

DANIEL T. SATTERBERG
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Office of the Prosecuting Attorney
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RECEIVED

AUG 31 2012

August 31, 2012

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

Pollution Control Hearings Board
1111 Israel Rd. SW, Suite 301
Tumwater, WA 98501

Via ABC Legal Messenger Service

RE: Notice of Appeal of Phase I Municipal Stormwater Permit
Issuance Date: August 1, 2012
Effective Date: August 1, 2013
Expiration Date: July 31, 2018

Dear Pollution Control Hearings Board:

Served herewith please find an original and one copy of King County's Notice of Appeal of the Phase I Municipal Stormwater Permit issued August 1, 2012, effective August 1, 2013, with an expiration date of July 31, 2018.

Sincerely,

Joseph B. Rochelle

JBR/ml
Enclosures

✓ cc: Department of Ecology, Appeals Processor
300 Desmond Drive SE
Lacey, WA 98503
(with Enclosures)

Attorney General, State of Washington
Ecology Division
2425 Bristol Court SW
2nd Floor
Olympia WA 98502
(with Enclosures)

- cc: Env. Database Coord.
- Rev/Hes - Grant Recovery
- _____

- cc: File Fax/ITB
- ATG Dept. Coord. (E)
- Bill Moore (WG-HQ)

Initial: Mc 9/4/12 Served (Wac)
8/31/12

RECEIVED

AUG 31 2012

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

- CC: Ent. Relations Coord.
- Remediation/Recovery
- _____
- File Permit ATG
- ATG's District Clerk
- Bill Moore WQ-46

Initial: Mc 9/4/12 Served (Val) 8/31/12

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

8 KING COUNTY, a political subdivision of the)
 9 State of Washington,)
)
 10 Appellants,)
)
 11 vs.)
)
 12 STATE OF WASHINGTON)
 DEPARTMENT OF ECOLOGY,)
)
 13 Respondent,)
)

PCHB NO.
KING COUNTY'S NOTICE
OF APPEAL OF THE PHASE I
MUNICIPAL STORMWATER
PERMIT

King County, a political subdivision of the State of Washington ("King County"), appeals the Phase I Municipal Stormwater Permit, a National Pollutant Discharge Elimination System and State Waste Discharge General Permit for discharges from Large and Medium Municipal Separate Storm Sewer Systems ("MS4 Permit" or "Phase I Permit" or "Permit") issued by the Washington State Department of Ecology ("Ecology") on August 1, 2012. A copy of the MS4 Permit is attached hereto as Exhibit A.

I. APPEALING PARTY

The appealing party is:

King County by and through
The Water and Land Resources Division of

COPY

1 The Department of Natural Resources and Parks
2 201 South Jackson Street
3 Suite 600
4 Seattle, WA 98104
5 Attn: Douglas Navetski

6 King County is represented in this appeal by the Office of the King County Prosecuting
7 Attorney:

8 Attn: Joseph B. Rochelle
9 King County Prosecuting Attorney's Office
10 516 Third Avenue, W400
11 King County Courthouse
12 Seattle, WA 98104
13 Phone: 206-296-9015 Fax: 206-296-0191
14 joe.rochelle@kingcounty.gov

15 **II. OTHER PARTIES**

16 The Washington State Department of Ecology is the respondent in this appeal:

17 Washington State Department of Ecology
18 P.O. Box 47608
19 Olympia, WA 98504-7608

20 **III. RELIEF REQUESTED**

21 King County recognizes and commends Ecology's work to develop and issue the Phase 1
22 Permit, and looks forward to working with Ecology towards protecting state water quality.
23 King County substantially agrees with many of the Permit's terms and conditions; however, the
County must object to several specific permit provisions detailed below. As a result, King
County is compelled to appeal the MS4 Permit and request that the Pollution Control Hearings
Board ("Board") invalidate specific provisions of the Permit and remand those provisions to
Ecology for modification consistent with the Board's order.

24 **IV. STATEMENT OF FACTS AND GROUNDS FOR APPEAL**

1 (1) Subsection S5.C.5.c. contains requirements related to watershed-scale stormwater
2 planning. King County has been a supporter of long term planning for stormwater
3 programs for many years and continues to believe that this type of planning is best
4 done on a basin or watershed basis, in an adaptive, science-based process tailored to
5 each watershed. (a) King County does not fundamentally disagree with the purposes
6 of the substantive requirements spelled out in subsections S5.C.5.c.ii.(1)-(5) of the
7 Permit, but does object to the Permit's placement of responsibility for sponsoring and
8 funding the watershed scale plan entirely upon the County, when portions of the plan
9 area will be outside of the jurisdiction of the County and outside the service area of
10 the County's MS4. At a minimum this Permit should be modified to require, with
11 corresponding amended mandatory language in the new Phase II five year permit,
12 that jurisdictions subject to the new Phase II Permit have shared responsibility to
13 actively participate in and fund on a land area percentage or other equitable basis the
14 costs of such planning effort. The inconsistency of requirements between the Phase I
15 Permit and the Phase II permit is unreasonable, unjust, and arbitrary and capricious.
16 (b) While the Permit does identify important issues to be addressed in subsections
17 S5.C.5.c.ii.(1)-(7) for the development of the watershed-scale plan, the requirements
18 themselves are overly prescriptive, leaving little or no room to tailor the plan's scope
19 to the actual needs or unique characteristics of the selected basin. Such an approach
20 is rigid and inflexible and runs contrary to sound adaptive management principles
21 that ensure that actions will be effective, and thus is unduly burdensome, and
22 unreasonable, and results in requirements that are arbitrary and capricious. The
23 Permit should be modified to allow greater flexibility. (c) Under subsection

1 S5.C.5.c.ii. the Permittee is required to submit a scope of work and schedule for the
2 entire watershed planning process to Ecology, and Ecology is granted review and
3 approval authority. No criteria or standards are provided for such review and
4 approval, thereby subjecting the Permittee to potentially arbitrary and unreasonable
5 expansion of the scope and contraction of the schedule without any stated right of
6 appeal or to negotiate changes. Without such protections, this provision is
7 unreasonable, unjust, and arbitrary and capricious. The Permit should be modified to
8 provide such protections.

