King County
Department of
Natural Resources and Parks
Director's Office
King Street Center
201 South Jackson Street, Suite 700
Seattle, WA 98104-3855

May 19, 2006

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

Dear Mr. Moore:

King County is pleased that after many years of hard work on new municipal stormwater permits for Western Washington, the Department of Ecology has released public review drafts and is expecting to issue the permits this fall. Stormwater management will be a critical piece in both the restoration of Puget Sound and the recovery of salmonid fisheries. We are glad that with the advent of the Phase II municipal permit, a much larger geographic area will begin to see improvements in the quality and quantity of discharges from municipal separate stormwater systems. As we have seen from the Water Resource Inventory Area (WRIA)-level planning that produced the Shared Strategy for salmon recovery, and from our work on cleaning up the Duwamish River sediments, it is critical for jurisdictions to work together to protect and restore water and water-dependent resources.

The new municipal permits provide a significant opportunity for the state to promote an interjurisdictional or watershed approach to water resource management. Such an approach would maximize the effectiveness and cost efficiency of management programs and actions. The municipal permits are certainly moving in the right direction by requiring Phase I permittees to coordinate their programs for shared waterbodies and by providing an option for regional monitoring and public outreach. The latter option is also available for Phase II permittees. However, there is no requirement for program coordination between Phase I and Phase II permittees or among Phase II permittees, and there is no incentive, monetary or otherwise, for coordinated watershed-wide stormwater management programs (SWMPs). By not requiring, rewarding, or even encouraging such coordination, Ecology will be missing an important opportunity to facilitate a shift toward watershed-wide stormwater management. The watershed-level planning that produced the Shared Strategy for Salmon Recovery and inspires the Puget Sound Partnership (PSP) has identified improved stormwater management as critical to the quality of the Sound's water and the health of the species dependent on it. Accordingly, we encourage Ecology to use the new municipal stormwater permits to help ensure that this watershed-level planning follows through into watershed-level implementation. This would be accomplished by doing all of the following:

1. Require all regulated municipalities to participate in the development of WRIA-based SWMPs.
2. Extend National Pollutant Discharge Elimination System (NPDES) regulation under Phase II to the maximum geographic extent in each WRIA, especially where there are waterbodies listed under Section 303(d) of the Clean Water Act (CWA) or water dependent species listed under the Endangered Species Act (ESA). To facilitate the work of the PSP, the entire Puget Sound Basin should be regulated.
3. Mandate WRIA-based NPDES monitoring, with the monitoring questions for each WRIA focused on its particular protection and restoration priorities as informed by the salmon recovery plans. WRIA-based NPDES monitoring should be fully integrated with WRIA-based monitoring programs planned as part of salmon recovery plan implementation.
4. Bring Phase II jurisdictions up to the protection and restoration standards required of Phase I jurisdictions.

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 term. This should include Phase II permit language of Ecology's intention to require fully integrated, cooperative watershed-wide SWMPs in the next permit term. The organization of the current Phase I and Phase II drafts, with corresponding condition numbers throughout, is a good step in this direction and would be even better if the order of the SWMP elements in both permits was the same. More substantively, there should be a requirement for Phase I's and at least strong encouragement for Phase II's 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. Strong encouragement could be created by including language announcing the intention to require integrated, cooperative SWMPs in the next permit term. In addition to monitoring, permit elements that particularly lend themselves to a regional, or watershed-wide approach include public education, information collection/management, development review, source control, illicit discharge detection, maintenance inspections and operations, and Total Maximum Daily Load (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. In King County's Water and Land Resources Division (WLRD) alone, the costs of implementation in the first year of the program are estimated to be in excess of $1 million. In out years of the permit, the cost is estimated to exceed $1.9 million over current annual spending. A breakdown summary of these costs is enclosed.

These costs represent a five to ten percent increase in current spending that would require a nine percent boost in the County's Surface Water Management (SWM) fee. This is a significant increase for a program that has historically been regarded as setting a standard for excellence in stormwater management. The increase is also significant for a program that is losing revenue as a result of annexations and incorporations.

