August 19, 2005

Bill Moore
Washington State Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

Dear Mr. Moore:

We at King County are pleased that after many years of hard work on new municipal stormwater permits for Western Washington, the Department of Ecology has finally issued preliminary drafts just as the Shared Strategy for Puget Sound plan for restoring threatened salmon runs has been compiled and presented to federal agencies for review, and the state is launching its Puget Sound Initiative. Stormwater management will be a critical piece in both the restoration of Puget Sound and the recovery of salmonid fisheries. As we have seen from the WRIA-level planning that produced the Shared Strategy for salmon recovery, a watershed approach is essential to the protection and restoration of water and water-dependent resources.

The new municipal permits provide a significant opportunity for the state to promote the watershed approach to water resource management. The inclusion of smaller jurisdictions in municipal stormwater permits means that (at least for the most populated WRIAs), a large portion, if not all the geographic area of a watershed or WRIA could be subject to regulation requiring coordinated stormwater management activities designed to address its particular protection and restoration needs. To that end, we encourage Ecology to use the new municipal stormwater permits to help ensure that the watershed-level planning that produced the Shared Strategy for Salmon Recovery plan follows through into watershed-level implementation. This should be achieved by either issuing WRIA-based permits for all regulated municipalities, or requiring all regulated municipalities to participate in the development of WRIA-based Stormwater Management Programs (SWMPs); by extending NPDES regulation to the maximum geographic extent possible in each WRIA, rather than limiting it to the Phase II minimum based on population, or a modest expansion thereof; by mandating WRIA-based monitoring, with the monitoring questions for each WRIA focused on its particular protection and restoration priorities; and by bringing Phase II jurisdictions up to the protection and restoration standards required of Phase I jurisdictions. WRIA-based NPDES monitoring should be fully integrated with WRIA-based monitoring programs expected as part of salmon recovery plan implementation.

While we realize some of these requirements may be too ambitious for the newly regulated Phase II jurisdictions in the first permit term, Ecology should do everything it can in this first term to create a structure that will ensure their implementation by the end of the second. To that end, we support similar organization of the Phase I and Phase II permits. We also find that the categories of the Phase II permit provide a somewhat more logical and less redundant structure than the categories used in the inaugural Phase I permit. Therefore, we recommend rewriting the Phase I permit using the Phase II categories. A similar structure between the two permits will also facilitate the comparison of requirements between the two permits, especially valuable for a public somewhat new to municipal stormwater regulations.

Additionally, there should be a requirement in Phase I and transitional Phase II language (or at least strong encouragement) for regulated municipalities to coordinate and pool resources on aspects of stormwater management that would likely be more cost-effective if implemented on a watershed-wide basis than jurisdiction by jurisdiction. In addition to monitoring, these include public education, information collection/management, development review, source control, illicit discharge detection, maintenance inspections, and TMDL implementation.

As is appropriate to ensure that the permits result in stormwater management programs that actually improve environmental quality, compliance with both the Phase I and Phase II permits will require significant new expenditures on the part of local governments. The Phase II grants appropriated by the legislature this year barely address the financial need. King County will advocate for additional state funding for the new SWMPs and we urge Ecology to lead the advocacy. Ecology is also well placed to identify opportunities for federal grants to facilitate upgrades in stormwater management programs. Finally, we will look to Ecology to provide support for our efforts to increase local funding for the expanded municipal permit programs.

The rest of this letter highlights some big picture issues we at King County have concerning the proposed Phase I, and in some cases, Phase II permit conditions. For more detailed comments and suggestions for alternate wording, please see the enclosed document.

Special Condition 1—Permit Coverage and Permittees

Ideally, we would like municipal stormwater permits to be issued by WRIA so that the language of S1A would be modified to add a reference to the WRIA covered by the permit and S1B would list all the regulated Phase I and Phase II permittees in the WRIA. Our next preference would be to have one general permit for all regulated western Washington municipalities that requires the development of WRIA-wide, rather than jurisdiction by jurisdiction, stormwater management programs (SWMPs). This alternative would also require changes to both sections A and B as well as S3 and to S7.