9 (2) Subsection S5.C.8.c.i. requires Permittees to implement an ongoing program
10 designed to detect and identify non-stormwater discharges and illicit connections
11 into the Permittee's MS4. While such detection and identification serve a legitimate
12 purpose, the Permit arbitrarily, and without notice in the draft permit, mandates a
13 12% inspection rate of all of the Permittee's MS4 conveyance systems in a calendar
14 year. Because the 2007 NPDES Phase I permit required mapping focused on the
15 urban/high density residential sub-basins, King County does not have a completed
16 mapped inventory of the County's entire stormwater conveyance system. Areas
17 outside the urban/high density residential areas were not required to be and so have
18 not been systematically mapped; consequently, it is virtually impossible for King
19 County to know whether it is compliant with the 12% requirement until its mapping
20 inventory is completed. King County estimates mapping costs to be in the \$4
21 million range over the life cycle of the Permit, and this requirement effectively
22 doubles the land area requiring mapping and thus the program cost. Additionally this
23 requirement will likely double the conveyance inspection program costs. Inclusion of

1 this new Permit condition of 12% annual inspection rate is unreasonable,
2 unattainable, unduly burdensome, arbitrary and capricious, and fails to meet the
3 Maximum Extent Practicable (MEP) standard. This requirement should either be
4 removed or deferred to be more consistent with the timeframes allowed for mapping.

5 (3) Subsection S5.C.9.d.i.(2) addresses the frequency of inspection of catch basins. The
6 draft permit introduced language indicating that the standard inspection cycle was
7 "every two years." Under the draft permit, inspections were allowed on a "circuit"
8 basis, and the inspection of a minimum of two catch basins per "circuit" was
9 allowed. The final Permit removed the two year inspection cycle, replaced it with an
10 annual cycle, and added a metric for the "circuit" inspection of a minimum of 25% of
11 catch basins. The change in frequency of inspection from the draft to the final permit
12 has significant financial repercussions for King County's Road Services Division,
13 with estimates of increased costs in the 30% to 70% range, at program cost that could
14 exceed \$250,000 per year. Already having experienced dramatic budget cuts and
15 significant layoffs of personnel, the Road Services Division seeks restoration of the
16 original draft permit frequency of inspection, as the new provision fails to meet the
17 MEP standard, which includes economic feasibility. King County also objects to this
18 provision on the grounds that it is unreasonable, inequitable, and arbitrary and
19 capricious.

20 (4) Subsection S5.C.5.a.iii applies standards to all development applications submitted
21 after July 1, 2015, and to projects approved prior to July 1, 2015 which have not
22 started construction by June 30, 2020. This requirement conflicts with the State of
23 Washington's vested right doctrine. Inclusion of this condition in the Permit will

1 place the County in the untenable position of having to choose between
2 noncompliance with the permit or violation of Washington State law, and will likely
3 lead to litigation in either instance. King County objects to this provision on the
4 grounds that it is unreasonable and unlawful, and consequently is arbitrary and
5 capricious. This provision should be removed from the Permit.

6
7 **V. CONCLUSION**

8 King County respectfully requests that the Board grant the following relief:

- 9 1. Issue an order invalidating specific provisions of the MS4 Permit that are
10 unreasonable, unduly burdensome, unattainable, unlawful, unfair, or inconsistent with federal
11 and state law and remand the Permit back to the Department of Ecology, directing Ecology to
12 make appropriate modifications to the Permit.
- 13 2. Such other and further relief as the Board deems appropriate under the
14 circumstances of this case.

15 Respectfully submitted this 31st day of August, 2012.

16 DANIEL T. SATTERBERG,
17 King County Prosecuting Attorney

18 By:


19 Joseph B. Rochelle, WSBA # 26978
20 Senior Deputy Prosecuting Attorney
21 Attorneys for King County
22
23

1 Declaration of Service

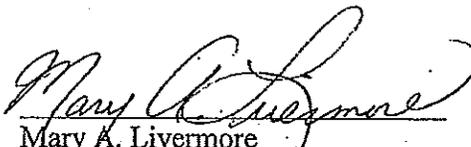
2 I hereby certify that I have on this 31st day of August, 2012, served an original and one copy of
3 the foregoing Notice of Appeal on the following, by ABC-Legal Messenger:

4
5 Pollution Control Hearings Board
6 1111 Israel Rd. SW, Suite 301
7 Tumwater, WA 98501

8
9 Phone: 360-586-2253
10 Fax: 360-586-2253

11
12 Department of Ecology
13 Appeals Processor
14 300 Desmond Drive SE
15 Lacey, WA 98503

16
17 Attorney General
18 State of Washington
19 Ecology Department
20 2425 Bristol Court SW (Second Floor)
21 Olympia, WA 98502
22 (one copy only)
23


Mary A. Livermore