If such high cost increases are needed for a municipality with an advanced stormwater management program, the costs of those that are less advanced, like the Phase II jurisdictions stepping up to the plate for the first time, must be relatively higher. The Phase II grants appropriated by the legislature last year barely address the financial need. We urge Ecology to lead the advocacy for increased state funding for Phase II, as well as for Phase I. Ecology is also well placed to identify and inform permittees about opportunities for federal grants to facilitate upgrades in stormwater management programs. We will also look to Ecology to provide support for our efforts to increase local funding for the expanded municipal permit programs, though Ecology should consider rethinking some of the more expensive requirements of the permit, like monitoring.

A key requirement of both the Phase I and Phase II permit is the adoption of either Ecology's 2005 Stormwater Management Manual for Western Washington (SMMWW) or an equivalent approved by Ecology. For some jurisdictions, adopting King County's 2005 Surface Water Design Manual (SWDM) is a cost-effective alternative to adopting the SMMWW. However, until Ecology approves an equivalent, the Phase II jurisdictions have no real choice. King County submitted its manual to Ecology for an equivalency review at the end of March 2005 and to date, that review has not begun. For the County and the one third of Washington's Phase II jurisdictions located within King County, this equivalency review is critical. It should be prioritized for completion by the effective date of the western Washington permits.

The Washington State Department of Transportation (WSDOT) is a Phase I municipality. Its operations have been covered under the first Phase I permits, but in this next permit term, it will have its own permit. The schedule for that permit is lagging behind that of the other Phase I's, which is not acceptable considering the impact of WSDOT's facilities on water resources and the need for consistent programs among the Phase I's to maximize resource protection.

The rest of this letter highlights significant 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 permit wording, please see the enclosed mark-up copy of the Phase I draft permit as well as a detailed legal analysis of Special Condition S4.A and a table summarizing the cost impacts of the Phase I permit on King County's existing WLRD programs.

Special Condition 1 (S1)—Permit Coverage and Permittees

Our 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, SWMPs and monitoring programs.

With respect to permit coverage, King County and other counties, own or operate municipal separate storm sewers (MS3s) in jurisdictions other than unincorporated King County. In King County, these MS3s are attached to sites usually associated with the County's regional services, such as the King County Airport, parks, courthouses and detention centers, road maintenance

facilities and properties, and park and rides. Under the current language of the draft Phase I and Phase II permits, it may be argued that King County must apply as a Secondary Permittee for these MS3s in each jurisdiction in which they are located, necessitating multiple additional SWMPs and multiple additional permit fees.

The Phase I fee, in excess of $30 thousand, is already high. This is not a good use of the public's money. The permit should clarify that either (1) every MS3 owned by a municipality regulated under Phase I is regulated under the Phase I permit, regardless of its location, or (2) MS3s owned or operated by Phase I municipalities and located within the geographic boundaries of a Phase II or non-regulated municipality do not need permit coverage. Without one of these changes, the amount the County pays for municipal stormwater permit fees could easily double.

One aspect of the permit that leads to the ambiguity about coverage for County MS3s in incorporated areas is the permit's failure to specify that the geographic coverage of the permit for Phase I counties extends only to the unincorporated areas of the County.

Two last coverage issues involve regulated districts. For example, in King County, there are a number of flood districts, that exist on paper, some perhaps even owning bits of MS3, but that have not been active in years. It hardly seems appropriate for inactive districts to be regulated. Additionally, the Green River Flood Control Zone District (GRFCZD) operates in King County, but while it is on paper a separate entity, the County Council constitutes its Board of Supervisors, and the Executive is charged with developing and implementing the District's program, which resides in WLRD. Secondary permittee status for the GRFCZD is inappropriate. It would be helpful if the permit eliminated any question about the secondary permittee status that by expressly stating that the GRFCZD and/or any other active flood control zone districts that the County implements should be considered a King County program.

Special Condition 2 (S2)—Authorized Discharges
S2.A.1 applies permit coverage to discharges both into and from permitted MS3s. The word "into" should be omitted as both the Clean Water Act and RCW 90.48 regulate only discharges from a MS3 or system of sewerage.

