

1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 PIERCE COUNTY; SNOHOMISH
4 COUNTY, a political subdivision of the State
5 of Washington; CLARK COUNTY,
6 WASHINGTON; KING COUNTY, a
7 political subdivision of the State of
8 Washington; and BUILDING INDUSTRY
9 ASSOCIATION OF CLARK COUNTY,

10 Appellants,

11 and

12 CITY OF SEATTLE, a municipal
13 corporation; and CITY OF TACOMA, a
14 municipal corporation, and STATE OF
15 WASHINGTON, DEPARTMENT OF
16 TRANSPORTATION,

17 Intervenor,

18 v.

19 STATE OF WASHINGTON,
20 DEPARTMENT OF ECOLOGY,

21 Respondent,

and

PUGET SOUNDKEEPER ALLIANCE,
WASHINGTON ENVIRONMENTAL
COUNCIL, and ROSEMERE
NEIGHBORHOOD ASSOCIATION,

Respondent Intervenor.

and

PCHB No. 12-093c

PCHB No. 12-097c

ORDER ON PUGET SOUNDKEEPER
ALLIANCE'S AND ECOLOGY'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

Phase I Issue Nos. 2, 4, 5, 6, 7, 17(d) and (e)
and 18

Phase II Issue Nos. 2(b) and (c), 3(b) - (e),
5, 9, and 17

1 COALITION OF GOVERNMENT
2 ENTITIES: CITY OF AUBURN, CITY OF
3 BAINBRIDGE ISLAND, CITY OF
4 BURLINGTON, CITY OF DES MOINES,
5 CITY OF EVERETT, CITY OF KENT,
6 CITY OF ISSAQUAH, CITY OF MOUNT
7 VERNON, CITY OF RENTON, CITY OF
8 SEATAC, CITY OF SNOQUALMIE, CITY
9 OF SUMNER, all municipal corporations of
10 the State of Washington; COWLITZ
11 COUNTY; and KING COUNTY, political
12 subdivisions of the State of Washington,

Appellants,

and

9 CITIES OF KIRKLAND, KELSO,
10 SAMMAMISH, CAMAS, LONGVIEW,
11 LYNNWOOD, POULSBO, BREMERTON,
12 BOTHELL and FERNDALE; and STATE
13 OF WASHINGTON, DEPARTMENT OF
14 TRANSPORTATION

Appellant Intervenors,

v.

14 STATE OF WASHINGTON,
15 DEPARTMENT OF ECOLOGY,

Respondent.

and

18 PUGET SOUNDKEEPER ALLIANCE,
19 ROSEMERE NEIGHBORHOOD
20 ASSOCIATION,

Respondent Intervenors.

1 **I. INTRODUCTION**

2 This case consists of numerous consolidated appeals brought by various local
3 governments that are permittees to either the 2013-2018 Phase I or Western Washington Phase II
4 Municipal Stormwater National Pollution Discharge Elimination System and State Waste
5 Discharge General Permits (“2013 Phase I and Phase II Permits” or “2013 Permits”) issued by
6 the Washington State Department of Ecology (“Ecology”) in 2012.

7 On July 2, 2013, Respondent-Intervenors Puget Soundkeeper Alliance, Washington
8 Environmental Council and Rosemere Neighborhood Association (collectively “PSA”) filed a
9 Motion for Partial Summary Judgment seeking to dismiss Phase I Issue Nos. 2, 4, 5, 6, 7, 17(d)
10 and (e), and 18, and consolidated Phase II Issue Nos. 2(b) and (c), 3(b)-(e), 5, 9, and 17 (“PSA
11 Motion”). Ecology joined PSA’s Motion. Appellants Pierce County, King County, Snohomish
12 County, and the Phase II Coalition of Governmental Entities (Coalition), and Appellant-
13 Intervenors the City of Tacoma (“Tacoma”), the City of Seattle (“Seattle”), and the State of
14 Washington, Department of Transportation (“WSDOT”) (collectively “Appellants”) responded
15 to the PSA Motion.

16 Each of the issues that the PSA Motion seeks to dismiss is set forth in full in Appendix A
17 to this Order. These issues relate to Low Impact Development (“LID”) requirements included in
18 the 2013 Permits. PSA argues these issues were decided by the Board in the prior consolidated
19 appeal of the 2007-2012 Phase I and Phase II Municipal Stormwater Permits (“2007 Phase I and
20 Phase 2 Permits” or “2007 Permits”), an appeal involving many of the same parties that appealed
21 the 2013 Phase I and Phase II Permits. PSA argues these issues are thus barred from litigation

1 now on the basis of res judicata, collateral estoppel, and/or stare decisis. PSA also argues the
2 Appellants failed to articulate and support a claim on four of the issues. The Appellants dispute
3 PSA and Ecology’s arguments.

