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Washington Dept. of Ecology
Attn: Carrie Graul
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Submitted Via Email

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

Department of Ecology:

Columbia Riverkeeper (Riverkeeper) submits the following comments on the Department of Ecology's (Ecology) draft Phase I, Western Washington Phase II Stormwater Permit, and Eastern Washington Phase II Municipal Stormwater Permits. Riverkeeper appreciates the countless hours that Ecology staff devoted to developing the draft permits and coordinating with stakeholders. Many aspects of the permits will provide long needed measures to address the high costs—both economically and ecologically—of urban stormwater pollution in the Columbia River and its tributaries. In other respects, Ecology fails to impose permit requirements, or significantly delays requirements, that would otherwise address the known impacts of urban stormwater pollution on public health and the aquatic environment.

Riverkeeper's comments on the draft municipal permits are aimed to address the current, degraded state of water quality in the Columbia and many of its tributaries. The Columbia River is currently the focus of a major region-wide effort to reduce toxic pollution and its harmful impacts on human health and local fish and wildlife. In 2006, EPA designated the Columbia River Basin as a priority Large Aquatic Ecosystem. Following this designation, EPA released *The Columbia River Basin State of the River Report for Toxics* (Toxics Report), which describes the serious impacts of toxic pollution on public health, fish and wildlife in the Columbia Basin. Stormwater from urban areas is a major source of toxic pollution and other pollution in the Columbia. In turn, effective regulation of urban stormwater in Washington State is critical to restoring the health of the Columbia and many of its tributaries.

Endangered Species Act (ESA) listings throughout the Columbia River Basin also underscore the importance of strong stormwater pollution controls. Thirteen stocks of salmon

and steelhead are currently listed as threatened or endangered under the ESA. Since Ecology issued the previous permits, the federal government added green sturgeon and smelt to the ESA-list and designated critical habitat for these species on the Columbia. Experts cite degraded water quality as one of the contributing factors to the severe population declines of the Columbia River's ESA-listed species. For example, copper, a neurobehavioral toxicant in fish, causes increased salmon mortality.¹ The level of dissolved copper in waterways is now considered a limiting factor in the survival and recovery of endangered salmon. The extremely high levels of copper and other toxic pollutants in stormwater runoff highlight the urgent need to strengthen municipal stormwater permits on the Columbia.

Overall, Ecology has a tremendous opportunity to improve the health of the Columbia River and other waterways when it revises and reissues the Phase I and II stormwater permits. For the reasons explained in the Puget Soundkeeper Alliance comment² and below, Riverkeeper urges the department to revise the permit to take full advantage of this opportunity and comply with the Clean Water Act's mandate to reduce stormwater pollution to the "maximum extent practicable."

A. Low Impact Development Standard.

a. LID requirements for code revisions in Phase I and Western Washington Phase II Permits: S.5.C.5.b.

In February 2009, the PCHB ruled that Ecology must begin to prepare Western Washington Phase II permittees for future implementation of LID. *Puget Soundkeeper Alliance v. State of Washington*, PCHB No. 07-022 & -023, Finding of Fact and Conclusions of Law and Order, 24-25 (Feb. 3, 2009). While Ecology has invested time and resources in exploring the expansion of LID requirements in the revised Phase I and Phase II permits, the permits contains vague language which threatens to undermine the LID standard's effectiveness. Riverkeeper urges Ecology to require that municipal codes include a specific net decrease in impervious area, increase in native vegetation, and reduction in vegetation loss. This issue is discussed at length in the PSA Comments, which Riverkeeper incorporates by reference.

b. LID requirements in Eastern Washington Phase II Permit: S5.B.5.

The Eastern Washington Phase II permit's treatment of LID takes a marked departure from the Phase I and Western Washington Phase II permits. At the outset, Ecology acknowledges that "LID in eastern Washington is relatively new compared to the number of projects, training programs, and guidance in western Washington." Eastern Washington Phase II

¹ Sandahl, J.F., et. al. "A Sensory System at the Interface between Urban Stormwater Runoff and Salmon Survival." *Environment Science & Technology* 41 (2007): 2998-3004; Sarah G. McCarthy, J.P. Incardona, and N. L. Scholz. "Coastal Storms, Toxic Runoff, and the Sustainable Conservation of Fish and Fisheries." *American Fisheries Society Symposium* 64 (2008): 7.

² Riverkeeper incorporates by reference the public comments submitted by the Puget Soundkeeper Alliance, People for Puget Sound, and the Washington Environmental Council (collectively "PSA"). To avoid repetition, Riverkeeper does not reiterate the points raised in the PSA comment.

