

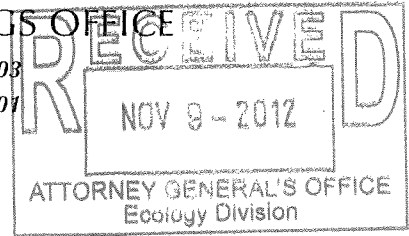


STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

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November 8, 2012



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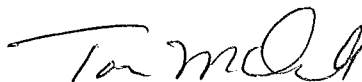
Re: **PCHB NOS. 12-093c**
PHASE I MUNICIPAL STORMWATER APPEALS

Dear Parties:

Enclosed is a Pre-Hearing Order, Order of Consolidation and Order Granting Intervention in the above matter. Please read over the Order carefully for filing dates and requirements.

If you have any procedural questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Tom McDonald, Presiding

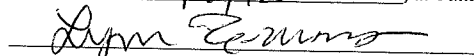
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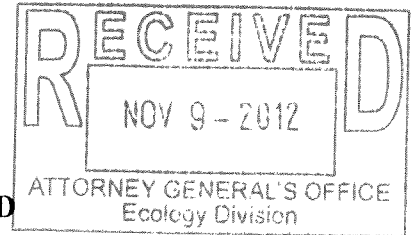
CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the parties of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED 11/8/12, at Tumwater, WA





**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PIERCE COUNTY; SNOHOMISH
COUNTY, a political subdivision of the State
of Washington; CLARK
COUNTY, WASHINGTON; KING
COUNTY, a political subdivision of the State
of Washington; and BUILDING INDUSTRY
OF CLARK COUNTY,

Appellants,

and

CITY OF SEATTLE, a municipal
corporation; and CITY OF TACOMA, a
municipal corporation, and STATE OF
WASHINGTON, DEPARTMENT OF
TRANSPORTATION,

Intervenors,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

and

PUGET SOUNDKEEPER ALLIANCE,
WASHINGTON ENVIRONMENTAL
COUNCIL, and ROSEMER
NEIGHBORHOOD ASSOCIATION,

Respondent Intervenors.

PCHB No. 12-093c

PRE-HEARING ORDER, ORDER OF
CONSOLIDATION, AND ORDER
GRANTING INTERVENTION

Appellants Pierce County, Snohomish County, Clark County, King County and the Building Industry of Clark County (BIAW of Clark County), filed appeals with the Pollution Control Hearings Board (Board) on August 30 and 31, 2012, respectively, challenging the 2013-18 Phase I NPDES Municipal Stormwater Permit (the "Permit").

The City of Tacoma (Tacoma) filed a Petition to Intervene and the City of Seattle (Seattle) filed a draft Stipulated Order Granting City of Seattle's Petition to Intervene in *Snohomish County v. Ecology*, PCHB No. 12-094. The Board issued an Order Granting Tacoma and Seattle intervention in all appeals.

Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively PSA) filed a Motion to Intervene in the appeals as consolidated. The Board is granting PSA intervention as ordered below. The State of Washington, Department of Transportation (WSDOT) filed a Petition to Intervene in PCHB 12-093. The Board is granting WSDOT intervention as ordered below.

A pre-hearing conference was held on October 19, 2012. Board Member Tom McDonald presided for the Board. The parties were represented as follows:

Appellant Pierce County: Attorneys Lori Terry Gregory and John Ray Nelson;
Appellant Snohomish County: Deputy Prosecuting Attorneys Bree Urban and Alethea Hart;
Appellant Clark County: Deputy Prosecuting Attorney Christine M. Cook;
Appellant King County: Deputy Prosecuting Attorney Joseph B. Rochelle;
Appellant BIAW of Clark County: Attorney James D. Howsley;
Intervenor Tacoma: Deputy City Attorney Doug Mosich;
Intervenor Seattle: Senior Assistant City Attorney Theresa R. Wagner;
Intervenor WSDOT: Assistant Attorneys General Stephen R. Klasinski and Kimberly Frinell;
Respondent Ecology: Senior Counsel Ronald Lavigne and Assistant Attorney General Thomas Young; and
Respondent Intervenor PSA: Attorneys Janette Brimmer and Todd D. True.

