011)

[7] See Phase I and II permits § S.7

comply with TMDLs in a timely manner is also inconsistent with the Clean Water Act, which requires timely implementation of the water quality standards largely through the interplay of TMDLs and NPDES permits. Under most cases, the CWA works on ten year compliance schedules,[8] however, if permittees are given an additional five plus years before they are even required to begin implementing allocations, then this effectively affords the permittees additional years before a compliance schedule timeline would even begin. This delay unreasonably subjects beneficial uses, such as salmon to water polluted beyond state and federal standards for lengthy periods of time. Moreover, the proposed approach is inconsistent with other Ecology stormwater permits (such as the Washington State Department of Transportation's stormwater permit), which allow more frequent updating of permits to incorporate TMDL requirements. The precarious status of salmon and orca signify a need to strengthen permit requirements, not making them more lax. We are at a crossroads, and if we are going to change the trajectory of salmon decline, then we must begin improving water quality protections now.

2. Excessive discretion afforded to the permittees does not ensure compliance with state and federal standards and obligations.

The proposed permits do not go far enough to protect our collective resources, or even hit the marks required by state and federal laws. For example, while we understand that federal regulations only require permits to control stormwater to the "Maximum Extent Practicable" (MEP),[9] the numerous exemptions and overly broad narratives of the permits create so many off-ramps that even this lesser federal standard is unlikely to be achieved. Moreover, state mandates to apply All Known Available and Reasonable methods of Treatment and control (AKART) of stormwater will be not be achieved due to the fact that the permits grant the permittee excessive discretionary control over the ultimate design and application of stormwater control programs, and abundant exemptions allow many sources of discharge and pollution to go uncontrolled.

For example, requirements to adopt and integrate LID into local codes (which in theory should contain stringent controls on thresholds of imperviousness) are vague and essentially delegate the decision on how much to protect our aquatic resources to the permittee. We are disheartened to learn that in lieu of clear performance standards, permittees are instead merely directed to try and make LID the "preferred and commonly used approach."[10] While we agree that this is a step forward, it is not a clear enough standard that will ultimately protect the beneficial uses, or meet

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[8] See for example see the implementing provisions of the Water Quality Standards which provides that "schedules of compliance shall be developed to ensure final compliance with all water quality-based effluent limits in the shortest practicable time" and may in no case exceed ten years, and shall generally not exceed the term of any permit. WAC 173-201A-510(a)&(c).

[9] 33 USC § 1342 (p)(3)(B)(iii); 40 CFR 122.26(d)(2)(iv)

[10] § S.5(C)(5)(b)(i)

the marks of MEP or AKART. Instead it establishes a permit structure that essentially allows for self-governance by the permittee.

Another illustration of this point is Ecology's approach to LID exemptions.[11] We understand that the concept of feasibility was a mandate from the PCHB, however, we are dissatisfied with how it was integrated into the permit. Essentially, the current approach allows for new development to opt out of LID practices based on numerous exemptions, such as soil types and cost of practices, and in many cases without prior approval of Ecology. LID approaches such as the retention of native vegetation and soils (and humus) should not be prohibited by these concerns, because they are neither impacted by soil type or cost. Unfortunately, the permit is structured such that feasibility exemptions can serve to prohibit these common sense practices. The end result being that Ecology's approach of granting discretion to the permittee, with numerous potential off-ramps, effectively eliminates the implementation of some of the most important LID practices.

Ecology's *allowing the fox to guard the hen house* approach doesn't provide the kind of clear-cut protections that scientific research suggests is needed to protect the beneficial uses from irreparable impacts.[12] This approach is also fundamentally inconsistent with the regulatory scheme of the Clean Water Act, which requires the delegated agency to make the determination of compliance, not the permittee. Nonetheless, by failing to set clear criteria to ensure the protection of beneficial uses, this permit essentially codifies a system of voluntary self regulations, because the permittee decides both the level of protection and the tools needed to accomplish it.

Finally, we would like to suggest that while setting stormwater controls for new development is important to help prevent further degradation, we must do more to remedy the problems associated with existing development. For example, while source control and structural stormwater BMPs required in the permit[13] will provide some benefit, the discretion afforded to the permittee to implement these programs greatly diminishes their potential effectiveness. The existing performance standards provide little in the way of clear-cut requirements for permittees to apply stormwater retrofits that will ensure compliance with state law obligations to meet water quality standards. Instead, Ecology sets vague criteria, which only direct permittees to

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[11] Appendix 1 sections 6 and 8

[12] See e.g. Booth, D (1991) Urbanization and the Natural Drainage System – Impacts, Solutions, and Prognoses, the Northwest Environmental Journal, 7:93-118; Booth, D. (1997) Rationale for a "Threshold of Concern" in Stormwater Release Rates, white paper for the Center for Urban Water Resources Management; Booth, D. and Jackson, R.C. (1994) Urbanization of Aquatic Systems – Degradation Thresholds and the Limits of Mitigation, Proceeding of the Annual Summer Symposium of the American Water Resources Association: Effects of Human Induced Changes on Hydrologic Systems, June 26, 1994 Jackson Hole, Wyoming.