King County owns and operates drainage facilities in jurisdictions other than unincorporated King County. These facilities are attached to sites usually associated with the County's regional services, such as the King County Airport, transfer and pump stations, parks, courthouses and detention centers, and park and rides.

There are currently differing opinions about whether these facilities are part of the County's regulated municipal separate storm sewer system (MS4), are covered by the permit of the host jurisdiction, are secondary permittees, or are not included in any permit. This topic, and its many associated issues, warrants further discussion before development of the next draft.

Special Condition 2—Authorized Discharges
Along with Special Condition 5, S2 segregates existing and new discharges from regulated MS4s. This distinction is not appropriate, as the Clean Water Act requires the regulation of municipal separate storm sewer *systems*—as a whole—not their separate discharges. Focusing on the system is consistent with the complexity and programmatic nature of municipal stormwater management. Focusing on the system and its priorities is more cost effective than focusing on discrete discharges. After all, municipal stormwater is essentially a non-point source that has been artificially included in a permitting system created for point sources. This fact should be recognized by, and addressed in, the permit.

Additionally, we are concerned that increasingly stringent stormwater regulations, while protecting state waters, will increase pressure on sanitary sewer agencies to accept stormwater into our wastewater treatment system. We have already seen such an increase as a result of regulations affecting shipyards and construction projects. While King County welcomes the opportunity to improve water quality, we also have an obligation to protect our system. Accepting contaminated stormwater into a sanitary sewer system requires a careful balancing of water quality and operational objectives. Coordination between stormwater and wastewater agencies is critical to finding this balance. We have drafted proposed language for the municipal stormwater permits to ensure this coordination and to emphasize that the permit does not authorize stormwater discharges to sanitary sewers.

This section also raises questions about how, or even whether, that portion of an MS4 that drains to an Underground Injection Control (UIC) facility or private outfall is regulated. This question should be answered to avoid future litigation. For example, if an outfall discharging to waters of the state is not owned or operated by a municipality, are catch basins, conveyances, and control structures upstream of the outfall that are owned and operated by the municipality regulated under the permit? Similarly, if a discharge to ground water occurs through a UIC facility that is not regulated under the permit, are the upstream portions of the system feeding that discharge regulated? While there does seem to be some logic to avoiding two regulatory processes for UIC facilities, it would be preferable to manage them primarily under the municipal permit as they are facility best management practices (BMPs) commonly used in managing municipal stormwater to reduce hydrologic impacts.

Special Condition 3—Responsibilities
In the absence of WRIA-based permitting, this section provides an opportunity for Ecology to mandate or at least strongly encourage regulated municipalities to develop and implement SWMPs on a watershed-wide basis to achieve both WRIA-based recovery goals and cost-effective implementation of permit programs.

Counties that have within their geographic boundaries multiple Phase II permittees and secondary permittees have a significant interest in the consistency and coordination of these SWMPs with their own, as will municipalities that share sensitive or significant waterbodies such as Lake Washington. Ecology should add a new section to this condition requiring consistency and coordination of SWMPs, with the County, including, for example, WRIA-wide governance structures as the facilitator of the coordination process. If Ecology chooses not to issue WRIA-based permits for this permit term, we would like to work with them to develop language for the next draft that would achieve coordinated and consistent SWMPs for all regulated municipalities in each WRIA, or at least in each WRIA that has participated in watershed-based salmon recovery planning.

Special Condition 4—Total Maximum Daily Loads (TMDLs)
In Washington state, the mechanisms for implementing TMDLs are contained in Detailed Implementation Plans (DIPs) that usually follow TMDLs by at least a year. This reality does not appear to be reflected in this section. Logically, a jurisdiction should not be required to adapt its SWMP to implement a TMDL until after the DIP is issued and the necessary actions are identified.