1 Based on the conference, the Board enters the following Orders:

2 **I. PRE-HEARING ORDER**

3 **A. HEARING**

4 The hearing in this matter is set to commence at 9:00 a.m. October 7 and continue
5 through November 1, 2013, at the Board's office in Tumwater, WA. Parties shall be prepared
6 to proceed to hearing on that date. The Board will not conduct the hearing on October 11, 18,
7 and 25, unless the Board determines on or before September 15 that these days are necessary.

8 **B. MEDIATION AND SETTLEMENT**

9 The parties are encouraged to undertake settlement efforts. The parties shall file a joint
10 status report, apprising the Board of settlement possibilities in the case by April 1, 2013. The
11 parties were informed that the Environmental and Land Use Hearings Office offers no-cost
12 mediation services. If the parties desire to use these services they should telephone or send a
13 written request to the Environmental and Land Use Hearings Office.

14 **C. LEGAL ISSUES**

15 The parties submitted and agreed to the following legal issues which will govern the case:

- 16 1. Whether Special Condition S5.C.1.b.iv of the 2013-18 Phase I NPDES Municipal
17 Stormwater Permit (the "Permit") is unlawful, unjust, unreasonable, impracticable,
18 vague, ambiguous and/or inconsistent with applicable laws and regulations;
19 2. Whether provisions of Special Condition S5.C.5, Appendix 1 and/or the 2012
20 Stormwater Management Manual for Western Washington (the "Manual") that
21 specify the types of surveys, studies, site plans and/or other scientific or engineering
reports the Permittee must require applicants for land development projects to submit
are unlawful, unjust, unreasonable, impracticable, vague and/or ambiguous.
3. Whether Special Condition S5.C.5.a of the Permit contains requirements that are
unlawful, unjust, unreasonable, impracticable, vague, ambiguous and/or beyond the
authority of Ecology to impose due to the following reasons:

- a. Said requirements conflict with or are inconsistent with Washington's vested rights law;
 - b. Said requirements conflict with or are inconsistent with Washington law regarding the finality of land use permitting decisions;
 - c. Said requirements in effect require Permittees to regulate in a manner that could expose Permittees to liability for violating the rights accorded to property owners by Washington and federal law;
 - d. Said requirements define and use terms related to land use permitting and development; and/or
 - e. Said requirements purport to govern, regulate or otherwise control the actions of the Permittees after the expiration of the Permit;
4. Whether provisions of Special Condition S5.C.5.a.i of the Permit are unlawful, unreasonable, impracticable, vague and/or ambiguous because they purport to provide Permittees with regulatory options and alternatives that are illusory, unattainable and/or nonexistent;
 5. Whether Special Condition S5.C.5.b and Minimum Requirement (MR) 5 set forth in Appendix 1 of the Permit are unlawful, unjust, unreasonable, impracticable, vague, ambiguous, economically infeasible and/or set forth mandates of unknown effectiveness in ameliorating, treating and/or controlling municipal stormwater;
 6. Whether Special Condition S5.C.5.c. of the Permit contains requirements that are unlawful, unjust, unreasonable and/or inequitable because they require Phase I counties to take on all the responsibility for watershed-scale stormwater planning for a basin, including areas that are (a) within the jurisdiction of Phase II permittees when such Phase II permittees are not required by their NPDES permits to actively and fully participate in, and share the costs of, such basin planning on an equitable pro-rata basis, (b) federally owned and thus regulated by EPA when such federal land owners are not required to actively and fully participate in, and share the costs of, such basin planning on an equitable pro-rata basis, and/or (c) within Indian Reservations and thus regulated by EPA when the Indian Tribes are not required to actively and fully participate in , and share the costs of, such basin planning on an equitable pro-rata basis;
 7. Whether Special Condition S5.C.5.c of the Permit contains requirements that are unlawful, unjust, unreasonable, impracticable, beyond the authority of Ecology to impose, contrary to the Washington State constitution, contrary to the United States constitution and/or contrary to other terms of the Permit because they require Phase I counties to perform activities and/or plan stormwater strategies in areas where their MS4s do not exist, and/or that are outside of their jurisdictional boundaries, and/or in locations over which they have no control or authority to access.
 8. Whether Special Condition S5.C.5.c of the Permit contains requirements that are unlawful, unreasonable, unjust, unduly burdensome, arbitrary and/or capricious

