

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE;
PEOPLE FOR PUGET SOUND; PIERCE
COUNTY PUBLIC WORKS AND
UTILITIES DEPARTMENT; CITY OF
TACOMA; PORT OF SEATTLE;
SNOHOMISH COUNTY; CLARK
COUNTY; PACIFICORP; and PUGET
SOUND ENERGY,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

CITY OF SEATTLE; KING COUNTY;
PORT OF TACOMA; PACIFICORP;
PUGET SOUND ENERGY; STATE OF
WASHINGTON, DEPARTMENT OF
TRANSPORTATION,

Intervenors.

PCHB NOS. 07-021, 07-026, 07-027
07-028, 07-029, 0-030,
07-037

THIRD PRE-HEARING ORDER
(PHASE I MUNICIPAL
STORMWATER PERMIT)

On January 17, 2007, the Department of Ecology (Ecology) issued National Pollutant Discharge Elimination System and State Waste Discharge General Permit for discharges from Large and Medium Municipal Separate Storm Sewer Systems (Phase I Municipal Stormwater Permit or permit). The effective date of the permit is February 16, 2007. Separate appeals were filed challenging various provisions of the permit.

**PHASE I MUNICIPAL
STORMWATER PERMIT
THIRD PRE-HEARING ORDER**

1 The first pre-hearing conference on the Phase I appeals was held in person at the offices
2 of the Pollution Control Hearings Board (Board) in Lacey, Washington, on March 16, 2007.
3 Bill Lynch presided for the Board. Following the conference, orders granting intervention,
4 consolidation and a pre-hearing order were issued.

5 After the issuance of the pre-hearing order, parties filed additional letters and decisions
6 have been made by the presiding officer and communicated to the parties through letters. A
7 second pre-hearing order was issued to formalize these decisions.

8 Another conference was held in person at the offices of the Board on December 6, 2007
9 to discuss further scheduling matters related primarily to a portion of the Phase I case referred to
10 as the Condition S(4) hearing. Most of the decisions made at the second conference pertain as
11 well to the Phase I case, which is on a nearly identical schedule to the S(4) hearing. Based on
12 this conference, the following Third Pre-Hearing Order is issued:

13 **I. HEARINGS AND CONFERENCE**

14 The hearing on Condition S(4) is set for **April 16 through April 25, 2008** at the John
15 O'Brien Building, Hearing Room A. Administrative Appeals Judge Kay M. Brown will preside
16 on this hearing.

17 The hearing on the remainder of the Phase I issues is set for **April 28, 2008 through**
18 **May 9, 2008**. Board Member Bill Lynch will preside on this hearing. This hearing also will be
19 conducted at the John O'Brien Building, Hearing Room A, with the exception of April 30, 2008,
20 and May 1 and 2, 2008. Another location will be determined in the future for these days.

1 An expert witness for Puget Soundkeeper Alliance and People for Puget Sound, Dr.
2 Horner, is unavailable after April 18, 2008. Therefore, Mr. Horner's testimony will be taken for
3 both Condition S(4) and Phase I (remaining issues) on April 17 and 18, 2008.

4 Two additional in person conferences are scheduled on Condition S.4 on **February 21,**
5 **2008 and April 3, 2008**, at the Board's office in Lacey, WA. The conferences will begin at
6 10:30 a.m. Matters that parties wish to have addressed at these conferences should be identified
7 by letter prior to the conference.

8 **II. MEDIATION AND SETTLEMENT**

9 Parties are encouraged to engage in mediation or settlement discussions with each other
10 at any time without the presence of the presiding officer of the Board or with his or her presence
11 if all parties and the presiding officer agree. If the parties wish to engage the services of an
12 administrative appeals judge for mediation, they shall contact the presiding officer in writing at
13 the Board's office.

14 The parties, through respondent's attorney, shall file with the Board a joint status report,
15 setting forth settlement possibilities in the case, by **March 17, 2008**.

16 **III. LEGAL ISSUES**

17 The legal issues for the Condition S(4) hearing are as follows:

- 18 1. Did Ecology act unreasonably, unjustly, or unlawfully in imposing Special Condition
19 S.4 in the Permits to the extent it imposes requirements beyond Maximum Extent
20 Practicable (MEP) and/or requires permittees to comply with standards that are not
21 legally required, or are otherwise unreasonable unjust, or invalid?
2. Whether Special Condition S.4.F. and conditions that refer to it, are unlawful,
unreasonable, unjust, or invalid in a municipal stormwater discharge permit, (a) by
characterizing a violation of water quality standards as permit noncompliance and as

a permit violation, and (b) by failing to clarify that the management process stated in S4.F.2 is a means to comply with the permit rather than action taken in response to a permit violation, and, (c) by imposing timeframes that do not allow sufficient time within which to accomplish required actions?