4 Board Chair Tom McDonald, and Board Members Kathleen D. Mix and Joan Marchioro
5 reviewed and considered the written record before the Board on this motion. No oral argument
6 was held. The record before the Board is included as Appendix B to this Order. Based on the
7 record before the Board, the Board enters the following decision:

8 **II. BACKGROUND**

9 **A. Phase I and Phase II Municipal Stormwater Permitting**

10 Municipal stormwater discharges require a National Pollution Discharge Elimination
11 System (“NPDES”) Permit under the Federal Water Pollution Control Act, commonly known as
12 the “Clean Water Act” (“CWA”), 33 U.S.C. §1251 et seq., and a State Waste Discharge General
13 Permit under the state Water Pollution Control Act (“WPCA”), chapter 90.48 RCW. Among
14 other requirements, the CWA requires that municipal stormwater permits reduce the discharge of
15 pollutants “to the maximum extent practicable” (the federal “MEP” standard). 33 U.S.C. §1342
16 (p)(3)(B)(iii). Washington’s WPCA additionally requires that all state and federal discharge
17 permits incorporate permit conditions requiring “all known, available, and reasonable methods to
18 control toxicants in the applicant’s wastewater” (the state “AKART” standard). RCW
19 90.48.520; 90.58.010; *see also* RCW 90.52.040 and RCW 90.54.020(3)(b). Ecology’s rules
20 define AKART as “the most current methodology that can be reasonably required for preventing,
21 controlling, or abating the pollutants associated with a discharge.” WAC 173-201A-020.

1 Different stormwater discharge permits are issued for different categories of municipal
2 permittees. The “Phase I” permit regulates discharges from municipal storm sewer systems
3 owned or operated by certain large and medium municipalities (“MS4s”) as established at Title
4 40 CFR 122.26, except for the Washington State Department of Transportation’s MS4s. It also
5 allows coverage of several “secondary permittees” for discharges from other publicly owned or
6 operated MS4s located within the primary permittee cities and counties. Two additional permits,
7 each termed “Phase II” permits, regulate discharges from small MS4s in Eastern and Western
8 Washington, respectively.

9 The Phase I and Phase II permits are “programmatic” permits that require the municipal
10 permittees to implement area-wide stormwater management programs (“SWMP”) in order to
11 meet state and federal standards. Required components of the SWMP are outlined in the
12 permits. Unlike general permits that regulate other sectors (*e.g.* industrial), the municipal
13 permits do not establish benchmarks or numeric or narrative effluent limits for stormwater
14 discharges from individual outfalls. One component that must be addressed in the permittees’
15 SWMPs is the control of runoff from new development, redevelopment, and construction.
16 Minimum requirements for accomplishing this are provided in the permits.

17 The 2013 Phase I and Phase II Permits represent the third iteration of such permits to be
18 issued in Washington. The first municipal stormwater permits went into effect in 1995. The
19 second permits were issued in 2007 and made effective until 2012.¹ The 2007 Permits were also
20 the subject of numerous appeals, which were partially consolidated and culminated in several

21 ¹ Consistent with legislative direction, the 2007 Permit was reissued without modification for one year in 2012,
remaining effective until Ecology issued and made effective the 2013 Permit. *See* RCW 90.48.260(3)(a)

1 decisions by the Board. This included two final decisions addressing LID requirements, or the
2 lack thereof, in the 2007 Permits, upon which PSA and Ecology rely for their motion. *See Puget*
3 *Soundkeeper Alliance v. Wash. Dep't of Ecology*, PCHB Nos. 07-021, 07-026 through 07-030,
4 and 07-037 (Findings of Fact, Conclusions of Law, and Order, Aug. 7, 2008) (“2008 Phase I
5 Decision”) (providing additional background); *Puget Soundkeeper Alliance v. Wash. Dep't of*
6 *Ecology*, PCHB Nos. 07-022 and 07-023 (Findings of Fact, Conclusions of Law, and Order, Feb.
7 2, 2009) (“2009 Phase II Decision”) (same).

8 **B. Procedural Context of the Current Appeals**

9 Ecology issued the 2013 Phase I and II Permits on August 1, 2012, with an effective date
10 of August 1, 2013. Separate appeals of the Phase I Permit were filed by Pierce County (PCHB
11 No. 12-093), Snohomish County (PCHB No. 12-094), Clark County (PCHB No. 12-095), King
12 County (PCHB No. 12-096), and the Building Industry of Clark County (“BIAW of Clark
13 County”) (PCHB No. 12-100). Tacoma, Seattle, WSDOT, and PSA each sought intervention.
14 The Board consolidated the Phase I appeals into PCHB No. 12-093c. The Board also granted
15 Seattle, Tacoma, WSDOT and PSA intervention in all Phase I appeals, limited to issues raised by
16 Appellants.²

17 Multiple, separate appeals were also filed for the Phase II Permit. The cities of Auburn,
18 Bainbridge Island, Burlington, Des Moines, Everett, Kent, Issaquah, Mount Vernon, Renton,
19 SeaTac, Snoqualmie, Sumner, Kirkland, Kelso, Sammamish, Camas, Longview, Lynnwood,

20
21 ² WSDOT voluntarily withdrew from the Phase I consolidated appeal, but remains a party to the Phase II consolidated appeal.