- 1 because they are overly prescriptive and/or do not take into account the timing
2 needs, actual needs and/or unique characteristics of the selected basin.
- 3 9. Whether Special Condition S5.C.5.c of the Permit grants authority to Ecology that is
4 unlawful, unjust, unreasonable, arbitrary and/or capricious because Ecology will
5 review and approve Permittees' submitted scope of work and schedule for the
6 mandated watershed planning process without adequate criteria or standards, without
7 prior notice of such provision, and/or without adequate appeal rights.
- 8 10. Whether Special Condition S5.C.5.c is unlawful, unjust, unreasonable and/or
9 impracticable due to the following reasons:
- 10 a. Said requirements deprive the Permittee of the ability to select a watershed of
11 its own choosing;
 - 12 b. No notice of the final watershed options was provided by the draft Permit;
 - 13 c. Said requirements will not provide data that is useful, cost-effective, or an
14 effective means of improving water quality;
 - 15 d. Said requirements compel Pierce County to conduct monitoring and
16 modeling in the Clover Basin, with no options to choose another basin;
 - 17 e. Said requirements require Ecology's approval of basin plans for
18 implementation that Permittees have already completed and which have
19 already been adopted by Permittees by legislation at local expense;
 - 20 f. Said requirements impact land use planning in local jurisdictions;
 - 21 g. Said requirements require the use of tools and modeling that are not
sufficiently reliable and/or unfairly impose burdensome requirement on
Permittees; and/or
 - h. The purported purposes of these requirements can be achieved by other more
efficient and effective means outside of the Permit.
11. Whether Special Condition S5.C.5.a.iv, Special Condition S5.C.9.b.i-iv, and/or
General Condition 5 of the Permit are unlawful, unjust, arbitrary, or capricious
because they provide Ecology unabated rights to enter private property to inspect
stormwater facilities;
12. Whether Special Condition S5.C.8.c of the Permit contains requirements that are
unlawful, unjust, unreasonable, unduly burdensome and/or impermissibly vague
because they require Permittees to perform inspections at an unreasonable rate
and in a percentage of locations that are not specified or defined by the Permit,
that have not been identified or mapped or required to have been mapped by
Permittee, and/or for which notice was not provided;
13. Whether Special Condition S5.C.9.d of the Permit contains requirements that are
unlawful, unreasonable, unjust, unduly burdensome, arbitrary and/or capricious
because the trigger and requirements are ambiguous and appear to burden
Permittees with an inspection and cleaning cycle and frequency that is overly
expensive, unwarranted, and/or for which notice was not provided;