[13] § S.5(C)(6) & (7)

"consider" retrofitting projects or other means.[14] Absent numeric effluent limitations applied to the end of the pipe, it is uncertain how permittees will acknowledge the need for, and ultimately apply the correct level of treatment necessary to protect the beneficial uses. Moreover, Ecology's elimination of their review and approval of the permittee's source control program further dilutes potential protections applied to existing development by again allowing the permittee to self-determine compliance. We believe that affording the permittee this level of discretion exemplifies the type of self regulation that the PCHB decried as impermissible.[15] To rectify this grant of excessive discretion, we recommend either clearly prescribed retrofit practices, including the appropriate quantity and quality, or preferably the application of numeric effluent limitations set at levels protective of the beneficial uses.

3. The permit de-emphasizes the most effective stormwater controls for new development

We strongly support the implementation of a robust LID program, however, we are gravely concerned that the current approach fails to implement the single most important element of stormwater control – the retention of native vegetation and soils. Ecology's de-emphasis of retention of native vegetation and soils is exemplified in the aforementioned LID exemptions, and also demonstrated in the diminished basin planning requirements. Planning for the retention of native vegetation and soils is a cost effective, low maintenance way to address stormwater pollution. Undoubtedly, this simple but highly effective way to control stormwater is within the purview of AKART. However, the permit largely fails to implement this simple, and affordable stormwater control at the scale to which it is most effective, i.e. the watershed or basin level.

Unfortunately, basin planning requirements in the phase I permit have been relegated to a mere pilot program status by requiring it in only a single basin in only four jurisdictions.[16] Moreover, basin planning is largely omitted in the phase II permit.[17] These requirements are further diminished because the planning direction is vague, provides needless opportunities for undefined alternative approaches, and lacks a clear performance standard. Most egregious of all, is the simple fact that the permit does not require the basin plan to be implemented. This essentially diminishes one of the single most important water quality and salmon protection tools to a mere paper exercise. The permit needs implementing provisions which will protect or maintain specific percentage of impervious surfaces shown to be protective of water quality standards, and those standards need to be implemented.

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[14] §S.5.(C)(6)(a)(i)

[15] *Rosmere Neighborhood Assoc., et al. v. Dept. of Ecology, et al.* PCHB No. 10-013 (2011) at 42

[16] § S.5(C)(5)(c)(i)

[17] § S.C.(4)(h)

Ecology's de-emphasis of important stormwater control practices is further illustrated by its approach to the application of AKART and adaptive management. Instead of requiring adequate implementation of key LID principles, such as planning for retention of native vegetation and soils at the front end of the permit process, the permits appear to rely upon an adaptive management process which provides that permittees will implement AKART, *after* a violation is identified. This approach is contrary to state law, which provides that AKART should be applied to *prevent* pollution, not just control it after violations have been identified. By failing to require full implementation of AKART for stormwater (such as the retention of native vegetation and soils) at the outset of permit issuance, the permit fails to adequately implement the standards of state law, and serves to authorize discharges to state waters without the application of the appropriate treatment and controls. This could be rectified, in part, by taking measures to ensure that policies which protect and retain native vegetation and soils are adequately implemented in all jurisdictions shortly after permits are issued, and properly reviewing and approving all program elements before granting coverage, to ensure that implementation of AKART is in fact achieved at the outset.

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We would like to note that our comments do not suggest that the tribes seek to stunt reasonable growth and economic development. The tribes are, however, interested in ensuring that the development is designed and implemented in ways that will better protect salmon and its habitat, and ultimately work to ensure that salmon can remain a part of their cultures and life-ways.

We know that stormwater is impacting our streams and harming our beneficial uses such as salmon. More needs to be done. So we respectfully request that you apply these Clean Water Act tools in a manner that is consistent with the needs of protecting treaty-reserved resources and implements more stringent stormwater controls, and timelines that do not unduly delay the protections that are needed now.

Sincerely,

Billy Frank, Jr.
Chairman

cc: Northwest Indian Fisheries Commissioners
Dennis McLerran
Will Stelle
Gerry O'Keefe
Kelly Susewind