

DEPARTMENT OF ECOLOGY
FEB 15 2007
WATER QUALITY PROGRAM

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

PCHB NO. _____

Appellants,

vs.

SNOHOMISH COUNTY'S NOTICE
OF APPEAL OF THE PHASE 1
NPDES AND STATE WASTE
DISCHARGE MUNICIPAL
STORMWATER GENERAL PERMIT

WASHINGTON STATE DEPARTMENT OF
ECOLOGY AND ITS DIRECTOR,

Respondents.

Snohomish County, a political subdivision of the State of Washington ("Snohomish County"), appeals the Phase 1 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 "Permit") issued by the Washington State Department of Ecology ("Ecology") on January 17, 2007. A copy of the MS4 Permit is attached hereto as Exhibit A.

I. APPEALING PARTY

The appealing party is:

Snohomish County, by and through the
Snohomish County Council
Dave Gossett, Chair
3000 Rockefeller Avenue, M/S 609
Everett, WA 98201
Phone: (425) 388-3494 Fax: (425) 388-3496

1 remand those provisions to Ecology for modification consistent with the Board's
2 order.

3 **IV. GROUND'S FOR APPEAL**

4 The MS4 Permit is unfair and unlawful, inconsistent with applicable
5 provisions of federal and state law and regulations, impracticable and/or
6 inappropriate for municipal stormwater, and the Permit imposes terms that are
7 unreasonable and/or unattainable.

8 **V. STATEMENT OF FACTS**

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10 1. Municipal stormwater is different from other stormwater discharges
11 because of its character and the inability of municipalities to stop discharges or
12 fully control the pollutants contained in the runoff. Congress recognized these
13 differences and regulated municipal stormwater differently from all other types of
14 discharges.
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16 2. The MS4 Permit's terms and conditions cover and authorize discharges
17 of stormwater into and from municipal separate storm sewers owned or operated
18 by each permittee that would otherwise be prohibited by law.

19 3. Snohomish County is a Phase 1 permittee. Snohomish County owns
20 and operates a municipal separate storm sewer system that collects or conveys
21 stormwater that is discharged into waters of the state. The storm sewer system
22 includes approximately 485 miles of enclosed pipes, 340 miles of open channels,
23 and more than 60,000 catch basin and pipe features.
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4. Ecology reissued the MS4 Permit on January 17, 2007.

5. The MS4 Permit imposes terms and conditions that are unfair, unreasonable, unlawful, unattainable, inconsistent with applicable provisions of federal and state law and regulations, and that are impracticable and/or inappropriate for municipal stormwater. These conditions include, but are not limited to the following:

(a) Special Condition S4 imposes terms that are unreasonable, unfair, inconsistent with federal and state law, inconsistent with other permit terms, impracticable and/or inappropriate for municipal stormwater, and imposes state law requirements intended for discharges of pollutants regulated outside the scope of 33 U.S.C. § 1342(p).

(b) Special Condition S7 imposes terms that are unreasonable, unlawful, unfair, inconsistent with federal and state law and regulations, inconsistent with Total Maximum Daily Load ("TMDL") implementation plans, and are impracticable and/or inappropriate for municipal stormwater. For example, the last sentence of the first paragraph of S7 provides that "[a]ll Permittees shall be in compliance with the requirements of applicable TMDLs." This sentence conflicts with other provisions in the Permit and creates ambiguity as to permit compliance. This sentence should be stricken to resolve the ambiguity and to clarify the conditions for permit compliance. Moreover, many of the TMDL plans associated with waters listed in Appendix 2 do not contain "requirements." Thus, this provision creates ambiguity as to permit compliance. This section and Appendix 2

1 should be modified to clarify the requirements necessary to comply with the
2 Permit.