- 1 14. Whether Special Condition S8.B. of the Permit is unlawful, unjust, unreasonable,
2 impracticable, inequitable and/or unduly burdensome because it requires Clark
County to continue a program that is far more expensive than options allowed for
other Phase I Permittees to satisfy the same requirement;
- 3 15. Whether Special Condition S8.C. of the Permit is unlawful, unjust, unreasonable
4 and/or impracticable because it requires Permittees to pay into a fund for studies
by Ecology that are unknown effectiveness in preventing, treating, controlling, or
5 regulating water pollution and/or improving water quality;
- 6 16. Whether Special Condition S8 of the Permit is unlawful, unjust, unreasonable
7 and/or impracticable because the Permit does not clearly state that the existing
monitoring being conducted by Permittees terminates on July 31, 2013, because
8 unless the existing monitoring terminates on July 31, 2013, without risk of non-
9 compliance, the Permittee could be required to conduct over-lapping
10 inconsistent, expensive, and unnecessary monitoring;
- 11 17. Whether certain Low Impact Development ("LID") provisions contained in the
12 Permit, Appendix 1, the Manual, and/or documents that are referenced by or
13 incorporated into the Permit, Appendix 1 and/or the Manual, are unlawful,
14 unjust, unreasonable, impracticable, vague and/or ambiguous for the following
15 reasons:
 - 16 a. The provisions interfere or conflict with land use planning, Growth
Management Act (chapter 36.70A RCW) and/or vesting;
 - 17 b. No meaningful opportunity for review and comment was afforded Permittees
because the draft Permit and draft Manual were issued at the same time;
 - 18 c. Permittees were provided no meaningful opportunity to review and comment
on some of the documents incorporated by reference into the Permit,
Appendix 1 and/or the Manual because said documents did not exist, were
19 not in final form, or were not otherwise made available for review during the
public comment period;
 - 20 d. Permittees are required to adopt LID development standards that are at least
as stringent as those found in the Manual, including infeasibility criteria,
which are not included in the Permit; and/or
 - 21 e. The Permit does not include criteria to determine LID feasibility, but instead
relies on "infeasibility" criteria included in the Manual;
- 18 18. Whether the provisions in the Permit, Appendix 1, and corresponding references
to the Manual are unreasonable, unjust, unlawful, burdensome, expensive, cost
prohibitive, impracticable, insufficiently tested and/or not legally required with
regard to provisions that apply to roadway projects, porous pavement, and full
dispersion.
- 20 19. Whether MR 5, set forth in Appendix 1 of the Permit is contrary to the
constitutions of the United States and/or Washington State and/or violates RCW
82.02.020 because it requires the owners or developers of private land to mitigate

1 for stormwater impacts that were not caused by the owners or developers of the
2 land, and to mitigate to an extent that is not roughly proportional to the impacts of
the present or proposed development of the land.

3 20. Whether MR 7, set forth in Appendix 1 of the Permit, is contrary to the
4 constitutions of the United States and/or Washington State and/or violates RCW
5 82.02.020 because it requires the owners or developers of private land to mitigate
for stormwater impacts that were not caused by the owners or developers of the
land, and to mitigate to an extent that is not roughly proportional to the impacts of
the present or proposed development of the land.

6 21. Whether Special Condition S5.C.5.b.ii of the Permit and Special Condition S8.A
7 of the Permit that require Permittees to deliver or report certain data or
information to Ecology are unlawful, unjust, unreasonable, impracticable, vague,
ambiguous and/or beyond the authority of Ecology to impose.

8 22. Whether one or more of the following provisions of the Permit that require
9 Permittees to deliver or report certain data or information to Ecology are
unlawful, unjust, unreasonable, impracticable, vague, ambiguous and/or beyond
the scope of Ecology to impose:

- 10 a. Special Condition S5.C.3.a of the Permit and Item No. 10 of Appendix 12;
11 b. Special Condition S5.C.5.b.ii of the Permit and Item No. 30 of Appendix 12;
and/or

12 c. Special Condition S8.A of the Permit and Item No. 72 of Appendix 12.

13 23. Whether provisions contained in (i) Special Condition S5.C.5.a of the Permit, (ii)
14 Special Condition S5.C.7 of the Permit, (iii) Special Condition S5.C.9 of the
15 Permit, (iv) Special Condition S7 of the Permit, (v) Special Condition S8.B.1.b of
16 the Permit, (vi) Section 2 of Appendix 1 to the Permit, (vii) Section 4 of
17 Appendix 1 to the Permit, (viii) the Executive Summary of the Manual, (ix)
18 Volume I, Chapter 2 of the Manual, (x) Volume I, Glossary of the Manual, (xi)
Volume II, Chapter 3 of the Manual, (xii) Volume III, Chapter 2 of the Manual,
19 (xiii) Volume III, Chapter 3 of the Manual, (xiv) Volume III, Appendix III-B of
the Manual, (xv) Volume III, Appendix III-C of the Manual, (xvi) Volume IV,
20 Chapter 2 of the Manual, (xvii) Volume IV, Appendix IV-D of the Manual, (xviii)
Volume V, Chapter 3 of the Manual, (xix) Volume V, Chapter 4 of the Manual,
21 (xx) Volume V, Chapter 5 of the Manual, and/or (xxi) Volume V, Chapter 7 of
the Manual, are unlawful, unjust, unreasonable, impracticable, vague, ambiguous
and/or beyond the authority of Ecology to impose for one or more of the
following reasons:

- a. Said provisions incorporate by reference and/or instruct the reader to consult
or comply with outdated and/or inapplicable life/safety codes in contravention
of the State Building Code Act, chapter 19.27 RCW, and/or its implementing
regulations;

- b. Said provisions incorporate by reference and/or instruct the reader to consult or comply with documents that were not made available for adequate public review and comment;
- c. Said provisions incorporate by reference and/or instruct the reader to consult or comply with documents that do not exist, or that did not exist as of the date on which the permit was issued;
- d. Said provisions incorporate by reference and/or instruct the reader to consult or comply with documents that exist in multiple versions without consistently specifying which version of said document must be used;
- e. Said provisions purport to incorporate by reference and/or instruct the reader to consult or comply with future, revised versions of documents that may potentially become available at some point in the future; and/or
- f. Said provisions state or imply that Ecology will or intends to make future changes, revisions and/or technical updates to portions of the Manual or to documents incorporated into or referenced by the Manual without following public notice and comment or other required procedures.

Phase II Issues: A number of the issues stated above may be similar if not identical to the issues in the appeal of the Phase II NPDES Municipal Stormwater Permit, PCHB No. 12-097c. In the interest of judicial economy, these issues will be consolidated with this appeal PCHB 12-093c for purposes of the motion and hearing schedules set forth in this Pre Hearing Order. The list of consolidated issues and any procedures regarding the consolidation will be determined after the pre-hearing conference on the Phase II appeals scheduled for November 29, 2012. The Board will not finalize an order consolidating the issues until the parties in this appeal are provided an opportunity to comment and respond to a proposed order, which shall be provided to the parties as soon as possible after the Phase II pre hearing conference. Prior to the Phase II pre hearing conference, the parties in this appeal are encouraged to work with the parties in the Phase II appeal to stipulate to the consolidated issues.

1 **D. MOTIONS**

2 1. Dispositive Motions: Motions on any issue that would be dispositive of all or part of
3 the case shall be filed and served by **August 9, 2013**. Opposing parties shall have **14 days from**
4 **the date received for response**, and the moving party will have **10 days from receipt of the**
5 **response for reply**. For dispositive motions, responses, and replies, **an original and three (3)**
6 **copies¹** of the pleading and supporting documents shall be filed with the Presiding Officer. **All**
7 **copies and attachments shall be three-hole punched.**

8 2. Non-Dispositive Motions: **Responses** to any non-dispositive motion shall be filed and
9 served **five days from receipt of the motion** by the non-moving party. The moving party shall
10 then have **three days from receipt of the response to file and serve a reply**. For non-
11 dispositive motions, responses, and replies, **an original and one (1) copy** of the pleading and
12 supporting documents shall be filed with the Presiding Officer. **All copies and attachments**
13 **shall be three-hole punched.**

14 3. Oral Argument Not Required. Motions will be decided based on the written record,
15 unless oral argument is requested by a party and granted by the Presiding Officer. At the parties'
16 request, argument may be held by telephone with the parties arranging the connections.

17 **E. WITNESSES AND EXHIBITS**

18 The parties submitted preliminary witness and exhibit lists.
19
20

21 ¹ The Board may request four (4) copies of the dispositive motions for those issues that are consolidated with the Phase II appeals.

1 1. Expert Witnesses: Preliminary designation of expert witnesses and a summary report
2 of each expert witness's qualifications and proposed testimony shall be served on the parties by
3 **April 10, 2013**.

4 A final designation of expert witnesses shall be served on the parties and filed with the
5 Board by **May 24, 2013**. A summary report of the qualifications and proposed testimony of the
6 expert witnesses shall also be served on the parties by **May 24, 2013**; provided however, if the
7 summary report is not revised and is the same as the report served on April 10, the party may
8 state this in writing to the other parties in lieu of serving the same report.

9 Expert pre-filed testimony shall be served on the parties and filed with the Board by
10 **September 9, 2013**. The parties shall provide the Board with **an original and three (3) copies**
11 of the expert testimony. At hearing, the experts shall testify by summarizing their respective
12 written testimony including qualifications, opinions and basis of the opinions, and thereafter
13 shall be available for cross-examination and re-direct. A witness's expertise shall be established
14 by resume offered as an exhibit.