This condition demands inter-jurisdictional coordination and shared implementation of its requirements. Implementing a TMDL is a task best accomplished by all regulated entities affecting the waterbody of concern. The permit should require their coordination on implementation actions and encourage the pooling of resources to ensure the most cost-effective TMDL implementation, including development of a monitoring program, if required.

Special Condition 5—Compliance with Standards
The Clean Water Act provides one standard for the regulation of municipal stormwater discharges: control to reduce pollutants to the *maximum extent practicable (MEP)*. S5's double standard for both existing and new discharges is not consistent with the Clean Water Act.

Under the proposed S5, new stormwater discharges may not cause or contribute to a violation of applicable standards, but no guidance is given on how cause of or contribution to violations is determined. This problem could be resolved in part by changing the language of the 'cause or contribution' sentence and the 'compliance shall be determined' sentence so they contain parallel constructions, e.g., "New stormwater discharges … must comply with applicable standards" or "New discharges shall not be considered to cause or contribute to a violation … if they are controlled…"

However, even with these improvements in language, the elimination of presumed compliance by site specific information raises significant questions concerning implementation and enforcement that would likely lead to litigation unless they are resolved with new permit language. For example, through what mechanism does site specific information arise? Is there an affirmative obligation to seek out such information? Must jurisdictions add another layer of review to their permitting requirements? Should SEPA be used, and if so do the SEPA rules

require a tweak to recognize this extra inquiry? Are all possible beneficial uses to be considered, or just those protected in the waterbody of concern? If additional controls are necessary, who determines what those are? Ecology has set the standards for BMPs in its stormwater design manuals. If something more is needed, should a jurisdiction look to Ecology to provide it? Will Ecology step into the business of approving local development permit conditions that address site-specific information? What if there is no known technology that will address the issue?

The Clean Water Act calls for all discharges from MS4s to be controlled to the maximum extent practicable. If there is no known BMP to eliminate a risk to standards revealed by site specific information, would the MEP standard allow the development to go forward with the best controls available considering costs? If there is a BMP that would completely eliminate the risk of a violation, would the MEP standard require its use if the cost of the BMP was disproportionate to the benefit achieved in comparison to what the Manuals, or their equivalents, would require? In light of S5D, which addresses permit modification or revocation if additional controls are found to be necessary, would this process be triggered if additional controls are found to be necessary for a particular site?

Before insisting on the double standard for existing and new discharges, we believe Ecology should think through and discuss these questions with us. Considering that there are far more environmental problems related to developments pre-dating stormwater regulation, or dating from its early days, the focus on eliminating all risks of violation from new development seems inappropriate and misplaced. We believe the best solution is to simplify S5 by reducing it to two sentences that clearly state the Clean Water Act standard for municipal stormwater and the role the permit plays in enforcing it:

> *Municipalities regulated under this permit shall protect water quality by using controls that reduce the discharge of pollutants from their municipal storm sewers to the Maximum Extent Practicable. Compliance with the terms of this permit will satisfy this requirement.*

Special Condition 6—Monitoring

Monitoring, perhaps the most critical of all permit compliance tasks, is best implemented through an integrated, collaborative, WRIA-based approach. Rather than detailing a monitoring program, the permit should require the development of WRIA-based monitoring and adaptive management programs, at least in those WRIAs involved in the Shared Strategy for Salmon Recovery or the Puget Sound Initiative, and focus on the criteria by which Ecology, or its designated agent or contractor (such as a science panel, consulting firm, or academic body), should evaluate the adequacy of a monitoring program. Criteria should include these types of elements:

1. Questions: Have stormwater-related concerns of the watershed been identified and prioritized based on a reasonable public process? Do the monitoring questions on which the program is based address priority stormwater-related concerns of the watershed? Are the questions expressed clearly enough to be answerable by a monitoring program?