Permit Fact Sheet at 37. However, Ecology recognizes that “the drier rainfall patterns, soils, geology, and landscape in eastern Washington are generally more favorable for LID practices that infiltrate stormwater at the development site.” *Id.* Ecology further acknowledges that, during the current permit term, eastern Washington permittees made major advances in understanding and implementing LID. Against this backdrop, Ecology’s decision to delay LID code changes until December 31, 2016 is unsupported. *Id.* at 39 (“Ecology proposes to require permittees to allow LID approaches for new development and redevelopment projects by December 31, 2016.”). Riverkeeper urges Ecology to revise the deadline for code changes to bring much-needed water quality protection into play before the dawn of 2017.

Ecology’s “regulatory flexibility” approach to LID, embodied in S5.B.5.a.ii., also goes too far. S5.B.5.a.ii. emphasizes measures to minimize impervious surfaces and the disturbance of native soils and vegetation, as allowed by site conditions. Under this approach, Ecology allows developers to build LID projects and use LID BMPs. Yet the condition includes flexible language that severely undercuts the permit’s effectiveness. According to Ecology, this language provides “flexibility for local governments to gradually adopt practices at a pace that suits their experience with LID and that of the local development community.” *Id.* at 40. This approach crosses the boundary between flexible permit *requirements* and a voluntary permit scheme. Riverkeeper urges Ecology to revise S5.B.5.a.ii. to ensure that the requirement to implement LID is not overtaken by the permit’s “flexibility.”

Ecology also takes an unreasonably lax approach toward permittees that currently do not apply the LID standard because their jurisdictions have “physical constraints such as poorly infiltrating soils, high groundwater, steep slopes, or other conditions.” Eastern Washington Phase II Permit Fact Sheet at 40. Ecology proposes to address these jurisdictions in the next round of Phase II permitting, explaining:

To address the concern of areas with poor soils and other conditions less favorable to LID, Ecology proposes to require that each permittee develop and implement feasibility criteria specific to the jurisdiction’s conditions. Permittees would provide these to Ecology to consider as it develops the next permit.

Id. While Riverkeeper agrees that a jurisdiction-specific approach is appropriate, Ecology’s decision to delay developing and implementing the feasibility criteria until the next permit term is unreasonable and arbitrary delay. This is particularly unreasonable given Ecology’s recent decision to significantly increase the availability of Columbia River water to serve growing urban areas in eastern Washington.

B. Stormwater Management Program (S.5).

a. Ecology should replace the ambiguous phrase “protect water quality” with “comply with water quality standards.”

The permits require compliance with water quality standards. *See e.g.*, Phase I at S4.B. (“This permit does not authorize a discharge which would be a violation of Washington State

surface water quality standards.”). Ecology should revise permit language governing the Stormwater Management Program (SWMP) to align the SWMP with the requirement to comply with water quality standards. For example, S.5.B. of the Phase I permit states: “The SWMP shall be designed to reduce the discharge of pollutants from MS4s to the maximum extent practicable (MEP), meet state AKART requirements, and *protect water quality*.” (emphasis added). Ecology should modify the Phase I permit to replace “protect water quality” with “comply with water quality standards.” This comment applies equally to the SWMP requirements for Phase II permits.

b. The lengthy compliance deadline for the Phase I SWMP source control program for existing development fails to reduce pollution to the maximum extent practicable.

Riverkeeper supports a rigorous source control program to reduce pollution discharges from existing development. During the recent Triennial Review, Ecology repeatedly emphasized the primary role of source control to achieve anticipated changes in Washington’s human health criteria water quality standards and sediment standards. Yet Ecology’s decision to require compliance with the source control program by February 2, 2018 runs counter to these statements. The 2018 deadline is both unjustified and unnecessary. Based on the appreciable role of existing sources in the current, degraded state of the Columbia River and its tributaries, Riverkeeper urges Ecology to revise the 2018 deadline and require compliance no later than 2014.

c. By giving Phase I permittees the option for businesses to “self-certify” compliance with source control requirements, Ecology impermissibly creates a self-enforcing regulatory scheme.

The National Research Council identifies stormwater pollution from industrial and commercial facilities as some of the leading causes of water quality impairment. Ecology’s source control requirements for existing businesses should therefore maximize opportunities to address polluted stormwater from the business sector. Yet the permit fails to implement the MEP standard by giving permittees the option for businesses to “self-certify compliance” with the source control program. *See e.g. Env’tl Defense Fund v. EPA*, 344 F.3d 832, 854 – 856 (9th Cir. 2003) (rejecting EPA’s Phase II municipal stormwater rules because the rules created a self-enforcing regulatory scheme contrary to the MEP standard of CWA § 402(p)). Specifically, S5.C.7.b.iii.1. of the Phase I permit states:

Permittees shall implement an inspection program for site identified pursuant to S5.C.7.b.ii. above.