15 2. Final Witness List: Final lists of non-expert witnesses shall be served on the parties
16 and filed with the Board by **September 23, 2013**. **An original and three (3) copies** shall be
17 filed. Any witness listed in final lists may be called by any party. The party calling a witness has
18 the responsibility to ensure his/her attendance at the hearing.

19 3. Final Exhibit List and Exhibit Exchange: By **September 16, 2013**, the parties shall
20 exchange lists of the exhibits intended to be used at the hearing. Parties shall then provide copies
21 of the exhibits to the other parties (if requested) within two (2) working days, confer, try to reach

1 agreement on exhibits' authenticity and admissibility, and eliminate duplicate exhibits. Final
2 exhibit lists shall also be filed with the Board and served on the other parties by **September 23,**
3 **2013.** An **original and three (3) copies**² shall be filed. All exhibits must be introduced in
4 connection with a witness' testimony. Parties are asked to submit into evidence only those
5 portions of voluminous documents actually being referred to or relied upon by a witness.

6 When meeting with the Presiding Officer prior to the commencement of the hearing, each
7 party shall have available an original and **three (3) copies**³ of its exhibits and exhibit lists which
8 shall identify those stipulated to by the parties, and spaces for indicating whether each exhibit
9 was offered, admitted, or excluded. The parties are expected to coordinate and to the extent
10 possible avoid duplication of exhibits. Appellants and Intervenors Seattle, Tacoma and WSDOT
11 are also expected to coordinate the labeling of exhibits which shall be pre-marked by tab for
12 identification (A-1, A-2, etc., for appellants; R-1, R-2, etc., for respondent; I-1, I-2 etc., for
13 Intervenors Seattle Tacoma and WSDOT; and RI-1, RI-2, etc., for respondent intervenor PSA),
14 and so identified on the exhibit lists. All oversized exhibits shall be marked with the case
15 number. The number given to an exhibit does not limit the order of its introduction at hearing.
16 Any exhibit listed by one party may be introduced by another party. Voluminous exhibits (over
17 100 pages) shall be three-hole punched for the convenience of the Board.

20 ² The Board may request four (4) copies of the exhibit list for those issues that are consolidated with the Phase II
appeals.

21 ³ The Board may request four (4) copies of the exhibits for those issues that are consolidated with the Phase II
appeals.

1 **F. DISCOVERY**

2 1. Completion of Discovery: The parties have agreed to complete discovery by **August**
3 **16, 2013**, except for witnesses identified for the first time in the final witness list. These
4 witnesses may be deposed after the discovery cut-off date. If formal discovery is pursued,
5 parties should pay particular attention to the time requirements of the superior court civil rules
6 with regard to interrogatories, depositions, etc. Discovery requests shall be served sufficiently
7 ahead of the discovery deadline so that the opposing party has the response time allowed by
8 these rules. (For example, responses to interrogatories are typically due thirty (30) days after
9 service. See CR 33.) Depositions, interrogatories, requests for production or inspection, requests
10 for admission and the responses shall not be filed with the Board. It is the initiating party's
11 responsibility to maintain the original together with answers to interrogatories and to make them
12 available for the proceedings, as necessary.

13 2. Discovery Disputes: The parties shall endeavor to resolve any discovery disputes
14 without involving the Board. Any motions to compel discovery must be filed and served by the
15 discovery cut-off date. An original and one (1) copy of discovery motions and supporting
16 documents must be filed with the Presiding Officer. Any party filing a discovery motion shall
17 also file a proposed order and shall accompany such filing with an affidavit reciting efforts to
18 resolve the discovery dispute.