We thank Ecology for resolving most of the issues between these permits and the Underground Injection Control regulations that existed at the time of the preliminary draft permit—see the discussion under Special condition 5.C.2 below.

Special Condition 3 (S3)—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. Strong encouragement could take the form of permit language announcing the intention to require watershed-wide SWMPs in the next permit term.

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 do municipalities that share sensitive or significant waterbodies like Lake Washington. The Phase I permit, in S5.C.3, requires Phase I permittees to establish written coordination procedures concerning stormwater management activities on shared waterbodies, which is a good small step towards WRIA-based SWMPs.

If Ecology is unwilling to add a coordination section to S5 of the Phase II permit, we would at least like to see a new section added to S3 of the Phase II permit requiring consistency and coordination of SWMPs with all permitted jurisdictions that share waterbodies and an announced intention to require WRIA-based, or otherwise regional SWMPs, under the next permit.

Special Condition 4 (S4)—Compliance with Standards

Proposed section S4A is unacceptable because it purports to make municipal separate storm sewer systems (MS4s) subject to a state law provision for wastewater treatment. The proposed subsection S4.A would make MS4s subject to RCW 90.48.520, which applies to discharge permits for "wastewater." The federal water pollution control act (CWA) and the Washington state water pollution control act (WPCA) distinguish between wastewater and storm water. Although they are both regulated discharges, they are distinctly different, and the statutes and regulations contemplate that they will be regulated differently. This regulatory distinction reflects the real-world differences between sanitary sewer systems and storm sewer systems. The proposed subsection S.4.A does not. Please see the enclosed legal argument for eliminating subsection S.4.A from the permit. RCW 90.48.520, the basis for S.4.A, is also included in the definition of "All known, available and reasonable methods of prevention, control and treatment" in the definitions section of the permit. This reference should also be removed.

S.4.E should be revised to clarify that AKART and MEP are defined by conditions S.5 or S.6, S.7, and S.8. Proposed language revisions are included in the enclosed mark-up copy of the draft permit.

Special Condition 5 (S5)—SWMP

S5.C.1—Legal authority—we have no issues with the current draft of this section.

S5.C.2—Mapping and documentation—with this draft, Ecology has created more practicable requirements for mapping. Section S5.2.b.v, however, requires the mapping of geographic areas that do not discharge stormwater to surface waters. This means that areas serviced by infiltration facilities regulated under the Underground Injection Control (UIC) program must be mapped under this permit. While infiltration facilities that are not covered under the UIC regulation and their service area are appropriately mapped under this permit, the requirement to map UIC facilities should be part of the UIC regulation and not this permit. That said, coordination of the mapping information between the UIC and NPDES stormwater programs would be desirable. On a more technical note, the mapping standards on the website referred to in Section S5.C.2.b.vi contain incorrect vertical datum and coordinate zone standards.

S5.C.3—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 especially within a watershed. The requirement for intergovernmental coordination is fairly meaningless unless it is also included 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.

S5.C.4—Public involvement and participation—Although the Phase I fact sheet states that existing Phase I public involvement opportunities will meet the minimum performance measures of the permit, S5.C.4.b.i strongly suggests otherwise. That language clearly requires Phase I's to do something new—"develop and begin implementing a process to create opportunities for the public to participate in an advisory role in the decision making processes involving [not just the] development, [but also the] *implementation and update* of the permittee's SWMP." If existing processes, like budget review, are adequate for compliance with this section, the permit language should be changed to reflect that. (Bracketed comments above along with italics for emphasis are King County's.)

S5.C.5—Controlling runoff from new and redevelopment and construction sites—we have no issues with this section of the draft Phase I permit. We are, however, concerned that the Phase II permit does not apply to developments under one acre in size, as these will undoubtedly make up a substantial portion of the new and redevelopment projects in Phase II cities. Many of these cities have adopted the SWDM, which was submitted to Ecology for equivalency review more than a year ago. We urge Ecology to prioritize this review, which, as we understand, has not yet begun.

S5.C.6—Structural controls—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.