- (1) All identified sites with a business address shall be provided by mail, telephone, or in person, information about activities that may generate pollutants and the source control requirements applicable to those activities. This information may be provided all at one time or spread out over the permit term to allow for some tailoring and

distribution of the information during site inspections. Businesses may self-certify compliance with the source control requirements at the discretion of the Permittee.

Giving permittees the option to have businesses “self-certify compliance” with the source control requirements undermines both the permittee and Ecology’s oversight of the source control program. Riverkeeper recommends that Ecology remove the self-certification option in the final Phase I permit.

C. Implementation of TMDL Waste Load Allocations by Permittees (S.7).

Ecology’s decision to delay TMDL compliance for post-permit adopted TMDLs misses a critical opportunity to improve water quality in the state’s most degraded waterbodies. This decision is also inconsistent with federal and state law. S.7. of the Phase I permit states:

The following requirements apply if an applicable Total Maximum Daily Load (TMDL) is approved for stormwater discharges from MS4s owned or operated by the Permittee. Applicable TMDLs are TMDLs which have been approved by EPA on or before the issuance date of this permit, or prior to the date that Ecology issues coverage under this permit, whichever is later.

See also Western Washington Phase II Permit at S.7; Eastern Washington Phase II Permit at S.7. By delaying compliance with a TMDL, and in turn any Waste Load Allocations (WLAs) contained in the TMDL, Ecology effectively grants a compliance schedule without satisfying the requirements of 40 CFR § 122.47 and WAC 173-201A-510(4). Therefore, Ecology must revise the permit to comply with federal and state law.

Since Ecology issued the current Phase I and Phase II permits, EPA released new guidance on TMDL WLAs for stormwater sources. *See* EPA, *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Nov. 12, 2010) (hereafter “2010 EPA guidance”). The 2010 EPA guidance describes developments in MS4 permitting and BMPs and notes “[n]otwithstanding these developments, stormwater discharges remain a significant cause of water quality impairment in many places, highlighting a continuing need for more useful WLAs and better NPDES permit provisions to restore impaired waters to their beneficial uses.” The agency therefore states:

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 where feasible to do so*.

Id. at 3; *See also* Letter from Michael Tehan, Chief of Oregon Habitat Branch for NMFS, to Rob Burkhart, Oregon DEQ, Comments on the Oregon DEQ MS4/TMDL Work Group Final Report (Dec. 10, 2002) (explaining that NMFS “believes that the MS4 permits need to include numeric

effluent limits to address wasteload allocations” because this type of “clear requirement[] . . . can be measured, monitored through time, and enforced when necessary.”).

The 2010 EPA guidance specifically addresses the use of compliance schedules in stormwater permits. EPA explains:

EPA’s regulations at 40 CFR § 122.47 govern the use of compliance schedules in NPDES permits. Central among the requirements is that the effluent limitation(s) must be met ‘as soon as possible.’ 40 CFR 122.47(a)(1). EPA expects the permitting authority to include in the permit record a sound rationale for determining that any compliance meets this requirement.

Id. at 4. In the case of Ecology’s draft Phase I and II permits, the agency adopts compliance schedule for post-permit TMDLs without meeting the requirements of federal and state law.

For the same reasons, if Ecology issues—and EPA approves—a TMDL *after* the Phase I and II permits are issued, Ecology must modify the permit to require monitoring requirements. Specifically, the 2010 EPA guidance states:

NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations. See CWA section 402(a)(2); 40 C.F.R. 122.44(i). Where WQBELs are expressed as BMPs, the permit must require adequate monitoring to determine if the BMPs are performing as necessary. When developing monitoring requirements, the NPDES authority should consider the variable nature of stormwater as well [as] the availability of reliable and applicable field data describing treatment efficiencies of the BMPs required and supporting modeling analysis.

2010 EPA Guidance at 4.

Like all NPDES permits, the Phase I and II permits contain reopener clauses authorizing Ecology to modify the permit. In turn, there is no rationale or legal basis for Ecology to issue a *de facto* compliance schedule for WLAs contained in post-permit TMDLs. Once EPA approves a TMDL, Ecology can reopen the permit, require compliance with the TMDL’s WQBEL, and amend Appendix 2 to account for monitoring requirements. Ecology may not, however, delay compliance with the WLA and monitoring requirements for five or more years by delaying the requirements until a new permit term.

D. Monitoring (S.8).

a. Monitoring requirements in the Phase I Permit and Phase II Permit for Western Washington.

