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**Williams, Kastner & Gibbs PLLC**

A NORTHWEST LAW FIRM®

February 15, 2007

DEPARTMENT OF ECOLOGY

FEB 15 2007

WATER QUALITY PROGRAM 20257 0102

HAND DELIVERED

Pollution Control Hearings Board  
4224 - 6th Ave., SE Rowe Six, Bldg. 2  
Lacey, WA 98504-0903

Department of Ecology Appeals Coordinator  
300 Desmond Drive  
Lacey, WA 98503

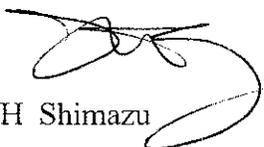
Re: Pierce County Public Works and Utilities Dept. v. Washington State Department of Ecology

Dear Sir/Madam:

Enclosed please find Pierce County Public Works and Utilities Department's Notice of Appeal of the Phase 1 Municipal Storm Water Permit

Very truly yours,

WILLIAMS, KASTNER & GIBBS PLLC

  
Tad H Shimazu

THS:kap  
Enclosures

cc: Jay Manning, Director, Department of Ecology (hand delivered)  
David Peeler, Water Quality Program Manager, Department of Ecology (hand delivered)  
Mary Sue Wilson, Ecology Div Chief, Office of the Attorney General (hand delivered)  
Kathleen Emmett, Department of Ecology (Overnight U.S. Mail)  
Ecology Appeals Coordinator, P O. Box 47608, Lacey, WA 98504 (Overnight U.S. Mail)

FEB 15 2007

STATE OF WASHINGTON  
POLLUTION CONTROL HEARINGS BOARD

In the Matter of:

PIERCE COUNTY PUBLIC WORKS AND  
UTILITIES DEPARTMENT,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF  
ECOLOGY,

Respondent.

PCHB NO.

PIERCE COUNTY PUBLIC WORKS  
AND UTILITIES DEPARTMENT'S  
NOTICE OF APPEAL OF THE PHASE  
1 MUNICIPAL STORM WATER  
PERMIT

I. APPELLANT AND SUBJECT OF APPEAL

Pierce County Public Works and Utilities Department ("Pierce County") appeals the Phase I Municipal Stormwater Permit for Discharges from Large and Medium Municipal Separate Storm Sewer Systems ("MS4 Permit") (copy attached) issued by the Washington State Department of Ecology ("Ecology") on January 17, 2007

Pierce County's contact information is:

Pierce County Public Works and Utilities Department  
9850 - 64th Street West  
University Place, WA 98467

PIERCE COUNTY PUBLIC WORKS AND UTILITIES  
DEPARTMENT'S NOTICE OF APPEAL OF THE PHASE 1  
MUNICIPAL STORM WATER PERMIT - 1

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Two Union Square, Suite 4100 (98101-2380)  
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## II. RELIEF REQUESTED

At the outset, Pierce County commends the Department of Ecology for its efforts in crafting and issuing the MS4 Permit. Pierce County is in substantial agreement with many of the provisions set forth in the MS4 Permit. However, as described below, there are some discrete, specific issues to which Pierce County objects. Thus, Pierce County is compelled to appeal these issues and request that the Pollution Control Hearings Board ("PCHB") invalidate specific sections of the MS4 Permit and remand those sections to Ecology for revision.

## III. STATEMENT OF ERRORS AND FACTS

(1) Section S4 is inconsistent with applicable laws and regulations, is vague, unreasonable, impracticable and/or inappropriate. Section S4, as drafted, may be interpreted in such a manner as to inherently create a situation in which the Permittee may be in immediate violation of the MS4 Permit, and immediately vulnerable to agency and citizen enforcement actions notwithstanding the Permittee's best good faith efforts to comply. The Permit should be revised to clarify that compliance with Section S4.F constitutes compliance with not only Sections S4.A and S4.B, but also the underlying state and federal laws. The Permit should also be revised to acknowledge that a determination of whether a specific stormwater discharge violates state water quality standards in the receiving water requires consideration of many factors, of which in-system monitoring data is only one factor, and that in-system monitoring data, by itself, is insufficient to establish a water quality violation in the receiving water. This

PIERCE COUNTY PUBLIC WORKS AND UTILITIES  
DEPARTMENT'S NOTICE OF APPEAL OF THE PHASE 1  
MUNICIPAL STORM WATER PERMIT - 2

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1 Section further imposes state law requirements intended for discharges of pollutants regulated  
2 outside the scope of 33 U.S.C. § 1342(p).

3 (2) Section S5 of the MS4 Permit is vague and inconsistent with applicable laws and  
4 regulations. For example, Section S5 improperly delegates Ecology's legal authority that is  
5 granted to Ecology under the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the  
6 Washington State Water Pollution Control Act, ch. 90 48 RCW, by requiring the Permittee to  
7 perform Ecology's function of inspecting, surveilling and monitoring stormwater discharges of  
8 third parties over which the Permittee has no control.