19 **G. BRIEFS**

20 Pre-Hearing Briefs are optional. If filed, they shall be filed and served no later than
21 **September 30, 2013**, with an **original and three (3) copies** for the Board (copies to be filed the

1 same day the brief is filed). Briefs are limited to fifteen pages absent an order granting a motion
2 to lengthen. If a citation is made to a case other than a Board Decision, Wn. App. or Wn.2d case,
3 a complete copy of the referenced citation must be attached **to all copies submitted to the**
4 **Board.**

5 **H. COMMUNICATION**

6 All correspondence and filings with the Board shall be sent to the attention of the
7 Presiding Officer with copies sent at the same time to all other parties. There shall be no *ex parte*
8 contact with the Presiding Officer or other member of the Board (contact by one party in the
9 absence of the other party).

10 The Board does not accept e-mail correspondence directed to the presiding officer.

11 **FAX:** Telefax may be used to communicate with the Board for single copies only and
12 limited to ten (10) pages in length, provided paper copies are mailed the same day.

13 **E-FILING:** Parties may file pleadings and other papers in this case with the Board by
14 electronic mail, if the original and any required number of copies are mailed the same day.

15 Please include attachments and exhibits with the hard copy, rather than the e-mail filing. The
16 following additional conditions apply to e-filings:

- 17 1. The date of "filing" will be the date/time email filings are received by the
18 Board. E-filings received by the Board after 5:00 p.m. on a business day will
19 be considered filed on the next business day. Please note that e-mail is not
20 always received immediately. There may be a significant delay between the
21 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.
2. The email address for e-filing is eluho@eluho.wa.gov.

3. The subject line of any email containing documents you wish to e-file must include the following: "E-filing for PCHB No. 12-093C" and may also include additional descriptors (e.g., Summary Judgment Motion).

The Board does not accept e-mail correspondence directed to the presiding officer.

E-SERVICE: The parties have agreed to use of electronic service among the parties, with hard copy to be mailed the same day for any party who requests the same.

I. MISCELLANEOUS

"Filed" means the date received by the Board.

The Board will schedule a conference with all parties at a date to be determined to review the hearing schedule, exhibits and hearing procedures.

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. Below is a summary of the deadlines:

Due date	Description
April 1, 2013	Joint Status Report due
August 9, 2013	Dispositive Motions must be filed
April 10, 2013	Preliminary Expert Witness Designation and Reports must be served on parties
May 24, 2013	Final Expert Witness Designation must be filed and served. Expert Reports must be served on parties
August 16, 2013	Discovery cutoff
September 9, 2013	Expert testimony must be filed and served
September 16, 2013	Final Exhibit Exchange
September 23, 2013	Final Witness Lists due
September 23, 2013	Final Exhibit Lists due
September 30, 2013	Prehearing Briefs due
October 7 – November 1, 2013	Hearing dates

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Civil Rule 42 allows the court to order a joint hearing or trial of any or all the matters when actions involving a common question of law or fact are pending before it. The Board, like any court, has substantial discretion to consolidate matters involving common questions of law and fact. *See, W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn2d 580, 590, 973 P.2d 1011 (1999). The question is whether the interests of economy in judicial administration will be advanced by consolidation and whether there is any prejudice to a party resulting from the consolidation.

It appearing that the issues and the subject matter of all Notices of Appeal are related, and it further appearing that a consolidation of the Notices of Appeal will expedite their disposition, avoid duplication of testimony and not prejudice the rights of the parties, the Board orders the consolidation of are PCHB 12-093, PCHB 12-094, PCHB 12-095, PCHB 12-096, and PCHB 12-100. The appeals as consolidated shall be referenced as PCHB 12-093c for all pleadings and correspondence.

1 **III. ORDER ON MOTIONS FOR INTERVENTION**

2 A. The State of Washington, Department of Transportation (WSDOT).

3 WSDOT filed a Petition to Intervene in *Pierce County v. Ecology*, PCHB 12-093.

4 WSDOT also filed a Stipulated Order Granting Intervention in which all parties and intervenors
5 concurred including Puget Soundkeeper Alliance, Washington Environmental Council, and
6 Rosemere Neighborhood Association, who are granted intervention per this Order.

7 Based on the agreement of the parties to allow for the intervention and pursuant to WAC
8 371-08-420 and Civil Rule 24, the Board finds that intervention is appropriate and grants the
9 WSDOT's Petition to Intervene subject to the following conditions imposed pursuant to WAC
10 371-08-420, the Board's practice rule related to intervention:

11 1. Intervention will be for all above captioned appeals. In the pre-hearing order the
12 Board intends to include an order of consolidation.