Like other NPDES permits, the municipal stormwater permits must include effective monitoring requirements to improve and verify permit compliance. For the draft Phase I permit, Ecology adopts markedly different monitoring requirements for Puget Sound and southwest

Washington. In Ecology's own words, the monitoring requirements for Puget Sound mark a "paradigm shift." Specifically, for Puget Sound permittees, the new Phase I and II permits require: status and trends monitoring to answer basic questions as to whether conditions in receiving waters are improving or deteriorating; regional effectiveness studies that will provide direct quantitative feedback about the results of different stormwater management activities and programs; and a source identification and diagnostic monitoring information repository to allow permittees to share source identification program information and provide regional understanding of stormwater pollutant sources to support new policy initiatives.

As for the Columbia River (*i.e.*, southwestern Washington), Ecology does nothing to move the ball forward. Notably, Ecology acknowledges that "it makes sense to expand the regional effectiveness studies and source identification information repository to include all of western Washington." Phase I Fact Sheet at 66. The Phase I Permit Fact Sheet states:

Ecology representatives met several times with permittees in southwest Washington to discuss receiving water monitoring and try to make progress toward a proposal that would work for Ecology and permittees.

Fact Sheet at 67. The Fact Sheet goes on to explain:

Ecology, permittees, and stakeholders will continue to discuss priorities and possible approaches for monitoring in receiving waters related to stormwater management questions. Ecology recommends that permittees located in Clark and Cowlitz Counties become more actively engaged in development of a salmon recovery monitoring program for the lower Columbia River.

Id.

Ecology's rationale for requiring a significantly less informative and protective monitoring scheme for southwest Washington is nothing short of arbitrary. Permittees' resistance to monitoring requirements is not a rational basis to impose significantly less informative monitoring requirements in southwest Washington when the department is making a "paradigm shift" up north.

Ecology's static approach to monitoring in southwest Washington comes at a time when national experts on stormwater are recommending significant changes to EPA and states' approach to monitoring. Since Ecology issued the last round of permits, the National Research Council released a seminal report, *Urban Stormwater Management in the United States*, which recommends important steps to improve municipal stormwater monitoring.³ The report, prepared at EPA's request, recommends major changes to EPA's current stormwater permitting approach.

For example, the report recommends improving how municipalities monitor pollution from the industrial section. This includes monitoring the quality of stormwater discharges from

³The Report is available online at: <http://dels.nas.edu/Report/Urban-Stormwater-Management-United/12465>.

certain critical industrial sectors in a more sophisticated manner, so that permitting authorities can better establish benchmarks and technology-based effluent guidelines. None of the report's recommendations are reflected in the permit's monitoring requirements for southwest Washington.

EPA's comments on Ecology 2007 permits also describe the critical importance of effective monitoring provisions. In a letter from Region 10 EPA to the Department of Ecology, EPA explained that an effective MS4 monitoring program should "measure[] conventional and targeted toxic parameters as well as biological measures, connect[] receiving water impacts to stormwater, test[] performance of alternative management scenarios on receiving waters, and measure trends." Comments from Ronald A. Kreizenbeck, EPA, Region 10, to Jay Manning, Director of Washington State Department of Ecology (Oct. 27, 2006).

Despite the fact that evidence has only mounted since the last permit term, Ecology does nothing to move the ball forward for monitoring in southwest Washington. This is particularly notable given the department's commitment to reducing toxics as part of EPA's region-wide toxic reduction initiative. In the end, Ecology's decision to require widely divergent monitoring requirements in western Washington is not grounded in any water quality-based rationale or the law. Riverkeeper's urges Ecology to revisit and expand the permit monitoring requirements for southwest Washington before finalizing the Phase I and Western Washington Phase II permits.

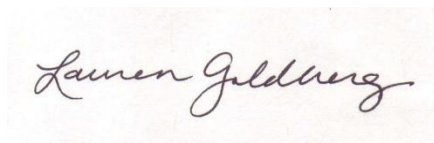
b. Phase II Permit for Eastern Washington.

The Eastern Washington Phase II Permit falls short of imposing meaningful, timely monitoring requirements. These flaws are described in detail in Spokane Riverkeeper's comments on the draft Eastern Washington Phase II permit. Rather than reiterate those comments herein, Riverkeeper incorporates by this reference Spokane Riverkeeper's comments on the Phase II permit's monitoring requirements.

II. Conclusion

For the reasons described above, Columbia Riverkeeper urges Ecology to revise the draft Phase I, Western Washington Phase II, and Eastern Washington Phase II permits to comply with federal and state MEP and AKART standards make important strides to protect and restore water quality in the Columbia River Basin. Thank you in advance for considering and responding to Columbia Riverkeeper's comments.

Sincerely,

A handwritten signature in cursive script that reads "Lauren Goldberg". The signature is written in dark ink on a light-colored, slightly textured paper background.

Lauren Goldberg
Staff Attorney, Columbia Riverkeeper