February 3, 2012

Ms. Harriet Beale and Ms. Carrie Graul
Municipal Permit Comments
Washington Department of Ecology
Water Quality Program
P.O. Box 47696
Olympia, WA 98504

RE: Draft Phase I Municipal Stormwater Permit, Western Washington Phase II Stormwater Permit, and Eastern Washington Phase II Stormwater Permit

Dear Ms. Beale and Ms. Graul:

River Network and American Rivers wish to submit the following comments on the Department of Ecology's Draft Stormwater Phase I and II MS4 permits that are due to become effective August 1, 2013.

River Network and American Rivers are both national organizations with a Northwest presence. We have been working to improve MS4 permits in many states around the country, and we are also working with other national and regional groups to

a) encourage a strong national post-construction stormwater rule, and
b) foster the states' and local governments' willingness to support and implement it.

We wish to fully support the comments of Puget Soundkeeper Alliance, People for Puget Sound and Washington Environmental Council (PSA/PPS/WEC) and Columbia Riverkeeper and some of our comments will emphasize points that they have made.

We appreciate the work that the agency has put into this permit and many improved elements. For many states, the first permit cycle for the Phase II communities was mostly about setting up programs. At this point, communities subject to the Phase II requirements throughout the state have had that opportunity and these new permits need to be about implementation. Even the new Phase II communities have known about and have likely anticipated that their day would soon come. It is critical that Ecology take another look at the many authorized delays for implementation throughout these permits and examine whether they are necessary to develop a new required component or whether they can efficiently (at least in a shorter time than proposed) incorporate the requirement into their program. In that examination it is obviously necessary to judge how important it is to the water resources of the state of Washington to have these requirements in place sooner rather than later.

Common to all three permits

- **Coverage**

The Department of Ecology recognizes in the Fact Sheets that stormwater runoff poses a significant pollution threat to the state's waters and that changes to the quantity and velocity of runoff due to increasing impervious surface throughout the state has altered the natural hydrology and causes significant impacts on habitat and stream channels. (Section 3.0 in each) The sources of and responsibility to addressing those problems are far broader than the current scope of the stormwater program. We understand that expansion of the current scope was discussed as part of the Stormwater Monitoring Working Group, and we support the comments of PSA/PPS on this topic.

  - **Residual Designation Authority**

    We would like to point out that in EPA Region 1, the inadequate coverage of the stormwater programs has led to legal action in Vermont, Massachusetts and Maine that has resulted in the invocation of Residual Designation Authority by the states of Vermont and Maine and EPA Region 1 in Massachusetts to capture some of the additional significant contributors to the defined stormwater problems.

    See the following links for more information:

    Chittenden County, VT
    http://www.vtwaterquality.org/stormwater/htm/sw_RDA.htm

    Long Creek, ME
    http://www.maine.gov/dep/water/wd/long_creek/index.html

    Charles River, MA
    http://www.epa.gov/region1/npdes/charlesriver/index.html

    We believe that Washington State has the ability and the will to address this problem without the legal pressure that was necessary in Region 1. We urge you to consider strategies for broadening the coverage to additional jurisdictions, complete MS4 systems beyond the urbanized thresholds, particularly in areas that are significantly contributing to the runoff pollution and volume going into an MS4.

  - **Relieving regulatory responsibility**

    Ecology must clarify the process for their determination of how MS4s under 1000 people are NOT contributing substantially to the pollutant loadings of a physically interconnected MS4 (S1.C.2.a). We also believe that in TMDL segments, because the science and art of defining stormwater contribution and specific policy responses is still nascent, Ecology must make a determination that stormwater controls on MS4s in a TMDL segment are not necessary in order to be relieved of regulatory responsibility. (S1.C.2.a) It will be far more difficult to bring MS4s into the program later than keeping them in now.

  - **Exceptions/Variances**

The exceptions and variances that may be granted (Western Phase I and II, Appendix I, Section 6), address the economic impacts of complying with the Minimum Technical Requirements, but it doesn't address the economic impacts (likely to others downstream) associated with granting the exception or variance. We recommend that a bullet be added to require that analysis as part of the findings of fact that the Permittee must consider document before granting.

Since project exceptions and variances from the Minimum Requirements due to "a severe and unexpected economic hardship" do not require prior approval of Ecology, we believe that development and implementation of these procedures warrant particular attention from Ecology and (at the very least) documentation should be submitted to Ecology for this permit cycle and MS4s should be required to summarize all such determinations in Annual Reports.

- **Requirement of Low Impact Development (LID)**

We certainly support Ecology's efforts to incorporate LID requirements, standards and practices into all three permits. We agree with the PSA/PPS/WEC and CR comments regarding how the effort has fallen short of truly requiring LID wherever feasible as the PCHB called on Ecology to do. As is further discussed below, several parts of the permits and their supporting documents make it possible for MS4s to get out from under coverage, delay implementation, seek exceptions and variances, and seek presumptive compliance through the Mandatory Lists rather than the LID Performance standard. Because the success of Ecology's efforts to promote LID will depend on how these permits are implemented, it also depends on the agency's commitment to technically supporting MS4s, actively reviewing the development of programs, and consistently inspecting compliance and enforcement strategies.

