



April 30, 2009

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Dear Ms. Lowe and Ms. Beale:

I am submitting the following comments on the proposed modifications to the Phase I and Phase II Western Washington general municipal stormwater permits on behalf of Puget Soundkeeper Alliance and People for Puget Sound (“PSA”). As you know, these organizations were the appellants in the Pollution Control Hearings Board (“PCHB”) appeals that led to the current modification proposal.

1. Deadlines: The draft modified permits propose some deadline extensions for the Phase II jurisdictions. In its notice, Ecology also signaled a willingness to further extend deadlines and otherwise “reduce costs.” PSA does not believe that further deadline extensions are appropriate, for several reasons.

First, the Phase II program is years—by some measures, decades—behind schedule. EPA issued its Phase II rules years after Congress imposed a deadline, and Ecology’s issuance of the permits was years behind EPA’s deadlines for permits. The permits, in turn, give permittees many years to come into compliance with permit terms, even where they are already meeting them. These are important programs and permittees should devote the appropriate resources to coming into compliance.

Second, while Ecology’s willingness to extend deadlines appears to be based on a consideration of the costs of compliance with the permit, Ecology should be giving equal if not greater consideration to the costs of non-compliance. Even the PCHB found that the failure to use the most effective stormwater controls exacts enormous costs on the region. Study after study has found that the costs of poorly regulated stormwater runoff on Western Washington’s environment, economy, tourism, fisheries, treaty obligations, and other resources are enormous. The region has made a commitment to recover Puget Sound’s health by 2020—an ambitious schedule that will require a significant and sustained commitment from all of the permittees as

well as the state. Delays in implementing the permit will make achieving this goal even more difficult.

Finally, there should be no reason that economic conditions will directly affect permittees' ability to comply with permit terms. Most permittees fund their programs through utility rate structures and—for provisions relating to new development and redevelopment—through permit fees to developers. Compliance with stormwater permit obligations are not generally funded out of general appropriations such that permittees need to make choices between complying with the permit and other public programs. Moreover, the evidence and testimony in the Phase II hearing demonstrated that utility rates in most Phase II jurisdictions are very low, far lower than in Phase I jurisdictions. It also demonstrated that some permittees choose to “subsidize” development via permit fees that don't cover the cost of review. These are choices that jurisdictions make, not immutable conditions that prevent them from compliance.

2. Low Impact Development: PSA agrees that in order to properly implement the Board's Phase I permit ruling, Ecology can and should develop an appropriate performance standard and criteria on evaluating feasibility. We are dismayed, however, that nearly eight months have passed since the Board's ruling and Ecology has yet to even initiate the process to begin defining these standards. Ecology has also indicated that the process could take up to two additional years once it starts. PSA sees no need for a process this lengthy—defining an appropriate performance standard for LID is chiefly a technical process. Once the technical team has defined a standard, and criteria for determining where primary reliance on LID is not feasible, it can be released in draft form for public comment. In contrast to the Phase II permit, the Board directed Ecology to require the use of LID in this permit term. However, the schedule Ecology has proposed will not be complete until close to the end of the permit term.

PSA agrees with the proposal that Phase I jurisdictions report in each annual report a summary of barriers to implementation of LID and actions taken to remove those barriers. It is important to emphasize that the removal of barriers to LID is an ongoing permit condition in both the Phase I and Phase II permits, even while the technical process proceeds. It would be very helpful for Ecology (or another suitable entity like the Puget Sound Partnership) to provide additional guidance on these barriers. In PSA's experience, barriers to LID include not just ordinances like street width and setback requirements, but “cultural” barriers like the additional burdens permit staff place on developers who wish to pursue LID projects. It is vitally important that permittees address these issues.

With respect to Phase II, PSA disagrees that the proposal is consistent with the Board's ruling. While the Board found that implementing LID was feasible to a lesser extent in the Phase II jurisdictions as compared to the Phase Is, it did set forth substantive standards with regard to LID that had to be satisfied during this permit term. Specifically, the Board stated that Ecology must take actions to “ensure that Phase II jurisdictions undertake actions to implement, or ready

themselves to implement[,] LID.” Phase II Final Order, ¶ 29; see also id. ¶ 20 (“ the Phase II Permit should require more and additional specific steps and goals for the implementation of LID over a reasonable time frame.”) The Board continued,

Specifically, consistent with what EPA has recommended to Ecology, we find it is reasonable and practicable for Phase II permittees to identify barriers to the use of LID and how those will be addressed, to identify potential non-structural actions or LID techniques to prevent continuing stormwater impacts, and to establish goals and metrics for promoting and measuring LID use, with the intent that LID and other non-structural actions will be widely implemented in Phase II jurisdictions on an appropriate time-line and in future permits.