3. Whether Special Condition S.4 is unlawful, unreasonable, unjust, or invalid because it fails to state specifically that compliance with the terms and conditions of this permit constitutes compliance with all applicable legal standards?
4. Does the permit unlawfully exempt permittees that comply with the process established in Permit Condition S4.F from the requirement to ensure that discharges do not cause or contribute to violations of water quality standards?
5. Does the process established in Permit Condition S4.F unlawfully fail to include standards and/or timelines necessary to ensure that discharges will comply with water quality standards?
6. Does the prohibition on violations of water quality standards contained in Permit Condition S4 unlawfully or unreasonably conflict with the other provisions of the permit?
7. Does Permit Condition S.4 unlawfully fail to prohibit violations of water quality standards?

The legal issues for Phase I (remaining issues) are:

A. Special Condition S5 (SWMP)

1. Whether Special Conditions S5.C.1, S5.C.5, S5.C.7, S5.C.8, and S5.C.9 unlawfully delegate to municipal permittees the authority specifically granted to Ecology by the federal Clean Water Act and the State Water Pollution Control Act to (a) inspect, surveil, and/or enforce the provisions of the Clean Water Act and the State Water Pollution Control Act against unpermitted stormwater dischargers; and/or (b) inspect, surveil, and/or enforce the provisions of the Clean Water Act and the State Water Pollution Control Act against stormwater dischargers that have been permitted by the Department of Ecology?
2. Whether Special Conditions S5.C.5, S5.C.7, and S5.C.8 unlawfully dictate that municipal permittees must adopt ordinances, establish legal authority to conduct specific functions, and/or perform specific regulatory functions for which Ecology is legally responsible, by requiring permittees to inspect privately owned stormwater facilities, prohibit illegal discharges and/or take enforcement actions at sites that are covered by stormwater permits issued by Ecology?

B. Special Condition S7 (TMDLs)

1. Whether Special Condition S7 and Appendix 2 are lawful, practicable, and reasonable because the provisions contain indefinite provisions and require Phase I permittees to implement TMDL requirements outside the jurisdiction of the Permit?
2. Whether Special Condition S7 and Appendix 2 unlawfully or unreasonably require all permittees to comply with applicable TMDLs?

C. Special Condition 8 (Monitoring)

1. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to achieve the goals of the statutory municipal stormwater permit program?
2. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to be consistent with generally accepted scientific, engineering and/or regulatory practices?
3. Whether the monitoring requirements imposed in Special Condition S8 are overly broad, overly prescriptive, and cost-ineffective so that requiring implementation of such requirements as written is unlawful, impracticable, and/or unreasonable?
4. Is Special Condition S8 invalid, unreasonable, or not reasonably practicable for municipal stormwater discharges as to:
 - a. The criteria requirements for storm events, basin selection, sampling, and wet/dry season allocation, and related provisions of S8.D;
 - b. Toxicity requirements of S8.D.2;
 - c. The calendar year reporting requirements and related provisions of S8.D, E, F, and H?
5. Whether the toxicity testing requirement of Special Condition S8.D should be clarified or modified to indicate that it does not trigger an effluent limit or compliance monitoring and triggers only investigation as may be specified in the permit?
6. Whether Ecology's inclusion of Special Condition S8.D.2.d in the final Phase I Municipal Stormwater Permit violated the Administrative Procedures Act, chapter 34.05 RCW?

D. Economic Impact Analysis

1. Whether the permit was unlawfully issued because Ecology did not conduct an economic impact analysis of the permit's requirements and/or because the permit does not include a reasonable means of prioritizing and sequencing the numerous tasks required of municipalities with limited resources?

E. Issues Specific to the Ports of Seattle and Tacoma

1. Whether Special Conditions S3.A., S6.E.4, S6.E.5, S6.E.6, and S6.E.7 are unlawful, unreasonable, unjust, or invalid to the extent that they impose on Ports requirements not imposed on other Secondary Permittees?
2. Whether Special Condition S6.C is unlawful, unreasonable, unjust, or invalid because it imposes requirements that unreasonably conflict with Secondary Permittees' other

1 legal obligations, and/or fails to recognize limitations on the legal authority of
2 Secondary Permittees?