2. Protocols: Are the monitoring protocols likely to provide a scientifically valid answer to the questions posed and within an appropriate timeframe? Is quality assured?

3. Follow-through: Is a data management system in place that will preserve the data and analysis so that it is readily accessible to decision makers and to the public? Is an adaptive management process in place that will ensure that the answers to the monitoring questions will help future SWMPs achieve permit goals more effectively?

As the Ecology stormwater design manuals have largely defined the control of pollutants to the maximum extent practicable in Washington, the question of whether its chosen BMPs are effective is one of utmost urgency to Ecology. Accordingly, primary responsibility for managing inquiries into BMP effectiveness rests with Ecology. Ecology should define the scope and priorities of BMP effectiveness monitoring and manage the process either in house, or through a designated agent or contractor. The results should inform future manual updates. Stormwater permit fees should help fund the program, as well as the reviews of watershed-wide monitoring programs. Ecology control of the BMP effectiveness monitoring should ensure that statewide priorities are addressed in the most cost-effective way, including the creation of truly comparable data throughout the state.

Special Condition 7—SWMP
This condition contains many deadlines. Several are set too soon to be met. Recommendations for alternate timeframes are contained in the detailed comments enclosed with this letter.

S7C1—Legal authority—the mechanism for how the required control of pollutants contributed by one jurisdiction to another would be achieved is not clear. Perhaps interlocal agreements are being contemplated; if so, a template provided by Ecology would be most helpful.

S7C2—Adequate information—this is another requirement that would best be implemented on a watershed-wide basis to reduce costs and promote consistency and coordination so that mapping information and data collected are centrally available for the entirety of a watershed. That said, it is a very expensive task that would provide, as it says, adequate information to conduct planning, priority setting, and program evaluation activities. Considering that planning and priority setting, and even program evaluation, have relatively insignificant roles in this prescriptive permit, the scope, timeline, and expense of this task may not be warranted.

S7C3—Coordination—this is an extremely important requirement to ensure the protection of watersheds. However, coordination among Phase I jurisdictions, particularly among Phase I counties, is not nearly as important to watershed health as coordination among Phase I jurisdictions and Phase II jurisdictions. The requirement for intergovernmental coordination is fairly meaningless unless it is included as well in the Phase II permit, and both permits clarify that the coordination should occur among all regulated municipalities whether Phase I or Phase II permittees, co-permittees, or secondary permittees.

S7C4—Public involvement and participation—this requirement is an artifact of the first Phase I permits which gave great flexibility to permittees to create their SWMPs. As the permit becomes more prescriptive, the role for public involvement and participation in the development of SWMPs is somewhat diminished. The scope of the public involvement program should be reduced accordingly.

S7C5—Controlling runoff—AKART and the protection of water quality are introduced as additional standards, over and above MEP, for jurisdictions choosing a different BMP approach than is dictated by the Stormwater Management Manual for Western Washington (SMMWW) or an equivalent. For municipal stormwater, AKART should equal MEP; no more, no less. The focus of this condition should be to adopt the SMMWW or develop an equivalent that protects water quality by reducing the discharge of pollutants to the maximum extent practicable.

S7C6—Structural controls—if this is the planning process for which adequate information and public involvement are required it would be helpful to refer to this section in S7C1 and S7C4. Also, while the information required for individual projects is appropriate for large projects, many small projects that are part of quick response-type programs (e.g., the Quick Fix and Neighborhood Drainage Assistance Programs in King County) do not warrant such detailed information. It should instead be required for the programs as a whole, not for each small project within them.

S7C7—Source control—shares with C5 the problem of AKART introduced as an extra requirement for those not choosing the SMMWW approach. Provisions for using an SMMWW equivalent are not included, but should be. In addition, it seems odd that legal authority to enforce violations of local ordinances through a notice and order process should be required if permittees can refer violations to Ecology after just two follow-up inspections and two warning letters.

