



STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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DEPARTMENT OF ECOLOGY
MAR 26 2009
WATER QUALITY PROGRAM

March 25, 2009

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Re: PCHB No. 09-023
PUGET SOUNDKEEPER ALLIANCE v. DOT and ECOLOGY

Dear Parties:

Enclosed please find the Pre-Hearing Order from the conference held on March 24, 2009. Please review the order carefully in order to understand the details of what the process requires. For ease of reference, the key deadlines are as follows:

1. **Discovery:** Discovery should be complete by **October 16, 2009**.
2. **Motions:** File motions on any issue that would be dispositive on or before **August 10, 2009**. Opposing parties shall file a response 14 days from the date received. The Reply must be made within 10 days from receipt of the response.
3. **Joint Status Report** shall be filed by **October 1, 2009**.
4. **Witness and Exhibit Lists:** Expert witness lists by **October 16, 2009**.
Final witness lists by **December 4, 2009**.
Final exhibit lists by **December 23, 2009**.
5. **Briefs:** Pre-Hearing Briefs shall be filed by **January 11, 2010**.
6. **Hearing:** The hearing date is set for **January 21 – 29, 2010**.
7. **Section references for issues:** Filed by **April 10, 2009**.

Upon further reflection, and after discussing the question with our staff, I have decided that e-filings should be made without attachments and exhibits. This decision is reflected in the

language in bold in § IX Communications. This does not affect any agreements the parties have made regarding e-service on each other.

If you have questions, please do not hesitate to call.

Sincerely,



Kay M. Brown
Administrative Appeals Judge, Presiding

KMB/dj/P09-023

Enc.

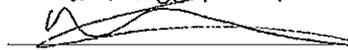
Cc: Kathleen Emmett, Ecology

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 to the attorneys 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 March 25, 2009 at Lacey, WA.



1
2 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
3 STATE OF WASHINGTON

4 PUGET SOUNDKEEPER ALLIANCE,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY, and
9 STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

10 Respondents.
11
12

PCHB NO. 09-023

PRE-HEARING ORDER

13 Appellant Puget Soundkeeper Alliance (PSA) is appealing the Washington State
14 Department of Transportation Municipal Stormwater Permit (Permit) issued by Washington
15 State Department of Ecology (Ecology) to Washington State Department of Transportation
16 (WSDOT). A pre-hearing conference in the case was held by telephone on March 24, 2009.
17 Administrative Appeals Judge Kay M. Brown, presided for the Board. Assistant Attorney
18 General Stephen R. Klasinski represented WSDOT. Assistant Attorney General Ronald L.
19 Lavigne, Senior Counsel, represented Ecology. Jan Hasselman and Joshua Osborne Klein,
Attorneys for Earthjustice, represented PSA.

20 Based on the conference, the following Pre-Hearing Order is entered:
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I. HEARING

The hearing in this matter is set for **January 21 through January 29, 2010**, commencing at 9:00 a.m. at the Board's office in Lacey, WA.

II. MEDIATION AND SETTLEMENT

Parties are encouraged to engage in mediation or settlement discussions with each other at any time without the presence of the presiding officer of the Board or with his or her presence if all parties and the presiding officer agree. If the parties wish to engage the services of an administrative appeals judge for mediation, they shall contact the Board's office. The parties shall file a joint status report with the Board, setting forth settlement possibilities in the case, by **October 1, 2009**.

III. LEGAL ISSUES

PSA's issues

1. Does the Permit, issued February 4, 2009, authorize WSDOT to discharge stormwater from new and expanded highway facilities without reducing the discharge of pollutants to the maximum extent practicable (MEP)?
2. Does the Permit authorize WSDOT to discharge stormwater from new and expanded highway facilities without using all known, available, and reasonable methods of treatment (AKART) to control and prevent pollution of waters of the state?
3. Does the Permit authorize stormwater discharges from new and expanded highway facilities that unlawfully degrade water quality and/or violate water quality standards?
4. Does the Permit unlawfully authorize stormwater discharges from new and expanded highway facilities into waterbodies indentified as impaired under section 303(d) of the Clean Water Act?
5. Does the Permit unlawfully authorize WSDOT to discharge stormwater from new and expanded highway facilities that will result in harm to ESA listed species, including Chinook salmon and steelhead?
6. Does the Permit authorize WSDOT to discharge stormwater from existing highway facilities without reducing the discharge of pollutants to the MEP?

- 1 7. Does the permit authorize WSDOT to discharge stormwater from existing highway
- 2 facilities without using AKART to control and prevent pollution of waters of the
- 3 state?
- 4 8. Do the retrofit requirements in the Permit unlawfully fail to require retrofitting of
- 5 existing WSDOT facilities to meet water quality standards and protect beneficial
- 6 uses?
- 7 9. Do the retrofit requirements in the Permit create an unlawful self-regulatory system?
- 8 10. Are the illicit discharge detection and elimination (IDDE) provisions in the Permit
- 9 inconsistent with governing law and do they create an impermissible self-regulatory
- 10 system?
- 11 11. If Ecology drafted the Permit based on the amount of available funding, does the
- 12 permit as a whole fail to reduce stormwater pollution to the MEP and/or fail to
- 13 require AKART?
- 14 12. Does the Permit unlawfully fail to control stormwater runoff from WSDOT facilities
- 15 to the MEP, and/or fail to require application of AKART to stormwater runoff from
- 16 WSDOT facilities, by failing to require WSDOT to investigate, advocate for, and/or
- 17 require methods to limit the source of runoff pollutants?