- 3 3. Whether the minimum performance measures in Special Condition S6.E.3 that
4 require that Ports “ensure” compliance with illicit discharge policies and that non-
5 stormwater discharges comply with requirements of a SWPPP reviewed by the Port,
6 are unlawful, unreasonable, unjust, or invalid?
- 7 4. Whether the minimum performance measures in Special Condition S6.E.4 that
8 require that within one year of the effective date of coverage Ports must comply with
9 minimum technical requirements for new development and redevelopment contained
10 in Appendix 1, are unlawful, unreasonable, unjust, or invalid?
- 11 5. Whether the requirement in Special Condition S6.E.7 to prepare and implement
12 SWPPP(s) for “all Port-owned lands,” regardless of their capacity to generate
13 pollutants or other site-specific characteristics, is unlawful, unreasonable, unjust, or
14 invalid?
- 15 6. Whether Special Condition S8 is unlawful, unreasonable, unjust, or invalid to the
16 extent it imposes monitoring requirements on some but not all Phase I Permittees?
- 17 7. Whether Special Condition S9.D is unlawful, unreasonable, unjust, or invalid because
18 it requires Permittees to make “all records related to this permit and the Permittee’s
19 SWMP”, including those that may be privileged or otherwise exempt from disclosure,
20 available for public inspection?
21

F. Joint Environmental Legal Issues

1. Low-Impact Development:

- 22 a. Does the permit fail to require maximum onsite dispersion and infiltration of
23 stormwater, through the use of “low impact development” techniques, basin
24 planning, and other appropriate technologies, and if so, does that failure
25 unlawfully cause or contribute to violations of water quality standards?
- 26 b. Does the permit fail to require maximum onsite dispersion and infiltration of
27 stormwater, through the use of “low impact development” techniques, basin
28 planning, and other appropriate technologies, and if so, does that failure
29 unlawfully allow permittees to discharge pollutants that have not been treated
30 with all known available and reasonable methods of treatment (“AKART”),
31 and/or fail to reduce the discharge of pollutants to the maximum extent
32 practicable (“MEP”)?

2. Existing Development:

- 33 a. Does the absence of any standard and/or technology requirements for
34 reducing stormwater discharges from existing development and existing
35 stormwater systems unlawfully cause or contribute to violations of water
36 quality standards?

- 1 b. Does the absence of any standard and/or technology requirements for reducing
2 stormwater discharges from existing development and existing stormwater
3 systems unlawfully allow permittees to discharge pollutants that have not been
4 treated with AKART, and/or fail to reduce the discharge of pollutants to
5 MEP?
- 6 3. Monitoring: Is the monitoring required under Permit Condition S.8 unlawful
7 because it is inadequate to determine whether: (i) the permittee is in compliance with
8 water quality standards; (ii) discharges are causing or contributing to violations of
9 water quality standards; or (iii) discharges are being treated with AKART and/or
10 MEP?
- 11 4. Water Quality Standards Violations:
12 a. Does the Phase I permit fail to ensure that discharges will not cause or
13 contribute to violations of water quality standards?
- 14 5. Compliance:
15 a. Does the permit unlawfully provide for compliance with permit terms on a
16 schedule that is indefinite and unenforceable, not as expeditious as possible,
17 and/or in excess of statutory deadlines?
18 b. Does the permit unlawfully allow a permittee to create and implement permit
19 requirements without Ecology's oversight or involvement?
- 20 6. Permit Modifications: Does the permit unlawfully provide for modification of permit
21 terms without adherence to permit modification procedures?
7. Urban and Large Rivers Exemption:
 a. Do the 2005 amendments to the 2001 Western Washington Stormwater
 Management Manual altering the flow control requirements for urban areas
 (Manual 2.5.7) and areas adjacent to larger rivers (App. I-E), which are
 incorporated into the permit's terms, result in discharges that unlawfully cause
 or contribute to violations of water quality standards?
 b. Do the 2005 amendments to the 2001 Western Washington Stormwater
 Management Manual altering the flow control requirements for urban areas
 (Manual 2.5.7) and areas adjacent to larger rivers (App. I-E), which are
 incorporated into the permit's terms, represent AKART and/or reduction of
 pollutants to the MEP?
8. TMDLs:
 a. Does permit condition S7 unlawfully or unreasonably fail to require
 compliance with TMDLs issued after the date of the permit's issuance?