3 (c) Special Condition S8 contains provisions that are unreasonable,
4 unlawful and unjust, ambiguous, impracticable, infeasible, and inappropriate for
5 municipal stormwater. The County has undertaken water quality monitoring for
6 several years and understands the need for accurate and reliable water quality
7 monitoring. But despite this need, Special Condition S8 contains conditions that
8 are infeasible to implement, ambiguous, or fail to provide the required
9 methodologies for specified testing procedures. These factors limit
10 comprehension of the required monitoring program, which in turn makes permit
11 compliance uncertain through no fault of the permittee.
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13 (d) Special Condition S8.D.2.d requires first flush toxicity monitoring.
14 The toxicity testing procedures are not feasible to implement in the field and the
15 requirements for toxicity identification reduction evaluation are ambiguous. It is
16 uncertain that there will be sufficient test subjects or laboratory resources for all
17 Phase 1 permittees to comply with analysis requirements. The toxicity testing
18 requirements also contain unreasonable first flush storm event criteria, require an
19 unreasonable sample size given the limitations contained in S8.D.1, and is untried
20 and inappropriate for municipal stormwater. Finally, the Permit fails to provide a
21 data validation process that would allow permittees sufficient time to rerun
22 sampling and analysis if required.
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1 (e) Special Condition S8.H.1 ignores the professional practice of
2 analyzing wet and dry seasons for stormwater analysis on a water year, and not a
3 calendar year. The Permit requires permittees to report monitoring data that is
4 collected during the preceding January 1 to December 31 time period. This
5 condition should be modified to reflect professional practices and to ensure data
6 sets that are consistent with the scientific norm.

7 (f) Special Condition S8 goes beyond Ecology's authority by requiring
8 permittees to perform water quality monitoring and analyses that are unnecessary
9 to Snohomish County's efforts to develop an effective stormwater program; rather,
10 such monitoring and analyses are merely for Ecology's convenience in creating a
11 statewide database.
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13 6. The MS4 Permit imposes numerous requirements that will require
14 substantial financial resources to implement. Yet, the MS4 Permit does not
15 prioritize such requirements, does not provide a reasonable schedule to implement
16 such requirements, and does not acknowledge that municipal separate storm
17 sewers are vulnerable to unforeseen circumstances, such as the extraordinary
18 floods of November 2006.
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20 7. Snohomish County continues to review the requirements of the Permit to
21 identify any additional potential issues that may be raised at or before the
22 prehearing conference on this appeal.
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VI. CONCLUSION

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3 Snohomish County respectfully requests that the Board grant the following relief:

4 1. Issue an order invalidating specific provisions of the MS4 Permit that are
5 unreasonable, unattainable, unlawful, unfair, or inconsistent with federal and state
6 law and remand the Permit back to the Department of Ecology, directing Ecology
7 to make appropriate modifications to the Permit.

8 2. Such other and further relief as the Board deems appropriate under the
9 circumstances of this case.
10

11 Respectfully submitted this 15th day of February, 2007.

12
13 JANICE E. ELLIS
Snohomish County Prosecuting Attorney

14
15 *Catherine A. Drews*

16 Catherine A. Drews, WSBA # 29451
17 Elizabeth Anderson, WSBA # 34036
18 Deputy Prosecuting Attorneys
19 Attorneys for Snohomish County
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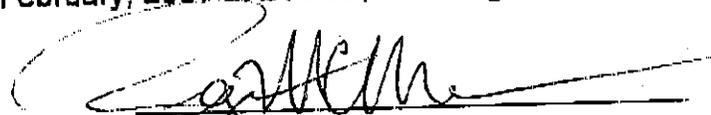
CERTIFICATE OF SERVICE

I, Regina McManus, certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 15th day of February, 2007, 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 Phase 1 NPDES and State Waste Discharge Municipal Stormwater General Permit:

- 1. Pollution Control Hearings Board
4224 6th Ave. SE, Rowe 6, Bldg 2
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- 2. Department of Ecology
Appeals Coordinator
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Lacey, WA 98503
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- 3. Department of Ecology
Kathleen Emmett
P.O. Box 47600
Olympia, WA 98504-7600
Fax: (360) 407-6426
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 Facsimile
 Legal Messenger

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

DATED this 15th day of February, 2007 at Everett, Washington


Regina McManus