9 (3) Section S7 of the MS4 Permit imposes conditions that are inconsistent with  
10 applicable laws and regulations, and that are vague, unreasonable, impracticable and/or  
11 inappropriate for municipal stormwater. Pierce County generally supports Ecology's approach  
12 to creating permit requirements in response to TMDLs insofar as the Permit requires the BMPs  
13 that Ecology has determined are appropriate for municipal stormwater management. However,  
14 the last sentence in the first paragraph of Section S7 requires that "[a]ll Permittees shall be in  
15 compliance with the requirements of applicable TMDLs." This requirement, as written, is  
16 ambiguous and creates uncertainty regarding Permit compliance. Further, this provision does  
17 not acknowledge that a wide variety of TMDL documents do not impose "requirements," but  
18 instead are intended to be used as analytical tools for planning purposes. This sentence should  
19 be removed in order to resolve the ambiguity and to clarify the requirements for Permit  
20 compliance.

21 (4) Section S8 contains provisions that are inconsistent with applicable laws and  
22 regulations, unreasonable, impracticable, unjust and/or inappropriate for municipal stormwater.  
23 For example, Section S8 of MS4 Permit imposes a prescriptive monitoring program that  
24 precludes Pierce County from developing and implementing a focused monitoring program  
25 that is better adapted to the unique circumstances of Pierce County, even when such a focused

1 monitoring program would provide more useful information and data that could then be  
2 utilized to develop a more effective stormwater management program to better protect human  
3 health and the environment from stormwater impacts within Pierce County.

4 In addition, inconsistencies and anomalies in S8 may prevent Permittees from  
5 complying with the required monitoring program. For example, S8.D.2 requires collection of  
6 samples from a number of storms meeting stated criteria. However, it is likely not possible to  
7 successfully sample the number of storms required to meet the permit requirements, taking into  
8 account Northwest weather, the uncertainties of precipitation forecasting, the limitations of  
9 monitoring equipment, the size of the geographic area that must be covered and the limitations  
10 associated with the criteria in S8.D.1 and S 8.D.2. Permittees may not be able to collect the  
11 type or volume of stormwater sample required for analysis.

12 Section S8 D.2.d improperly imposes toxicity testing and associated criteria.  
13 Notwithstanding Ecology's careful consideration of many concerns during the public review  
14 process, the toxicity testing and criteria were not included in the review draft, but was instead  
15 imposed as a new provision in the final Permit. This provision was not subject to public  
16 review and comment, and its inclusion in the MS4 Permit without public comment is improper  
17 and constitutes an unlawful rulemaking under the Administrative Procedures Act.

18 S8 D.2.d also contains numerous flaws and uncertainties that prevent Permittees from  
19 complying with, or comprehending the required procedures. The toxicity testing requirement is  
20 not described in an understandable way, contains impracticable first flush storm event criteria,  
21 is untried and inappropriate to municipal stormwater, and requires an unreasonable and  
22 impracticable sample size given the limitations associated with S8.D.1.

23 Section S8.H.1 requires the reporting of monitoring data that is collected from the  
24 preceding January 1 to December 31 time period. Applying this reporting requirement to S8.D  
25 ignores the professional practice of analyzing wet and dry seasons for stormwater on a water

1 year basis that generally begins October 1. The Permit requires each annual report to include  
2 only a portion of a given wet season (October 1 – December 31), and requires that the data  
3 from that same wet season (January 1 – April 30) be reported in the following year’s report. In  
4 addition, applying this reporting schedule to the S8.E and S8.F monitoring does not take into  
5 account that these projects will not necessarily be scheduled to coincide with either the  
6 calendar year or water year. Thus, S8.H.1 will provide a less useful annual report and requires  
7 permittees to create artificial breaks in its data reporting.

8 Section S8 exceeds Ecology’s lawful authority insofar as it requires Permittees to  
9 perform monitoring and analyses that are not necessary or helpful to Pierce County’s efforts to  
10 develop an effective stormwater management plan, but instead are solely intended to assist  
11 Ecology in developing a statewide database for its own purposes.

12 (5) The MS4 Permit imposes numerous requirements that will require substantial  
13 financial resources to implement. Yet, the MS4 Permit does not prioritize such requirements,  
14 does not provide a reasonable schedule to implement such requirements given the limited  
15 resources of the Permittees, and does not acknowledge that unforeseen circumstances, such as  
16 the extraordinary floods of November 2006, may divert the limited stormwater funds away  
17 from permit implementation efforts to deal with more emergent and dire circumstances.

18 The Permit creates a situation in which the Permittee will likely violate the Permit and  
19 be vulnerable to agency and citizen enforcement actions notwithstanding the Permittee’s best  
20 efforts to comply. The MS4 Permit should prioritize these tasks and provide a reasonable  
21 implementation schedule that takes into account the substantial financial resources that will be  
22 required. The Permit should also include provisions that give the Permittee some flexibility to  
23 respond to emergent situations, such as the extraordinary flood events of November 2006, by  
24 diverting budgeted stormwater funds without being penalized for such efforts. This could be  
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1 accomplished by adding a hardship provision, a broad force majeure clause or some other  
2 appropriate mechanism.

3 Pierce County continues to review the requirements of the MS4 Permit to identify  
4 additional potential issues that may be articulated at or prior to the prehearing conference on  
5 this appeal.

6 **IV. CONCLUSION**

7 The Pollution Control Hearings Board should invalidate specific provisions of the MS4  
8 Permit that will be fully vetted at hearing, and remand the Permit to Ecology with orders to  
9 make appropriate revisions.

10 DATED this 15th day of February, 2007.

11 **WILLIAMS, KASTNER & GIBBS PLLC**

12  
13 By 

14 Tad H. Shimazu, WSBA #16571  
15 Timothy Jones, WSBA #37226  
16 Attorneys for Pierce County Public Works  
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