- b. Does permit condition S77 unlawfully or unreasonably fail to include additional restrictions on stormwater discharges for applicable TMDL beyond the five listed in Appendix 2 to the permit?
9. Maintenance of Stormwater Facilities:
 - a. Does the Permit unlawfully fail to require adequate long-term operation and maintenance of new and existing stormwater facilities and therefore result in discharges that unlawfully cause or contribute to violations of water quality standards?
 - b. Does the Permit fail to require adequate long-term operation and maintenance of new and existing stormwater facilities and therefore unlawfully allow permittees to discharge pollutants that have not been treated, reduced or prevented with AKART, and/or fail to reduce the discharge of pollutants to the MEP?
10. Stormwater Pollution Management Programs ("SWMPs"): Does the permit unlawfully fail to incorporate the terms of the SWMPs as enforceable requirements under the permit?
11. Public Participation: Does the permit unlawfully fail to provide for required public participation, public review, and public oversight of the permit, the permit's terms, and the SWMPs?

IV. WITNESSES

The parties have provided preliminary lists of witnesses. Final witness lists for Condition S(4) and Phase I (remaining issues) shall be served on the parties and filed with the Board by **March 5, 2008**. Telefax is allowed, provided that the original is mailed the same day. Any witness listed herein or in final lists may be called by any party. The party calling a witness has the responsibility to ensure his or her attendance at the hearing.

A witness' expertise shall be established by résumé offered as an exhibit.

V. EXHIBITS

The parties provided preliminary lists of exhibits prior to the pre-hearing conference.

1 Final exhibit lists for Condition S(4) and Phase I (remaining issues) shall be served on the parties
2 by **March 26, 2008**. The parties shall exchange copies of exhibits and file the final exhibit lists
3 with the Board by **April 2, 2008**. The parties are directed to meet either in person or by phone
4 prior to filing the final exhibit list with the Board for the purpose of attempting to stipulate in
5 advance of hearing to exhibits' authenticity and admissibility and to remove any duplicative
6 exhibits. Parties are encouraged to offer only those exhibits, or portions they intend to rely upon
7 in their case. Telefax is allowed, provided that the original is mailed the same day. Even though
8 the parties may stipulate to the admissibility of exhibits, the exhibits generally should be offered
9 through a witness at the hearing.

10 When meeting with the presiding officer on the first hearing day, each party shall have
11 available for the Board an original and three (3) copies of its exhibits and exhibit lists which
12 shall identify those admissible by stipulation of the parties. An original or one copy of any
13 exhibit that cannot be conveniently copied due to size, bulk, reproduction difficulty, etc., must be
14 available for the Board at the hearing.

15 Each exhibit shall be pre-marked and organized by tab for identification (A-1, A-2, etc.,
16 for appellant and R-1, R-2, etc., for respondent, respectively) and so identified on the exhibit
17 lists. The number given to an exhibit does not limit the order of its introduction at hearing.

18 Any exhibit listed by one party may be introduced by another party.

19 VI. DISCOVERY

20 The discovery cutoff is **December 14, 2007**. A limited extension of the discovery date is
21 granted to **January 10, 2008**, for the purpose of deposing expert witnesses.

1 If formal discovery is pursued, parties should pay particular attention to the time
2 requirements imposed by the superior court civil rules with regard to interrogatories, depositions,
3 etc. Discovery requests shall be served sufficiently ahead of the discovery deadline so that the
4 opposing party has the response time allowed by these rules. (For example, responses to
5 interrogatories are typically due thirty (30) days after service. See CR 33).

6 The parties shall attempt to coordinate depositions of witnesses that are common to both
7 the Phase I and Phase II appeals to the greatest extent possible, and shall consider using lead
8 attorneys to handle specific issues at the depositions.

9 The parties shall endeavor to resolve any discovery disputes. If a dispute persists, any
10 party may file a discovery motion provided such motion is accompanied by an affidavit reciting
11 efforts to resolve the discovery dispute.

12 An original and one (1) copy of any discovery motion and supporting documents must be
13 filed with the Board.

14 Depositions, interrogatories, requests for production or inspection, requests for admission
15 and the responses shall not be filed. It is the initiating party's responsibility to maintain the
16 original together with answers to interrogatories and to make them available for proceedings.