We recommend timelines for implementation should be far sooner than is currently allowed in the permits once they are effective (Phase I - 18 months (S5.C.5.a(iii)); Western Phase II - 2.5 years (S5.C.4.a); and (Eastern Phase II -3.5 years(S5.B.5.a(ii)) since they have been anticipating these changes and will know the specifics of them in August of this year.

- **Mandatory Lists**

It is our expectation that most projects will defer to Mandatory Lists if at all possible because no consulting engineer required.

Given the reliance on these lists, we recommend that Ecology provide more specificity and measurability to the BMP list. Rather than allowing for presumptive compliance through use of the Mandatory Lists, operators should have to (at least) document the effectiveness of each strategy and identify the other ways that they will address the component of their runoff that they cannot capture with LID. We support the comments of PSA/PPS noting the strength of LID is in the combination of multiple layers and types of green controls.

In addition, we are concerned that by allowing commercial entities to simply document the cost of a green roof, rather than its comparison to other feasible options or combination of options, will result in a great migration to that method for presumptive compliance.

- **Watershed coordination**

The National Research Council report recommended that stormwater programs be watershed-based. (http://cfpub.epa.gov/npdes/newsemails.cfm?news_release_id=158) We support Ecology's efforts to promote watershed coordination in these permits (Phase I, S5.C.3) whenever possible and economically efficient. In particular, it is particularly important to refer to specific coordination mechanisms between physically interconnected MS4s and those in shared waterbodies. We believe that this type of coordination can go much further, and we recommend that Ecology review the Phase I permits in San Diego, Ventura County and Los Angeles which all include Phase II communities as co-permittees and require Watershed Urban Management Plans (coordinated watershed-based stormwater management plans) for each watershed in the jurisdiction.

- **Public access to Stormwater Management Program Reports (SWMPRs) and Annual Reports (S5.C.2. – Western & Phase I and S5.C.4.b. Phase I)**

For all MS4s, the SWMPR is the permit document with the specificity that will truly matter, and the Annual Reports will be the critical screening documents for compliance. Therefore, the public involvement requirements need to require online access to them. We appreciate that requirement for the SWMPRs, and we recommend that it be extended to annual reports, monitoring QAPPs and monitoring result. , need to add AR to online requirement

- **Adaptive Management response**

Each permit discusses the description of potential monitoring or other assessment and evaluation efforts (S4. F3.iii.), but there is no requirement for monitoring to occur associated with this adaptive management procedure. In order for adaptive management to be effective, there must be some way to intentionally assess the effectiveness of the different or additional BMPs put in place in a timely fashion.

- **Replace "protect water quality" with comply with water quality standards"**

Each permit reads "This permit does not authorize a discharge which would be a violation of Washington State surface water quality standards (chapter 173 – 201A WAC)…"(S4.B.). Yet, all three permits repeatedly require that permittees develop program elements that "protect water quality." We recommend that Ecology change that phrase in all places to "comply with water quality standards."

EPA released a memo in November 2010 memo entitled "Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" that supports the need for MS4s to comply with water quality standards.

> The CWA provides that stormwater permits for MS4 discharges shall contain controls to reduce the discharge of pollutants to the "maximum extent practicable" and such other provisions at the Administrator or the State determines appropriate for the control of such pollutants. CWA section 402(p)(3)(B)(iii). Under this provision, the NPDES permitting authority has the discretions to include requirements for reducing pollutants in stormwater dishcarges as necessary for compliance with water quality standards. *Defenders OF Wildlife v. Browner, 191 F .3d 1159, 1166 (9th Cir.1999).*
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> Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that, where

feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards. The 2002 memorandum stated "EPA expects that most WQBELs for NPDES-regulated municipal ans small construction stormwater discharges will be in the form of BMPs, and that numeric limitations will be used only in rare instances." Those expectations have changed as the stormwater permit program has matured. EPA now recognizes that where the NPDES authority determines that MS4 discharges and/or small construction stormwater discharges have the reasonable potential to cause or contribute to water quality standards excursions, permits for MS4s and/or small construction stormwater discharges should contain numeric effluent limitations where feasible to do so. EPA recommends that NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling stormwater discharges.

- **Consistency of delayed implementation**

As mentioned above, there are numerous implementation delays built in to all three permits, especially the Phase II permits. While we will address specific concerns below for each permit, Ecology must decide whether the permits will have a time frame (e.g. 1 year) or a date (e.g., August 1, 2014) in these footnotes. It is currently inconsistent within and across permits and will lead to confusion.

- **Grandfathering applications**

Understanding the need for clarity in expectations for new construction, it makes sense that there would be a specific point after which all projects must comply with the new ordinances adopted by the permittees. To us, that bright line would be the day the permittee adopts its required ordinances, which we recommend should be far sooner than is currently allowed in the permits once they are effective (Phase I - 18 months (S5.C.5.a(iii)); Western Phase II - 2.5 years (S5.C.4.a); and (Eastern Phase II -3.5 years(S5.B.5.a(ii)) since they have been anticipating these changes and will know the specifics of them in August of this year.

