

FOSTER PEPPER PLLC

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*FACSIMILE TRANSMITTAL SHEET*

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Date Faxed: **Thursday, February 15, 2007 10:51:34 AM**

TO:

**Kathleen Emmett**

FAX NUMBER:

**360-407-6426**

VOICE CONTACT:

From: **Alexandria Gust**Direct Dial: **206-447-5354**

Direct Return Fax:

Number of Pages (Including cover page): **08**

Message: Please see the attached Notice of Appeal without exhibits. The original and copies with exhibits will be delivered as indicated in the Declaration of Service.

Thank you.

DEPARTMENT OF ECOLOGY  
FEB 15 2007  
WATER QUALITY PROGRAM

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POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

COALITION OF GOVERNMENTAL ENTITIES: CITY OF ANACORTES, CITY OF AUBURN, CITY OF BELLEVUE, CITY OF BELLINGHAM, CITY OF BOTHELL, CITY OF BREMERTON, CITY OF BUCKLEY, CITY OF BURIEEN, CITY OF BURLINGTON, CITY OF CAMAS, CITY OF DES MOINES, CITY OF ELLENSBURG, CITY OF EVERETT, CITY OF FEDERAL WAY, CITY OF FIRCREST, CITY OF KENNEWICK, CITY OF KENT, CITY OF LONGVIEW, CITY OF MARYSVILLE, CITY OF MOUNT VERNON, CITY OF NORMANDY PARK, CITY OF ORTING, CITY OF PORT ANGELES, CITY OF PULLMAN, CITY OF PUYALLUP, CITY OF RENTON, CITY OF RICHLAND, CITY OF SAMMAMISH, CITY OF SEATAC, CITY OF SUMNER, CITY OF UNIVERSITY PLACE, and CITY OF VANCOUVER, all of which are municipal corporations of the state, and KITSAP COUNTY, a political subdivision of the State,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

NO.  
NOTICE OF APPEAL

NOTICE OF APPEAL - 1

FOSTER PEPPER PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
PHONE (206) 447-4400 FAX (206) 447-9700

## I. INTRODUCTION

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2  
3 1.1 Appellants, a Coalition of Governmental Entities ("the Coalition"), hereby appeal  
4 the Western Washington and Eastern Washington Phase II Municipal Stormwater Permits issued  
5 by the Washington State Department of Ecology ("Ecology") on January 17, 2007. Coalition  
6 members are firmly committed to protecting the quality of waters in the State of Washington.  
7 This appeal does not change that commitment. However, the Permits issued by Ecology fail to  
8 account for the unique nature of municipal stormwater. Because municipal stormwater is  
9 unique, both in terms of its character (urban runoff) and the inability of a municipality to  
10 eliminate stormwater discharges or to fully control the pollutants in urban runoff, the federal  
11 Clean Water Act regulates municipal stormwater differently from all other types of water.  
12 Congress and EPA recognized that, regardless of any action that a municipality takes,  
13 precipitation will continue to fall and flow across the urban environment to municipal storm  
14 drains that are designed to convey that water away from the population to avoid flooding. This is  
15 a difference that makes all the difference in the Clean Water Act's specific municipal stormwater  
16 statutory provisions and EPA's separate NPDES regulations for municipal stormwater. The  
17 Permits issued by Ecology fail to fully recognize that difference.  
18  
19

## II. APPEALING PARTIES

20  
21 2.1 The names and addresses of the appealing parties are listed in the attached Exhibit  
22 "A."  
23  
24  
25  
26

1 2.2 Appellants are represented by:

2 Kathryn L. Gerla  
3 Lori A. Terry  
4 Foster Pepper PLLC  
5 1111 Third Ave., Suite 3400  
6 Seattle, WA 98101  
7 Telephone: (206) 447-4400  
8 Facsimile: (206) 447-9700

9 **III. ADDITIONAL PARTY**

10 3.1 The other party to this appeal is the Washington State Department of Ecology,  
11 which issued the permits that are the subject of this appeal.

12 3.2 Ecology's address is:

13 Washington State Department of Ecology  
14 P.O. Box 47600  
15 Olympia, WA 98504

16 **IV. ORDER OR DECISION APPEALED FROM**

17 4.1 The Coalition appeals Ecology's issuance of the Western Washington Phase II  
18 Municipal Stormwater Permit ("Western Washington Permit") and Ecology's issuance of the  
19 Eastern Washington Phase II Municipal Stormwater Permit ("Eastern Washington Permit"),  
20 collectively referred to as "the Permits." The Permits were issued by Ecology on January 17,  
21 2007. Copies of the Permits are attached as Exhibits "B" and "C," respectively.