17 **VII. DESIGNATION OF EXPERTS**

18 The parties shall complete the designation of expert witnesses by **December 19, 2007**.
19 This designation should include all experts expected to provide direct expert testimony at the
20 S(4) and Phase I (remaining issues) hearing. Testimony will not be allowed from any expert
21

1 who is not so designated, unless a party shows good cause for its failure to designate and obtains
2 a ruling granting leave to call the additional expert.

3 **VIII. MOTIONS**

4 Any motion, which would be dispositive of any or all legal issue shall be filed and served
5 on **January 16, 2008**. An original and three (3) copies of motion pleadings shall be filed with
6 the Board (hard copy filing only) and served on opposing parties. Responses to motions shall be
7 filed (hard copy filing only) and served on opposing parties on **February 4, 2008**. Replies shall
8 be filed (hard copy filing only) and served on opposing parties on **February 14, 2008**. Opening
9 and response briefs are limited to 40 pages. Reply briefs are limited to 15 pages.

10 Please file separate motions for Condition S(4) and Phase I (remaining issues). Any
11 dispositive motions regarding Condition S(4) must be served on all Phase I and Phase II parties.
12 All Phase I and Phase II parties will have an opportunity to file responsive briefs on motions
13 pertaining to this permit provision.

14 Responses to any non-dispositive motion shall be filed and served five days from receipt
15 of the motion by the non-moving party. The moving party shall have three days from receipt of
16 the response to file and serve a reply.

17 Dispositive motions will be decided based on the written record, unless oral argument is
18 requested by the Board.

19 Note: Filing of motion, answer, and reply (if 15 pages or less) may be by telefax,
20 provided that the original and required numbers of copies are mailed the same day. **The Board**
21 **will not accept e-mail filing on dispositive motions.**

1 IX. BRIEFS

2 Pre-hearing briefs are optional. If submitted, they shall be filed and served no later than
3 April 2, 2008 for Condition S(4), and April 9, 2008 for Phase I (remaining issues), with an
4 original and three (3) copies for the Board. Telefax of 15 pages or less is allowed, provided that
5 the original is mailed the same day.

6 Briefs are limited to 15 pages in length, absent an order granting a motion to lengthen. If
7 a citation is made to a case other than Wn. App. or Wn.2d, a complete copy of the referenced
8 citation must be filed and served.

9 X. COMMUNICATION

10 All correspondence and filings with the Board shall be sent to the attention of the
11 presiding officer with copies sent at the same time to all other parties.

12 Telefax may be used to communicate with the Board and the parties, limited to 15 pages
13 in length.

14 The parties have agreed to allow e-mail for communication between each other, and that
15 this may be used for purposes of pleadings and service. The parties also have agreed that the 3-
16 day rule applies to communications.

17 The Board will accept electronic filing on the following terms:

- 18 1. The filing of pleadings and other papers with the Board may be made by
19 electronic mail in lieu of facsimile transmission, *provided that the original*
20 *and any required number of copies are mailed the same day;*

2. Documents (including any attachments) must be in an electronic format that can be read by the Board's computers (e.g., Word, .pdf, Excel). Please call in advance if you have questions about a particular format or application.

3. The date of "filing" will be the date email filings are received by the Board. An e-filing is considered received when filed by the Board by 5:00 p.m. on a business day. E-filings received by the Board after 5:00 p.m. on a business day will be considered filed on the next business day. Please note that e-mail is not always received immediately. In fact, there may be a significant delay between the time you send your e-mail, and the time the Board receives it. The office has experienced delays of up to two hours, so please plan accordingly.

4. The email address to which you must send any documents you wish to e-file is eho@eho.wa.gov

5. The subject line of any email containing documents you wish to e-file must include the following: "E-filing for Municipal Stormwater Permit Appeals." Please also identify which appeal it pertains to i.e. either the Condition S.4 Hearing, Phase I and/or Phase II. You may also include additional descriptors (e.g., Summary Judgment Motion).

The Board will not accept e-mail filing on dispositive motions.

XI. MISCELLANEOUS

"Filed" means the date received by the Board.

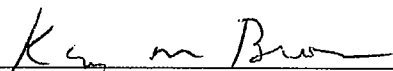
ORDER

This order shall govern the proceedings, unless subsequently modified by order of the Board for good cause upon a party's motion or the Board's volition.

1 SO ORDERED this 11th day of December, 2007.

2
3 **POLLUTION CONTROL HEARINGS BOARD**

4
5 
6 WILLIAM H. LYNCH, Presiding (Phase I)

7 
8 KAY M. BROWN, Administrative Appeals Judge
9 Presiding (Condition S.4)