As the PPS/PPA/WEC comments refer to this as vesting. We support their concerns as well.

- **Source Control Programs (S5.C.7.)**

Across the country, retrofit programs are being incorporated into MS4 programs. We support Ecology's requirements of the Phase I permittees, with the caveats mentioned by the PPS/PPA comments about maintaining Ecology oversight, and we would strongly encourage similar provisions in the Phase II permits.

- **TMDLs (S7.)**

The November 2010 memo addressed above entitled "Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs", MS4 permits need to fully account for the current impaired conditions of the receiving waters and MS4s need to improve their practices to meet stormwater allocations increasingly called out in TMDLs. We appreciate the attention that Ecology has given this relationship in Appendix 2. Requiring MS4s to be aware of the TMDLs and

their responsibilities is the first step, however, it will take active oversight and agency prioritization for these new steps to begin to reduce stormwater contributions to impaired and TMDL waters.

We support the PSA/PPS/WEC and Columbia Riverkeeper comments on the concerns about not requiring MS4 permit modifications as TMDLs are developed.

- **Monitoring (S8.)**

We wish to support the development of regional and watershed-based coordination for stormwater monitoring in general, and the Regional Stormwater Monitoring Program specifically, to take advantage of cost savings and improved data gathering. However, we have concerns about the unequal requirements between Puget Sound and Southwest Washington in the Phase I and Western Phase II permits, and we would recommend that status and trends monitoring be part of the requirements outside the Puget Sound area as well "to answer basic questions as to whether conditions in receiving water are improving or deteriorating." These requirements are more comprehensive than is currently required for Clark County and the other Phase I and II jurisdictions do not have any such requirements (unless they are related to TMDLs or IDDE programs). We support the comments of Columbia Riverkeeper in this area. The rationale as stated in the Phase I Fact Sheet (p. 68), for why Southwest Washington is not included does not sufficiently defend the omission. It is unclear whether jurisdictions in Puget Sound will buy into the RSMP and yet they are still required to fulfill the status and trends monitoring component.

Ecology should require some level of status and trends monitoring in southwest Washington as well, even if it is less comprehensive than that in Puget Sound. Staff admitted that some of the jurisdictions are already coordinating on their monitoring in shared waterbodies. This approach should be supported, encouraged and required in a way that moves coordinated regional (ideally waterbody) monitoring forward.

Eastern Phase II

We applaud the options for collaborative effectiveness monitoring, and we recommend that it be given higher priority by requiring permitees to justify in writing their reasons for not working together on monitoring, if they so choose.

We note the lack of status and trends monitoring and recommend that Ecology require at least annual receiving waterbody monitoring, summarized in annual reports, to better understand whether the quality of the waters is improving or deteriorating.

Ecology's focus on the RSMP in the western part of the state disadvantages the MS4s in the eastern part of the state. We strongly believe that, for equity purposes, Ecology needs to provide the same regional pay-in option to accomplish Effectiveness Studies and Source Identifcation and Diagnostic Monitoring in the East.

- **Feasibility Criteria for LID/infiltration**

Because the feasibility criteria all for many ways out of LID requirements, the permits need clarity about demonstration, documentation and determination through each set of minimum requirements in order

to prevent them from being used as easy off ramps. Ecology needs to dedicate staff to the examination of how they are being applied (and abused).

Specific to particular permits

<u>Western Phase I</u>

- General permit

Individual permits are better suited to address the specific geographic issues associated with the larger communities, and that is the way that most other states handle Phase I MS4s. In particular, it is much easier to assign wasteload allocations from TMDLs to individual permits.

<u>Western Phase II</u>

We support Ecology's approach to combining the Construction and post-Construction minimum measures as they do relate to each other and it is easier for permittees and those they regulate to understand the relationship and process better with them combined. It also supports development that looks ahead to incorporate longer term stormwater management (in particular LID) into the development process, not as an afterthought.

We support the removal of the Erosivity Waiver from S5.C.4.

<u>Eastern Phase II</u>

We are greatly concerned about the double standards being developed for western and eastern Washington Phase II MS4s.

- Ecology has recognized that conditions in Eastern Washington are "generally more favorable for LID practices" and that "a number of LID stormwater facilities" have been designed and built during this permit term (Eastern Phase II Fact Sheet, p. 37,39), yet the requirements in the Eastern Phase II permit are considerably weaker and allow for more delay (one more year for implementation, 12/31/16, S5.B.5.a(ii) and no implementation at all for new permittees). We recommend that code changes not merely "allow" LID to occur, but put the same requirements in place as in the Western Phase II permit and that the changes be implemented at the same time as the Western Phase II deadlines.

- The Construction and Post-Construction minimum measures are still separate and siloed. It is not logical to justify and recommend their combination in one part of the state and not throughout. Of greater concern is that the one acre threshold still exists when it has been decided that such a threshold in the west is not appropriate.

- The Erosivity Waiver is still in place at S5.B.4.b(i) when it has been removed from the Western Phase II permit.

We appreciate the opportunity to submit these comments and we encourage the Department of Ecology to revise the draft permits to reflect the points we have raised. We look forward to the final permits this summer.

Thank you,

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