S7C8—Illicit connections—the focus on urban areas for screening of illicit connections may be misguided, as most of the illicit connections found within King County have been in rural areas. In addition, if permittees can refer unsuccessful source control violations to Ecology, it seems they should also be able to do the same for recalcitrant illicit connections.

S7C9—Operations and maintenance—the "timely" turnaround time of 90 days for typical maintenance is too short to ensure that all identified maintenance actions for the large number of facilities in our inventory will be completed. Frequently, maintenance work becomes backlogged during the dry season due to peak demands for maintenance and construction crews. In addition, there are times when maintenance work must wait for favorable weather conditions or until the Hydraulic Project Approval "fish window" before it can be completed. A more reasonable turnaround is 180 days. Other comments and suggested alternative wording can be found in the detailed comments enclosed with this letter.

S7C10—Education program—the performance measures language for this requirement creates confusion about which audiences must be targeted and further provides an overly broad and unfocused approach that will not achieve, within the budgets that can reasonably be expected to be appropriated for this component of the SWMP, the goal of modifying behavior. Please see our suggested alternative performance measures in the detailed comments enclosed with this letter.

Special Condition S8—SWMP for Co- and Secondary Permittees
As mentioned earlier, coordination and consistency of SWMPs among co-permittees, secondary permittees, and permittees is critical and should be mandated, preferably as part of a watershed-based (WRIA) approach to municipal stormwater permitting that incorporates the goals and implementation strategies of each WRIA's salmon recovery plans (where they exist) and promotes pooling resources for more cost-effective implementation of permit conditions.

Special Condition S9—Reporting
With no reporting format yet provided in Appendix 5, this condition cannot be evaluated yet.

These comments capture the "big picture" issues King County sees principally in the Phase I municipal stormwater permitting, though some issues related to the Phase II permit for Western Washington are also addressed. Additional detailed comments and suggestions for alternate wording are contained in the document enclosed with this letter. If you have any questions, please do not hesitate to contact Mark Isaacson, Division Director for the Water and Land Resources Division of the Department of Natural Resources and Parks at 206-296-6585.

We look forward to ongoing discussions with Ecology on these very important permits and issues, and to reviewing the next draft.

Sincerely,

Pam Bissonnette
Director

Enclosure

cc: The Honorable Ron Sims, King County Executive
The Honorable Larry Phillips, Chair, King County Council
The Honorable Dow Constantine, King County Councilmember
The Honorable Carolyn Edmonds, King County Councilmember
The Honorable Jim Compton, Councilmember, Seattle City Council
The Honorable Don Davidson, Councilmember, City of Bellevue
The Honorable Rebecca Clark, Councilmember, City of Covington
The Honorable Steve Mullett, Mayor, City of Tukwila
Jeff Koenings, Director, Washington State Department of Fish and Wildlife
Jay Manning, Director, Washington State Department of Ecology
Brad Ack, Chair, Puget Sound Action Team
Bob Nichols, Supervisor, Governor's Salmon Recovery Office
L. Michael Bogert, Administrator, Environmental Protection Agency Region 10
Elizabeth Babcock, Puget Sound Salmon Recovery Coordinator, NOAA Fisheries
Matt Stone, Acting Chair, Snoqualmie Watershed Forum
Jim Kramer, Executive Director, Shared Strategy for Puget Sound
Mark Isaacson, Division Director, Water and Land Resources, Department of Natural Resources and Parks

bcc: Verna Bromley, Deputy Prosecutor, Office of Prosecuting Attorney
Debbie Arima, Maintenance Operations Manager, Roads Services Division, Department of Transportation (DOT)
Doug Navetski, Senior Ecologist,, Roads Services Division, DOT
Elsie Hulsizer, Program Manager, Wastewater Treatment Division (WTD), Department of Natural Resources and Parks (DNRP)
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