13 2. WSDOT may not raise new legal issues distinct from those raised by the
14 Appellants in all above captioned appeals, and evidence introduced must relate to the matters
15 directly at issue.

16 B. Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere
17 Neighborhood Association (PSA).

18 PSA filed a Motion to Intervene in the appeals as consolidated. Several Appellant's filed
19 responses objecting to intervention. The objections were primarily based on the argument that
20 PSA would be raising issues that should have been brought through an appeal and not through a
21 petition to intervene after the 30-day appeal period had expired. PSA filed a Reply clarifying the

1 purpose of its intervention was not to raise new issues, nor ask for relief beyond upholding the
2 permit as issued.

3 Intervention before the Pollution Control Hearings Board is governed by WAC 371-08-
4 420:

5 (1) The presiding officer may grant a petition for intervention at any
6 time, upon determining that the petitioner qualifies as an
7 intervenor pursuant to civil rule 24, that the intervention will
serve the interests of justice and that the prompt and orderly
conduct of the appeal will not be impaired.

8 (2) The presiding officer may impose conditions upon the
9 intervenor's participation in the proceedings.

10 A four-part test governs the decision whether or not to grant intervention of right under the Rule.

11 This rule thus imposes four requirements that must be satisfied before
12 intervention must be granted: (1) timely application for intervention; (2)
13 an applicant claims an interest which is the subject of the action; (3) the
applicant is so situated that the disposition will impair or impede the
applicant's ability to protect the interest; and (4) the applicant's interest
is not adequately represented by the existing parties.

14 *Westerman v. Carey*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994).

15 These requirements are to be construed broadly to favor intervention. *Columbia Gorge*
16 *Audubon Society v. Klickitat County*, 98 Wn. App. 618, 989 P.2d 1260 (1999); *Fritz v. Gorton*, 8
17 Wn. App. 658, 660, 509 P.2d 83 (1973). CR 24(a) is to be interpreted to allow an intervention of
18 right unless it would work a hardship on one of the original parties. *Loveless v. Yantis*, 82 Wn.2d
19 754, 513 P.2d 1023 (1973). The Board notes that in several environmental or land use cases,
20 fairly general interests held by citizens groups, tribes, and nearby landowners have been found
21 sufficient to qualify for intervention. *Vashon Island Committee for Self-Government v.*

1 *Washington State Boundary Review Board for King County*, 127 Wn.2d 759, 903 P.2d 953
2 (1995); *Loveless v. Yantis*, at 759. For instance, the interests cited in *Vashon Island Committee*
3 were (1) promoting preservation of the rural nature of Vashon, and (2) concern about the effect a
4 more densely populated Vashon would have on the quality of a landowner's well water. *Vashon*
5 *Island Committee*, at 765.

6 The Board finds that PSA timely filed the petition to intervene. PSA has also shown that
7 it, Washington Environmental Council and Rosemere Neighborhood Association have an interest
8 in the subject matter and disposition will impair or impede those interests. Each of these entities
9 has a history of involvement in the development of permitting and regulating municipal storm
10 water, including challenging the issuance and implementation other previous storm water
11 permits. They are non-profit organizations with missions that support involvement in this
12 consolidated appeal. Finally, other parties including Ecology cannot be presumed to represent
13 PSA's interests. Ecology is charged with enforcing the state's water pollution control laws for
14 the benefit of the public. RCW 90.48.037. And while PSA has made very little showing that
15 their interests are any different than that of Ecology, it is only necessary to show that their
16 interests may not be adequately addressed. *Columbia Gorge v. Klickitat County*, 98 Wn.App. at
17 630. The Board is persuaded that PSA may have additional arguments to offer in this case.

18 The Board concludes that subject to conditions intervention will ensure there is no
19 hardship or that the case will not be unduly delayed as a result of intervention. The Board
20 thereby grants PSA's petition to Intervene subject to the following conditions, imposed pursuant
21 to WAC 371-08-420, the Board's practice rule related to intervention:

