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DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SNOHOMISH COUNTY, a political
subdivision of the State of Washington,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY, an agency of the State of
Washington,

Respondent.

PCHB No. _____

SNOHOMISH COUNTY'S NOTICE OF
APPEAL OF THE 2013 - 2018 PHASE I
MUNICIPAL STORMWATER
PERMIT

I. APPELLANT AND SUBJECT OF APPEAL

1.1 Snohomish County is a political subdivision of the State of Washington ("Snohomish County"). Snohomish County appeals the 2013 – 2018 Phase I Municipal Stormwater Permit, a National Pollutant Discharge Elimination System ("NPDES") and State Waste Discharge General Permit, issued by the Washington Department of Ecology, an agency of the State of Washington, ("Ecology") on August 1, 2012, and having an effective date of August 1, 2013, ("Phase I Permit" or "Permit") as well as the 2012 Stormwater Management Manual for Western Washington, Publication No. 12-10-030, ("Manual"), issued on August 1, 2012, to the extent incorporated by reference into the Permit and described in Section IV below. A copy of the Phase I Permit is attached hereto as Exhibit A. The Manual can be found at: <https://fortress.wa.gov/ecy/publications/>

COPY

1 [summarypages/1210030.html](#). A copy of portions of the Manual cited herein is attached
2 hereto as Exhibit B.

3 1.2 The appealing party is:

4 Snohomish County, by and through the
5 Snohomish County Council
6 Brian Sullivan, Chair
7 3000 Rockefeller Avenue, M/S 609
8 Everett, WA 98201
9 Phone: (425) 388-3494
10 Fax: (425) 388-3496

11 1.3 Snohomish County is represented in this appeal by the Office of the
12 Snohomish County Prosecuting Attorney:

13 Bree Urban, Deputy Prosecuting Attorney
14 Snohomish County Prosecuting Attorney
15 3000 Rockefeller Avenue, M/S 504
16 Everett, WA 98201-4046
17 Phone: (425) 388-6351
18 Email: burban@snoco.org

19 Alethea Hart, Deputy Prosecuting Attorney
20 Snohomish County Prosecuting Attorney
21 3000 Rockefeller Avenue, M/S 504
22 Everett, WA 98201-4046
23 Phone: (425) 388-6354
24 Email: ahart@snoco.org

25 **II. OTHER PARTIES**

26 2.1 Ecology is the respondent in this appeal:

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

2.2 The Phase I Permit was issued to other jurisdictions including the City of
Seattle, the City of Tacoma, Clark County, King County, Pierce County, the Port of Seattle,
and the Port of Tacoma.

III. STATEMENT OF FACTS

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2 3.1 Snohomish County is the owner or operator of a municipal separate storm
3 sewer system (“MS4”), as that term is defined by the Clean Water Act, 33 U.S.C. § 1251 et
4 seq. (“CWA”).¹ As the owner or operator of an MS4, Snohomish County falls under
5 “Phase I” of the NPDES municipal stormwater program.²

6 3.2 Washington State has been authorized to administer the NPDES program
7 within its jurisdictional borders since 1973.³

8 3.3 Ecology is the State agency responsible for implementing the NPDES
9 permit program within Washington State.⁴

10 3.4 Ecology issued the 2013 – 2018 Phase I Permit on August 1, 2012, with an
11 effective date of August 1, 2013.

12 3.5 The Phase I Permit is also issued under the authority of Ecology pursuant to
13 chapter 90.48 RCW, the Water Pollution Control Act (“WPCA”),⁵ as a State Waste
14 Discharge Permit.
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17
18 ¹ See 40 CFR § 122.26(b)(8) (defining “municipal separate storm sewer”); 40 CFR § 122.26(b)(18) (defining
19 “municipal separate storm sewer system”); see also 40 CFR § 123.2, stating the definitions contained in 40
20 CFR Part 122 apply throughout 40 CFR Part 123.

21 ² See 40 CFR § 122.26(a)(3); Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1295-96 (9th
22 Cir. 1992) (discussing the “phase-in” approach to NPDES municipal stormwater permits); see also
23 Environmental Defense Center, Inc. v. EPA, 344 F.3d 832, 840-42 (9th Cir. 2003) (discussing the two phases
24 of the NPDES municipal stormwater permit program).

25 ³ See EPA, National Pollutant Discharge Elimination System, “Specific State Program Status,” available at
26 http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last visited August 29, 2012); see
also Memorandum of Agreement Between the Washington Department of Ecology and the United States
Environmental Protection Agency, Region 10, dated August 15, 1989 (replacing the Memorandum of
Agreement between EPA and Ecology dated November 9, 1973).

⁴ See RCW 90.48.260; Memorandum of Agreement Between the Washington Department of Ecology and the
United States Environmental Protection Agency, Region 10, dated August 15, 1989; Public Utility Dist. No. 1
of Pend Orielle County v. State Department of Ecology, 146 Wn.2d 778, 807, 51 P.3d 744 (2002) (“[p]ursuant
to RCW 90.48.260, Ecology is the designated state agency for purposes of securing the benefits of and
meeting the requirements of the Clean Water Act”).

⁵ See Tukwila School Dist. No. 406 v. City of Tukwila, 140 Wn. App. 735, 739, 167 P.3d 1167 (2007).

1 3.6 Ecology issued the 2012 Manual, which is incorporated by reference into
2 the Phase I Permit, on August 1, 2012.

3 3.7 Snohomish County is a Phase I Permittee subject to the requirements of the
4 Phase I Permit.

5 IV. GROUNDS FOR APPEAL/STATEMENTS OF ERROR

6 4.1 The Phase I Permit imposes terms and conditions that are unlawful,
7 unreasonable, vague, ambiguous, inconsistent with applicable laws and regulations,
8 arbitrary and capricious, unfair, inappropriate, impracticable, and/or imposes requirements
9 outside the authority of Ecology to impose. Those terms and conditions include, but are
10 not limited to the following:

11 4.1.1 Section S5.C.5.a.iii is contrary to state statutory and case law
12 regarding vested rights,⁶ unlawfully attempts to define “application” or “completed
13 application” despite clear legislative direction that local governments should define those
14 terms,⁷ and improperly attempts to control the actions of Snohomish County outside the
15 2018 term of the Phase I Permit. Permittees cannot legally implement this Permit
16 requirement. The second sentence of this provision should be struck from the Permit.
17

18 4.1.2 Section S5.C.1.b.iv is unreasonable, inappropriate, unlawful, vague,
19 and arbitrary and capricious in that it obligates Snohomish County to enter into interagency
20 agreements without clearly describing the scope and subject matter of those agreements, is
21 duplicative of the other requirements in Section S5.C.1.b, and impermissibly places control
22

23
24 ⁶ See e.g. RCW 58.17.170, RCW 19.27.095(1), RCW 58.17.033(1), Noble Manor Co. v. Pierce County, 133
Wn.2d 269, 943 P.2d 1378 (1997) (generally discussing Washington’s vested rights doctrine).

25 ⁷ See e.g. RCW 19.27.095(2), RCW 58.17.033(2), RCW 36.70B.070, RCW 36.70B.020(4), Abbey Road
26 Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 258, 218 P.3d 180 (2009) (“[t]he statute leaves to the
local authority the determination of when a building permit application is ‘fully complete’”).

1 over Snohomish County's Permit compliance in the hands of third parties. Snohomish
2 County cannot force any other agency to contract with it and Permit compliance should not
3 be made dependent on doing so. Snohomish County also questions the authority of
4 Ecology to require it to enter into numerous interagency agreements of this nature as a
5 Permit requirement. This provision should be struck from the Permit.

6 4.1.3 The Phase I Permit unreasonably, unlawfully, in excess of Ecology's
7 authority, and arbitrarily and capriciously requires Snohomish County to provide to
8 Ecology unnecessary information that increases the possibility of technical violations of the
9 Permit in a manner that unreasonably exposes Snohomish County to citizen lawsuits under
10 the CWA. For example, but not limited to the following, Permit Section S5.C.5.b.ii
11 requires job title, job description, and department represented information for individuals
12 participating in the review and revision process. Snohomish County questions how that
13 information is relevant to its compliance with the CWA or the WPCA. By way of further
14 example, but not limitation, Permit Section S8.A, requires submission to Ecology of a
15 description of any stormwater monitoring or stormwater-related studies conducted by the
16 Permittee or any stormwater monitoring or stormwater-related studies conducted on behalf
17 of the Permittee. This would appear to require double reporting of information that is
18 already required to be reported under any other stormwater permit held by Snohomish
19 County or require reporting of stormwater-related monitoring or studies conducted by
20 Snohomish County outside the substantive or geographic scope of this Phase I Permit.
21 These requirements should be struck from the Permit or clarified that, for example,
22 Snohomish County is not required to report information already reported under another
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1 permit or that fall outside of the area of substantive or geographic coverage of the Phase I
2 Permit.

3 4.1.4 The Phase I Permit unreasonably, unfairly, unlawfully, contrary to
4 Permit modification procedures, ambiguously, and arbitrarily and capriciously incorporates
5 by reference documents that do not exist in final form or documents "as revised." This
6 improperly presents Snohomish County with a moving target as it attempts to comply with
7 Permit requirements. For example, but not limited to the following, Section S5.C.9.a of the
8 Permit requires Permittees to implement maintenance standards that are as protective or
9 more protective than those found in the Manual, Volume V, Chapter 4. Volume V, Chapter
10 4, Section 4.6, pages 4-52 and 4-53 in turn, reference the maintenance requirements in the
11 "2012 Low Impact Development Technical Guidance Manual for Puget Sound." See also
12 Permit Appendix 1, Section 2. But that document does not exist in final form. It is, at this
13 time, only a draft document that presumably will be finalized at some point after the appeal
14 period on this Permit has run. By way of further example, but not limitation, Permit
15 Appendix 1, Section 2 (as well as Manual Volume I, Chapter 2, Section 2.3, page 2-7 and
16 G-35) define "rain garden" by reference to the "Rain Garden Handbook for Western
17 Washington Homeowners (WSU 2007 or as revised)" for specifications. It is improper,
18 unreasonable, and unlawful for Ecology to require Permittees to comply with technical
19 guidance documents that will be modified by a third party at some unknown point during
20 the Permit term. Furthermore, it is not clear that such documents have gone or will go
21 through the normal channels of regulatory review as required by law. In addition, Section
22 S5.C.5.a and Permit Appendix 1 incorporate by reference large portions of Volume V of
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1 the Manual. Throughout Volume V, there are various references to either the “2012 Low
2 Impact Development Technical Guidance Manual for Puget Sound,” or the “Low Impact
3 Development Technical Guidance Manual for Puget Sound,” or hyperlinks to, in some
4 cases, the “2005 Low Impact Development Technical Guidance Manual for Puget Sound.”
5 For example, but not limited to the following, Volume V, Chapter 7, BMP T7.30, page 7-
6 12, as incorporated by reference in Permit Appendix 1, Section 4.5, directs Permittees to
7 refer to a “Low Impact Development Technical Guidance Manual for the Puget Sound
8 Basin” without clarification. See also Volume V, Chapter 5, Section 5.1, page 5-1. These
9 ambiguities compromise Snohomish County’s ability to fully understand its responsibilities
10 under the Permit and leave Snohomish County vulnerable to challenges.
11

12 4.1.5 Section S5.C.5 of the Phase I Permit unreasonably, arbitrarily and
13 capriciously, unfairly, improperly, and unlawfully limits the ability of Snohomish County
14 to choose a watershed that Snohomish County believes is likely to yield the most useful
15 information and is better adapted to its unique circumstances. It is inappropriate,
16 unreasonable, and in excess of Ecology’s authority for Ecology to dictate the watersheds
17 available for planning. Instead, that choice should be left to Permittees so that they have
18 the flexibility to determine local priorities and decide where limited government resources
19 are best spent. Ecology changed entirely the watershed choices available to Snohomish
20 County from the draft to the final Permit. As a result, Snohomish County has been
21 impermissibly and unlawfully denied the opportunity for meaningful comment and input on
22 Section S5.C.5 requirements. Furthermore, the “alternative” provided in Section S5.C.5.c.i
23 is not, in actuality, an alternative, as no other watershed in Snohomish County meets those
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1 criteria. This is arbitrary and capricious, unreasonable, and unfair. Snohomish County
2 generally supports the idea of watershed-scale planning but is opposed to Ecology's
3 unreasonable limitation on qualifying watersheds. Snohomish County objects to Ecology's
4 attempt to impermissibly control its discretion as to where to spend its limited planning
5 money. The watershed-scale stormwater planning requirements must be modified to
6 permit greater flexibility to Snohomish County to choose which watershed to study, based
7 on local priorities.

8
9 4.1.6 To the extent the Permit may be read to limit the discretion of local
10 jurisdictions to determine the extent of surveys, geotechnical studies, soil reports, etc.
11 necessary for development or redevelopment projects, especially small projects, that
12 limitation is unfair, unreasonable, improper, arbitrary and capricious, and unlawful. In
13 particular, Snohomish County is concerned that the costs associated with these studies,
14 reports, and surveys may be both prohibitively expensive and, in some cases, unnecessary.
15 For example, but not limited to the following, Section S5.C.5 and Permit Appendix 1,
16 Section 4.1, require Permittees to comply with Manual Volume 1, Chapter 3, Section 3.1.1,
17 which lists required elements, including minimum requirements, of a site analysis. But
18 Section 3.1.1 also provides that project reviewers may choose to waive "certain"
19 components "as appropriate." This is ambiguous and unclear. Snohomish County seeks
20 clarification that Phase I jurisdictions have discretion regarding the necessary surveys,
21 reports, and studies or, in the alternative, the Permit should be modified to make any
22 requirements that trigger these submissions do so at a higher threshold, for example, for
23 projects that create or replace more than 5000 square feet of hard surface.
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1 4.2 Snohomish County continues to review the requirements of the Phase I
2 Permit to identify any additional potential issues that may be articulated at or before the
3 prehearing conference on this appeal.

4 **V. RELIEF REQUESTED**

5 5.1 While Snohomish County recognizes and commends Ecology's work in
6 developing the Phase I Permit and substantially agrees with many of the Permit's terms and
7 conditions, Snohomish County objects to several specific provisions, as detailed above,
8 and asks that the Pollution Control Hearings Board ("Board") invalidate or modify those
9 provisions of the Phase I Permit as described in this Notice of Appeal and remand those
10 provisions to Ecology for modification consistent with the Board's order.
11

12 Respectfully submitted this 30th day of August, 2012.

13
14 MARK K. ROE
Snohomish County Prosecuting Attorney

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16 
17 By: _____
18 Bree Urban, WSBA # 33194
19 Alethea Hart, WSBA # 32840
20 Deputy Prosecuting Attorneys
21 Attorneys for Snohomish County
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CERTIFICATE OF SERVICE

I, Regina McManus, certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 30th day of August, 2012, I caused to be served on the parties listed below, and by the method indicated, a true and correct copy of Snohomish County's Notice of Appeal of the 2013 – 2018 Phase 1 Municipal Stormwater Permit:

1. Environmental and Land Use Hearings Office
Pollution Control Hearings Board
1111 Israel Road SW, Suite 301 (Legal Messenger)
Tumwater, WA 98501

2. Department of Ecology
ATTN: Appeals Processing Desk (Legal Messenger)
300 Desmond Drive SE
Lacey, WA 98503

3. King County Water and Land Resources Div.
Stormwater Services Section (U.S. Mail, First Class)
201 S. Jackson St., Suite 600
Seattle, WA 98104-3855

Joseph B. Rochelle
Senior Deputy Prosecuting Attorney (U.S. Mail, First Class)
King County Prosecuting Attorney's Office
500 Fourth Ave., Suite 900
Seattle, WA 98104-2316

4. City of Seattle
c/o Seattle Public Utilities Director's Office (U.S. Mail, First Class)
700 Fifth Ave., Suite 4900
P.O. Box 34018
Seattle, WA 98124-4018
Attn: Chuck Clarke, Director

Theresa R. Wagner
Senior Assistant City Attorney (U.S. Mail, First Class)
Seattle City Attorney's Office
600 Fourth Ave., 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769

1 5. Port of Seattle
2711 Alaskan Way, Pier 69 (U.S. Mail, First Class)
2 P.O. Box 1209
3 Seattle, WA 98111

4 6. Dough Mosich
Assistant City Attorney (U.S. Mail, First Class)
5 City of Tacoma
747 Market St., Room 1120
6 Tacoma, WA 98402-3767

7 7. Port of Tacoma
Administration Office (U.S. Mail, First Class)
8 P.O. Box 1837
9 Tacoma, WA 98401

10 8. Pierce County Public Works & Utilities Dept.
9850 – 64th St. W. (U.S. Mail, First Class)
11 University Place, WA 98467

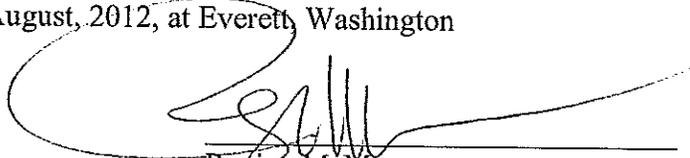
12 Lori Terry Gregory
13 Foster Pepper PLLC (U.S. Mail, First Class)
14 1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

15 9. Clark County Environmental Services
Clean Water Program (U.S. Mail, First Class)
16 P.O. Box 9810
17 Vancouver, WA 98666-9810
Attn: Rod Swanson

18 Christine Cook
19 Clark County Prosecuting Attorney's Office (U.S. Mail, First Class)
20 P.O. Box 5000
Vancouver WA 98666-5000

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

23 DATED this 30th day of August, 2012, at Everett, Washington

24 
25 Regina McManus
26