Id. ¶ 30. However, in the face of the Board’s direction that Ecology must set standards that result in actual implementation of LID during this and future permit terms, the proposed permit modification only includes reporting obligations. That is inconsistent with the Board’s direction. The permit must be modified so that these are actual, substantive permit conditions, not simply items for inclusion in a report.

PSA further disagrees that permittees should be given two years in which to report on the barriers to LID and opportunities for earlier implementation. That is less than one year before the end of the permit term. Given the importance of shifting to LID—and the significance of the endeavor for permittees—this kind of analysis should not be delayed.

While the Board concluded that the Phase II permittees do not need to require use of LID in the same manner as the Phase I permittees during this permit term, this conclusion appears to be predicated on the belief that the permit will be revised in 2012. The Board appears to have anticipated that a new Phase II permit will be issued in 2012, and that such a revised permit will contain the same LID requirement that is being developed now for the Phase I permittees. If, however, the new Phase II permit is substantially delayed, the existing permit will have to be modified to include a LID requirement during this permit term. Ecology should not lock in a status quo that everyone acknowledges is inadequate for more time than absolutely necessary.

The modified Phase II permit should also explicitly provide Phase II jurisdictions the opportunity—and strong incentives—to adopt the new LID performance standards defined by Ecology for the Phase I jurisdictions. Many jurisdictions may wish to simply revise their codes just once rather than go through a lengthy process of updating codes twice—once to adopt an inadequate flow detention standard, and again to transition to LID.

For these reasons, PSA proposes that the Phase II permit be modified to give permittees the option of adopting the LID-based standards developed for the Phase I jurisdictions, instead of the Appendix 1 standards, for new development and redevelopment. As an incentive for them to

do so, PSA proposes that the deadline for adoption of new ordinances be extended for those permittees that commit to adopt the new LID performance standards on the same schedule as the one that will be developed for Phase I permittees. As an additional incentive, PSA proposes that the reporting obligations identified in S.9.E.4 be waived for permittees who commit to adopt the LID performance standard when it is completed.

As the PCHB found, and as virtually all scientific and technical analysts have confirmed, transitioning to a rigorous LID framework is absolutely crucial to protecting and recovering Puget Sound and is necessary to meet the CWA's standards. While the Board did not require full implementation of LID for Phase II jurisdictions during this permit term, it is clear that Phase II permittees will ultimately need to do so in the future. PSA urges Ecology to think of different ways in which this transition LID can be effectuated during this permit term, sparing permittees the obligation to significantly overhaul their ordinances twice in a short time.

3. Structural Stormwater Controls: In PSA's Phase I appeal, the PCHB agreed with PSA that the Phase I permit's provisions for structural controls was inadequate. The Board reasoned that the provisions amounted to "impermissible self-regulation" for several reasons.

First, the permit failed to require a "minimum level of effort" and that it "provides no review and approval role for Ecology." See Conclusion of Law 29. Second, the Board found the permit inconsistent with governing regulations because it did not require permittees to describe "priorities for implementing controls." Id. The Board's decision emphasized the relationship between permittees' articulation of such priorities, and a substantive standard to evaluate those priorities: either through setting a minimum level of effort up front, or through Ecology review and approval of each permittee's plan. As the Board observed, "[T]he structural stormwater program is left entirely to the discretion of the municipalities, not only with respect to which projects they initially select but also in the timing and manner in which they implement the selected projects." Id. ¶ 29.

PSA cannot discern how the proposed modifications resolve these problems. The proposal does not change any substantive standard, articulate an appropriate level of effort, or call for Ecology review and approval of programs. Instead, the only proposed modification is the inclusion of a reporting obligation that the "description" of the program include a description of the prioritization process used to select projects.

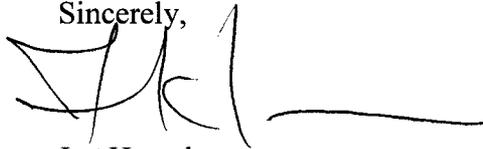
This is not what the Board directed Ecology to do. The structural control program permit provision should either be subject to some kind of consistent, verifiable standard that ensures that AKART will be applied. Ecology's review of the programs is essential.

Thank you for your consideration of these comments. Puget Soundkeeper Alliance and People for Puget Sound are committed to working with Ecology to improve the Phase I and

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Phase II permits so that they are actively contributing to the health of Puget Sound. We are happy to discuss these comments further in person.

Sincerely,

A handwritten signature in black ink, appearing to be 'JH', followed by a long horizontal line extending to the right.

Jan Hasselman

*Attorney for Puget Soundkeeper Alliance and  
People for Puget Sound*