22 **V. GROUNDS FOR APPEAL**

23 5.1 Ecology acted unreasonably, unjustly, or unlawfully in imposing the following  
24 conditions in the Permits:

25 5.1.1 Special Condition S.4 to the extent it imposes requirements beyond  
26 Maximum Extent Practicable.

NOTICE OF APPEAL - 3

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1           5.1.2 Provisions in Special Condition S5.C.4 and in Appendix 1 of the Western  
2 Washington Permit that, among other things, purport to require stormwater discharges from new  
3 development and redevelopment activities to meet flow control requirements for pre-developed  
4 conditions. These conditions may require cities and counties to require developers to mitigate in  
5 a manner that puts the cities and counties at risk of being sued for violation of RCW 82.02.020  
6 and the substantive due process and takings provisions of the United States and Washington  
7 State Constitutions. The Coalition, therefore, requests amendment of the Western Washington  
8 Permit to clarify that the Permit does not require cities or counties to regulate in a manner that  
9 violates RCW 82.02.020 or the federal or state constitutions, and to impose a condition requiring  
10 the Department of Ecology to indemnify cities and counties in the event claims are filed against  
11 cities and counties for violation of these provisions arising out of implementation of the Permit.  
12  
13 *See Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987).

14  
15           5.1.3 Conditions in the Permits that mandate the use of Ecology's Stormwater  
16 Management Manuals or equivalent measures.

17           5.1.4 Duplicative and unreasonably burdensome provisions in the Permits that  
18 require permittees to regulate stormwater discharges from construction activities that are also  
19 regulated by Ecology under the National Pollutant Discharge Elimination System (NPDES) and  
20 State Waste Discharge General Permit for Stormwater Discharges Associated with Construction  
21 Activity or to conduct activities that should be conducted by Ecology.  
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1           5.1.5 Special Conditions S5.A.4 and S5.C.4.a in the Western Washington  
2 Permit, Special Conditions S5.A.2 and S5.B.4.a in the Eastern Washington Permit, and  
3 provisions in Appendix 1 in both Permits that prohibit permittees from repealing any existing  
4 local requirements to control stormwater that go beyond the minimum standards set forth in the  
5 Permits.

6           5.1.6 Special Conditions S5.C.1.a and b in the Western Washington Permit,  
7 which require permittees to achieve measurable improvements and to measure the understanding  
8 and adoption of the targeted behaviors among the targeted audiences with respect to public  
9 education.

10           5.1.7 Special Condition S5.C.3 in the Western Washington Permit and Special  
11 Condition S5.B.3 in the Eastern Washington Permit, which require permittees to regulate  
12 activities such as discharges of potable water, fire hydrant flushing, discharges from lawn  
13 watering and irrigation, and dechlorinated swimming pool discharges (of any size) and to engage  
14 in expensive and extensive investigations based on indications of potential illicit discharges.

15           5.1.8 The definitions, or lack thereof, which relate to the above issues,  
16 including, but not limited to, the definition of "All known, available and reasonable methods of  
17 prevention, control and treatment" and "Maximum Extent Practicable."

18           5.2 Ecology acted unreasonably, unjustly, or unlawfully by failing to conduct an  
19 economic analysis under WAC 173-226 and by otherwise failing to adequately evaluate and  
20 consider the economic impact of the Permits.

21           5.3 Ecology failed to adopt provisions that are included or incorporated in the Permits  
22 as rules, in violation of the State Administrative Procedure Act, RCW 34.05.  
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NOTICE OF APPEAL - 5

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**CERTIFICATE OF SERVICE**

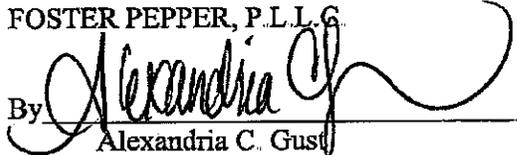
The undersigned hereby certifies that on February 15, 2007, I caused to be served upon the parties in this action in the manner noted below, a true and correct copy of the Notice of Appeal via facsimile (without Exhibits) and via Legal Messenger (with exhibits):

- 1. Appeals Coordinator  
Department of Ecology  
300 Desmond Drive  
Lacey, WA 98503  
Fax: (360) 407-6989
- 2. Ms. Kathleen Emmett  
Department of Ecology  
300 Desmond Drive  
Lacey, WA 98503  
Fax: (360) 407-6426
- 3. Mary Sue Wilson  
Office of the Attorney General  
Ecology Division  
2425 Bristol Court SW  
Olympia, WA 98502  
Fax: (360) 586-6760
- 4. Jay Manning, Director  
Department of Ecology  
300 Desmond Drive  
Lacey, WA 98503  
Fax: (360) 407-6989

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of February 2007, at Seattle, Washington.

FOSTER PEPPER, P.L.L.C.

By   
Alexandria C. Gust  
Legal Assistant