10 WSDOT's issues

- 11 1. Does PSA have standing to appeal the Permit, the Stormwater Management Plan
- 12 (SWMP), the Highway Runoff Manual (HRM), or the application thereof in areas
- 13 outside the Puget Sound Basin?
- 14 2. Did Ecology act unlawfully or abuse its discretion when it approved the HRM as
- 15 equivalent to Ecology's stormwater management manuals?
- 16 3. Does the Board have jurisdiction to review and overrule funding decisions for
- 17 WSDOT and its stormwater system made by the Washington State Legislature?

15 PSA will file an update to this list of issues no later than **April 10, 2009**, that identifies,
16 to the extent possible, the specific sections of the Permit implicated by each issue.

18 **IV. DISPOSITIVE MOTIONS**

19 Motion deadline: The parties shall file and serve motions on any issue that would be
20 dispositive of all or part of the case **on or before August 10, 2009**. An original and four (4)
21 copies of the motion and supporting documents shall be filed with the Board. Opposing parties

1 shall have 14 days from receipt of the motion to file a response, and then the moving party will
2 have an additional 10 days from receipt of the response for reply to the motion. (Original and
3 four (4) copies for the Board).

4 Motions will be decided based on the written record, unless oral argument is requested by
5 a party and granted by the Board. At the parties' request, argument may be held by telephone.

6 V. WITNESSES AND EXHIBITS

7 The parties shall file and serve a list designating all expert witnesses on **October 16,**
8 **2009** (Original and one). This designation should include all experts expected to provide direct
9 expert testimony at the hearing. Testimony will not be allowed from any expert who is not so
10 designated, unless a party shows good cause for its failure to designate and obtains a ruling
11 granting leave to call the additional expert. Any expert identified for the first time on the list
12 filed on October 16, 2009, may be deposed after the discover cut-off date.

13 Both parties have filed preliminary witness and exhibit lists. The parties shall file and
14 serve final lists of witnesses by **December 4, 2009** (Original and one). Any witness listed in
15 final lists may be called by any party. The party calling a witness has the responsibility to ensure
16 his/her attendance at the hearing.

17 A witness's expertise shall be established by resume offered as an exhibit.

18 The parties shall serve final exhibit lists on the parties by **December 14, 2009**.. After the
19 exchange of final exhibit lists, the parties shall confer to reach any agreement on exhibits'
20 authenticity and admissibility and to eliminate duplicate exhibits. The parties shall file and serve
21 final exhibit lists (original and one copy) with the Board on **December 23, 2009**.

1 All exhibits must be introduced in connection with a witness's testimony or referred to in
2 argument. Parties are asked to submit into evidence only those portions of voluminous
3 documents actually being referred to or relied upon by a witness.

4 When meeting with the Presiding Member on the first hearing day, each party shall have
5 available for the Board, an original and four (4) copies of its exhibits and exhibit lists which shall
6 identify those stipulated to by the parties. An original or one copy of any exhibit, which cannot
7 be conveniently copied due to size, bulk, reproduction difficulty, etc., should be available for the
8 Board at the hearing.

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

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

13 VI. PREFILED TESTIMONY

14 Pre-filed direct testimony of expert witnesses is encouraged, but not required. The
15 testimony is limited to 20 pages (double spaced) per witness. If testimony is to be pre-filed, it
16 must be filed and served no later than **January 11, 2010**.

17 VII. DISCOVERY

18 The parties have agreed to complete discovery by **October 16, 2009**. If formal discovery
19 is pursued, parties should pay particular attention to the time requirements imposed by the
20 superior court civil rules with regard to interrogatories, depositions, etc. Discovery requests shall
21 be served sufficiently ahead of the discovery deadline so that the opposing party has the response

1 time allowed by these rules. (For example, responses to interrogatories are typically due thirty
2 (30) days after service. See CR 33).

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

6 An original and one (1) copy of discovery motions and supporting documents must be
7 filed with the Board.

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

11 **VIII. BRIEFS**

12 Pre-Hearing Briefs are optional. If submitted, they shall be filed and served no later than
13 **January 11, 2010**, with an original and four (4) copies for the Board.

14 Briefs are limited to 20 pages in length, absent an order granting a motion to lengthen. If
15 a citation is made to other than a Wn.App. or Wn.2d case, a complete copy of the referenced
16 citation must be filed.

17 **IX. COMMUNICATION**

18 All correspondence and filings with the Board shall be sent to the attention of the
19 Presiding member with copies sent at the same time to all other parties.

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

1 The parties have agreed to accept service from each other by electronic mail.

2 Parties may file pleadings and other papers with the Board by electronic mail, if the
3 original and any required number of copies are mailed the same day. **Please include**
4 **attachments and exhibits with the hard copy, rather than the e-mail filing.** The following
5 additional conditions apply to e-filings:

- 6 1. The date of "filing" will be the date/time email filings are received by the
7 Board. E-filings received by the Board after 5:00 p.m. on a business day will
8 be considered filed on the next business day. Please note that e-mail is not
9 always received immediately. There may be a significant delay between the
10 time you send your e-mail, and the time the Board receives it. The office has
11 experienced delays of up to two hours, so please plan accordingly.
- 12 2. The email address for e-filing is eho@eho.wa.gov.
- 13 3. The subject line of any email containing documents you wish to e-file must
14 include the following: "E-filing for SHB No. 08-036" and may also include
15 additional descriptors (e.g., Summary Judgment Motion).

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

17 **X. MISCELLANEOUS**

18 "Filed" means the date received by the Board.

19 **ORDER**

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

SO ORDERED this 25th day of MARCH, 2009.

POLLUTION CONTROL HEARINGS BOARD



Kay M. Brown
Administrative Appeals Judge, Presiding