S5C.7—Source control—source control is an extremely important component of any program designed to reduce water pollution, especially in highly developed jurisdictions like cities. It is a necessary complement to the required detection and elimination of illicit discharges. Thus, the Phase II permit's lack of a required source control enforcement program, like that required in the Phase I permit, is a serious omission. While we recognize that it may be inappropriate to hold the Phase II's to the same standards as the Phase Is in this permit term, they should at least be required to make a start.

With regard to the source control program requirements in the Phase I permit, we are providing you with alternative wording for the inspection and self certification portions of this section to clarify when one versus the other approach is used. This alternative wording is provided in the enclosed mark-up copy of the draft permit.

S5.C.8—Illicit connections—the focus on urban areas for screening of illicit connections in S7.C.8.b.vi.(2) is misguided, as many of the illicit connections found within King County have been in rural areas. Additionally, the guidance manual identified as the resource for how to do screening relies on an inventory of outfalls to receiving water. This is not an appropriate method for illicit connection screening for two reasons:

1. Many if not most outfalls to receiving waters are on private property and are therefore not part of the MS4. It is more appropriate to survey points in the conveyance system that discharge from the MS4 but not necessarily directly to the receiving water.
2. Performing reconnaissance of a stream requires that the County obtain permission from each property owner, which is cost prohibitive and has not in the past nor is likely in the future to yield success in obtaining permission for an entire stream corridor.

Please see the enclosed mark-up copy of the draft permit for proposed wording.

S5.C.9—Operations and maintenance—we thank Ecology for increasing the turnaround time for typical maintenance from 90 to 180 days. However, some additional flexibility is still needed to allow for factors outside our control such as delays due to permitting, inadequate access, physical impediments, weather, etc. The enclosed mark-up copy of the permit offers some wording to address this concern.

S5.C.9.b.vi. and viii should reference the Regional Road Maintenance ESA Program Guidelines — Regional Guidelines approved by the National Oceanic and Atmospheric Administration (NOAA)-Fisheries for compliance with section 4(d) of the ESA.

S5.C.10—Education program—we provide a substantially rewritten proposal for this section in the enclosed mark-up copy of the permit. The rewrite focuses on target audiences and the behaviors that need to be changed or adopted, as these are the critical elements for achieving improvements in water quality. In addition to improved clarity, this rewrite is intended to specify which aspects of the education program should be measured.

Special Condition 6 (S6)—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 WRIA-based approach to municipal stormwater permitting that incorporates the goals and implementation strategies of the WRIA salmon recovery plans and promotes pooling of resources for more cost-effective implementation of permit conditions. Also, as mentioned earlier, facilities owned or operated by a permitted jurisdiction within another jurisdiction should not require a separate SWMP or secondary permittee status. For example, small facilities such as wastewater pump stations, which are on small footprints, will all typically utilize similar BMPs and thus would be reasonable candidates for a programmatic approach to compliance.

Further, with regard to the co-permittee duties shared by the City of Seattle and King County for the Densmore Metro Drainage Basin, there must be a recognition in the permit that this cooperative relationship needs flexibility because the drainage system in that area is very

complex. While the work plans and programs related to the system may be "consistent," they may not be exactly the same.

Special Condition 7 (S7)—TMDLs
In Washington, the mechanisms for implementing TMDLs are contained in Detailed Implementation Plans (DIPs) that usually follow TMDLs by at least a year. These DIPs are not, under the Clean Water Act, a required part of TMDLs. They exist as a consequence of the settlement of the TMDL lawsuit brought by environmental groups in the late 1990s.

Because in Washington, the implementation strategy for TMDLs is disclosed in DIPs, which are separate from, though related to TMDLs, the publication of the DIP should be the trigger for TMDL-related compliance activities, not the approval of the TMDL itself. The permit must be clear on this or permittees are likely to find themselves in court for failure to implement a TMDL that does not specify what actions the permittee is supposed to take.

This condition demands inter-jurisdictional coordination and shared implementation of its requirements. Implementing a DIP 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 implementation, including development of a monitoring program, if required.

Special Condition 8 (S8)—Monitoring
The monitoring requirements in this draft of the Phase I permit are substantially improved over those in the preliminary draft. However, the discharge characterization requirements of S8.A, while more focused than the receiving water monitoring required in the preliminary draft, remain problematic. In general, we oppose the idea of performing this characterization monitoring for the purposes of long-term trend analysis as stated in this section.

The cost to implement such monitoring is nearly $300,000 per year in King County alone and the results are not likely to provide information that will actually answer the question of whether and why stormwater discharges are improving in quality or not. The variable nature of stormwater and the inability to link monitoring results to specific actions taken through the permit leads us to believe this would not be a good use of increasingly limited taxpayer dollars. Trends monitoring should not be a requirement of the permit since stormwater is just one of many factors affecting water quality.

We think such monitoring should be conducted by Ecology on a regional or watershed basis and should be integrated with other such monitoring being conducted by municipalities engaged in watershed-planning. We do believe that a program on the lines of that described in S8.A would be useful as part of a planning effort focused on identifying problems and improving conditions in targeted small basins. This should be the stated purpose of the program and such monitoring at any one outfall should occur only as long as needed to identify problems and support planning efforts. Also, we believe that the number of storms to be sampled each year should be five rather than the fifteen specified in S8.A. Please see the mark-up copy of the permit for more specific comments and suggested wording.

S8.B requires research that would be of great interest to municipal stormwater managers—this requirement should be preserved unchanged.

With respect to the BMP monitoring requirements of S8.C, the Ecology stormwater design manuals have largely defined the control of pollutants to the maximum extent practicable in Washington, so the question of whether Ecology's 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.

The final overarching problem with the monitoring section of the draft permit is that, while it provides for a "collaborative, integrated monitoring program" (not defined), it does not require permittees to cooperate on a monitoring program that would answer important stormwater questions in Washington, or one that is integrated with the other numerous monitoring requirements associated with the ESA, shoreline management, critical areas, and the like. If public funds are to be well spent on monitoring, at the very least, a regional, or watershed approach must be taken and the Phase II jurisdictions must be included.

Special Condition 9 (S9)—Reporting

S9.A requires submittal in 2008 of the first annual report under the permit, but Ecology has told us that 2007 is the date intended. Realistically, if the new permits are issued late in 2006, after municipal budgets for 2007 have been adopted, it will be challenging for municipalities to fully begin implementing them until 2008, though many, King County among them, will have made an effort to adjust its 2007 budget based on the draft Phase I permit. However, with annual reports due at the end of March, a 2007 report could only provide information on the activities of Phase I municipalities under the 1995 permit. If Ecology wishes a report based on the 1995 permit in 2007, the permit should say so. Otherwise, 2008 is the earliest reasonable year for reporting on the new permit.

The methods for tracking costs in Appendix A3 as referenced in S5.A.2 are far too complicated and will not lead to useful cost comparisons. The methods must be robust, simple, and lead to documentable estimates. Please see the enclosed mark-up copy of the permit for proposed revisions to the language.

In summary, these comments capture the significant issues King County sees in the Phase I municipal stormwater permit, 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 enclosed mark-up copy of Phase I draft permit. If you have any questions, please do not hesitate to contact Mark Isaacson, Division Director for the Water and Land Resources Division in the Department of Natural Resources and Parks, at 206-296-6587.

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: King County Councilmembers
ATTN: Shelley Sutton, Policy Staff Director
Anne Noris, Clerk of the Council
The Honorable Ron Sims, King County Executive
The Honorable Richard Conlin, Councilmember, City Seattle
The Honorable Don Davidson, Councilmember, City of Bellevue
The Honorable Bill Paulsen, Councilmember, City of Carnation
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
L. Michael Bogert, Administrator, Environmental Protection Agency Region 10
Elizabeth Babcock, Puget Sound Salmon Recovery Coordinator, NOAA Fisheries
Jim Kramer, Executive Director, Shared Strategy for Puget Sound
Mark Isaacson, Division Director, Water and Land Resources, Department of Natural Resources and Parks

LEGAL ARGUMENT FOR ELIMINATING PROPOSED SUBSECTION S4A FROM THE NPDES PHASE I MUNICIPAL STORMWATER PERMIT FOR WASHINGTON

Proposed section S4A is unacceptable because it purports to make municipal separate storm sewer systems (MS4s) subject to a state law provision for wastewater treatment. The proposed subsection S4A would make MS4s subject to RCW 90.48.520, which applies to discharge permits for "wastewater." The federal water pollution control act (CWA) and the Washington state water pollution control act (WPCA) distinguish between wastewater and storm water. Although they are both regulated discharges, they are distinctly different and the statutes and regulations contemplate that they will be regulated differently.

A primary component of the original CWA was its program to build or upgrade sewage treatment plants to provide secondary treatment. That part of the CWA focused on "publicly owned treatment works," or POTWs, which were (and are) defined as systems to collect and treat wastewater.[1] POTWs were (and are) subject to NPDES permitting requirements because their outfalls constitute "point sources" under the CWA.[2] Much later, amendments to the CWA rendered certain MS4s subject to the NPDES requirement as well.[3] The federal regulatory definition of "MS4" specifically excludes treatment works that handle wastewater.[4] The regulations promulgated under the CWA amendments further define the term "storm water."[5] Under federal law, then, MS4s are not treatment works; and storm water is not wastewater.

The WPCA and its companion statutes are consistent with the federal CWA. State law recognizes that wastewater comprises water and wastes discharged from homes, businesses and

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[1] See 33 U.S.C. §1292(2)(A)-(B) (defining "treatment works") see also 40 C.F.R. §122.2 ([the term] "*POTW* is defined at § 403.3 of this chapter." (italics in the original; bracketed material added); see also 40 C.F.R. §403.3(o):

> The term *Publicly Owned Treatment Works* or POTW means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

[2] See 33 U.S.C. §1362 (defining "point source").

[3] See 33 U.S.C. §1342(p).

[4] See 40 C.F.R. §122.26(b)(8) (italics in the original; underlining added):

> *Municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains):
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> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

[5] 40 C.F.R. §122.26(b)(13) ("*Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.") (italics in the original).

industry to the sewer system, where it is processed by treatment plants such as publicly owned treatment works.[6]

It would be contrary to the structure of the CWA and the WPCA to apply wastewater standards to MS4s. The permit regimes for wastewater and storm water are not interchangeable.[7] This regulatory distinction reflects the real-world differences between sewer systems and storm sewer systems. Treatment works that handle wastewater properly receive individual NPDES permits conditioned on individual plant performance measures. This is consistent with their basic structure, which typically consists of large but well-documented conveyance systems that terminate in very few treatment plants with effluent and outfalls that can be sampled and monitored with relatively little difficulty. In contrast, MS4s can consist of complex small-scale drainage, piping and outfall systems that drain at numerous locations, many of which are not readily accessible, and in some cases may not be particularly well-documented. The nature of MS4s and their effluent—open to the public and the environment, exposed to the vagaries of interstate and international travel—also makes it very difficult (if not impossible) to control what goes into them.

It was not by accident that Congress specified that regulated MS4s "reduce the discharge of pollutants to the maximum extent practicable."[8] The "maximum extent practicable" (MEP) requirement in 33 U.S.C. §1342(p)(3)(B)(iii) replaces the water quality standard requirements of §1311 and unambiguously demonstrates that Congress did not require MS4s to comply strictly with §1311(b)(1)(C).[9] The MEP requirement stands in stark contrast to the CWA's stated goal that discharges of pollutants to waters of the U.S. be "eliminated" by 1985.[10]

Against this statutory backdrop, it seems plain that RCW 90.48.520 does not and should not apply to MS4s. The very title of the section ("Review of operations before issuance or renewal of wastewater discharge permits") indicates that it is aimed at POTWs and other wastewater dischargers, not MS4s and other storm water dischargers. And the requirements set forth in RCW 90.48.520—limits on discharges of specific chemicals, limits on overall toxicity, reliance on bioassays, etc.—indicate that the Legislature contemplated discharges that could be readily monitored, assessed, and controlled. MS4s are not readily monitored, assessed, or controlled. POTW outfalls are.

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[6] See RCW 90.46.010(7) (defining "wastewater" for purposes of reclaimed water act) ("Wastewater means water and wastes discharged from homes, businesses, and industry to the sewer system."); see also WAC 173-221A-030 (defining "wastewater" for purposes of waste permit regulations) ("Wastewater" means the water or liquid carried waste. These wastes may result from any process or activity, including but not limited to, of industry, manufacturer, trade, business, development of any natural resource, or from animal operations such as feed lots, poultry houses, dairies, or fish rearing operations. The term also includes contaminated storm water and leachate from solid waste facilities.); see also WAC 173-224-030 (defining stormwater for purposes of wastewater discharge permit fees) "Storm water" means an industrial operation or construction activity discharging storm water runoff as defined in 40 CFR 122.26 (b)(14) or facilities that are permitted as a significant contributor of pollutants as allowed in the federal Clean Water Act at Section 402 (p)(2)(E).

[7] For example, compare 40 C.F.R. §122.21(a)(2)(i)(B) (POTW application requirements); 40 C.F.R. §122.26(d) (large and medium MS4 application requirements).

[8] 33 U.S.C. §1342(p)(3)(B)(iii).

[9] Defenders of Wildlife v. Browner, 191 F.3d 1159, 1165 (9th Cir. Az 1999) (stating same).

[10] 33 U.S.C. §1251(a)(1).

Finally, RCW 90.48.520 was enacted in April of 1987.[11] It replaced an earlier statute, which required Ecology to study the feasibility of reviewing and updated existing standards for wastewater treatment.[12] Ecology told the Legislature that it would be expensive to revise existing standards for wastewater treatment, and that it would be better to simply enact new standards.[13] The Legislature responded by enacting RCW 90.48.520. The federal MS4 permit scheme was added to the federal CWA just a few weeks earlier, in February of that same year.[14] Prior to the MS4 scheme, there was no CWA mandate to control municipal storm water runoff.[15] Even after the MS4 requirements were added, most storm water discharges did not need an NPDES permit until after 1994.[16] It is hardly conceivable that in 1987 the Washington Legislature intended RCW 90.46.520 to apply to then-unregulated storm water discharges. Rather, the Legislature authorized Ecology to enact new wastewater regulations for POTWs and other wastewater treatment providers.

The requirements in RCW 90.48.520 do not belong in a general MS4 permit. The sprawling nature of MS4s renders it virtually impossible to "limit the discharge of specific chemicals" to or from MS4s as would be required under that statute. It would require an enormous infusion of money (potentially billions of dollars) and time (potentially decades) to reinvent MS4s to treat runoff to the level of the treatment plants contemplated in RCW 90.48.520. Such an effort would be equivalent to the original CWA mandate to upgrade wastewater treatment plants to secondary treatment. Surveillance and social initiatives to keep pollutants out of the storm water could potentially cost even more.

Policy initiatives of this magnitude should be instigated through a change in the law by Congress or the state Legislature, not through an obscure condition in an administratively issued general permit. If Ecology wants to require POTW-level treatment of storm water, then Ecology should seek a change in state law, and the Legislature should be prepared to finance the work—and manage the public process to deal with the impacts of the projects. To do otherwise would result in an unfunded mandate to local jurisdictions operating MS4s.[17]

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[11] See 1987 Laws of Washington Ch. 500 §1 (ESHB 499).
[12] See 1987 Final Legislative Report for ESHB 499.
[13] Id.
[14] See P.L. 100-4, Title IV §401-405 (February 4, 1987), 101 Stat. 65-69.
[15] See, e.g., Defenders of Wildlife v. Browner, 191 F.3d 1159 at 1163 ("Initially, the EPA determined that [storm water] discharges generally were exempt from the requirements of the CWA.").
[16] Id (citing 33 U.S.C. §1342(p)).
[17] See, e,g., City of Tacoma v. State, 117 Wn.2d 348, 816 P.2d 7 (1991); RCW §43.135.060.