1 Poulsbo, Bremerton, Bothell and Ferndale, and Cowlitz County (referred to as the “Coalition of
2 Government Entities” or “Coalition”) (PCHB No. 12-097) filed appeals. King County filed a
3 separate appeal of the Phase II Permit (PCHB No. 12-099). These appeals were consolidated
4 into PCHB No. 12-097c. The cities of Kirkland, Kelso, Sammamish, Camas, Longview,
5 Lynnwood, Poulsbo, Bremerton, Bothell and Ferndale were granted intervention to join the
6 Coalition as a party. WSDOT and PSA were also granted intervention in the Phase II appeal.

7 The Board conducted pre-hearing conferences and entered separate pre-hearing orders
8 setting forth twenty-three issues for the Phase I appeal and eighteen issues for the Phase II
9 appeal. The Board consolidated seven of the Phase II issues with the Phase I Permit appeal.

10 The Phase I and II Appellants raise overlapping issues related to LID requirements
11 included in certain identical provisions in the Phase I and II Permits. These overlapping issues
12 are addressed by the current motions before the Board.

13 **C. The Board’s 2008 and 2009 Final Decisions on LID Issues for the 2007 Permits**

14 In the 2007 Phase I Permit, Ecology regulated stormwater discharges from new
15 development and redevelopment primarily through a flow control standard. *See* 2008 Phase I
16 Decision at FF 38, p. 28. In contrast to LID techniques, which try to minimize or even prevent
17 discharges of stormwater from a site, the flow control standard assumed there would be
18 discharges and focused on mitigating the worst impacts from large storm events. *Id.* at FF 38-39,
19 pp. 28-29. The 2007 Permit incorporated the use of LID techniques in various ways but largely
20 encouraged or promoted it. LID was not required as a primary tool to manage stormwater. *Id.* at
21 FF 51-55, pp. 35-39. Ecology had declined to incorporate LID as a requirement because it

1 believed at the time that LID as a stormwater management strategy had not been sufficiently
2 developed to define minimum requirements or develop a regulatory performance standard. *Id.* at
3 FF 51, p. 36. The Permit instead required municipalities to identify barriers to the use of LID
4 and take steps to “allow” it. *Id.* at FF 53, p. 36. Likewise, the 2007 Phase II Permit took only
5 initial steps to require Phase II jurisdictions to “allow non-structural preventive actions and
6 source reduction approaches such as Low Impacts Development Techniques (LID).” *See* 2009
7 Phase II Decision at COL 5, pp. 46-47.

8 Multiple parties appealed the 2007 Permits, many of which also appealed the 2013
9 Permits. Parties to both the 2007 and 2013 consolidated appeals include Puget Soundkeeper
10 Alliance, Pierce County, King County, Snohomish County, Clark County, Tacoma, Seattle,
11 WSDOT, and the majority of members of the Coalition (2007 Appellants).³ *See* 2008 Phase I
12 Decision at 2; 2009 Phase II Decision at 2.

13 PSA challenged the 2007 Permits for their lack of LID requirements. There were two
14 LID-related issues in the 2007 Phase I Permit appeal:

15 F.1 Low-Impact Development:

- 16 a. Does the permit fail to require maximum on-site dispersion and infiltration of
17 stormwater, through the use of “low-impact development” techniques, basin
18 planning, and other appropriate technologies, and if so, does that failure
19 unlawfully cause or contribute to violations of water quality standards?
20 b. Does the permit fail to require maximum on-site dispersion and infiltration of
stormwater, through the use of “low-impact development” techniques, basin
planning, and other appropriate technologies, and if so, does that failure
unlawfully allow permittees to discharge pollutants that have not been treated

21 ³ Parties to the current appeal that were not Coalition members in 2007 include Bainbridge Island, Issaquah,
Snoqualmie, and Cowlitz County. PSA Motion at 20.

1 with all known available and reasonable methods of treatment (“AKART”) and/or
2 fail to reduce the discharge of pollutants to the maximum extent practicable
3 (“MEP”)?

4 City of Tacoma’s Opposition to Puget Soundkeeper’s Motion for Partial Summary Judgment,
5 Ex. A (Second Prehearing Order in the 2007 Phase I Municipal Stormwater Appeal), at 6.

6 The Board declined to rule on the LID issues on summary judgment, proceeding instead
7 to hearing on the factual question of whether Ecology should have required LID techniques as a
8 stormwater management tool in order to meet state and federal regulatory requirements. *See*
9 *Puget Soundkeeper Alliance v. Wash. Dep’t of Ecology*, PCHB Nos. 07-021, 07-026 through 07-
030, and 07-037 (Order on Summary Judgment, April 8, 2008) at 6, 21-24.

10 Following an evidentiary hearing that addressed a number of issues with the 2007 Phase I
11 Permit, including LID, the Board issued extensive findings and conclusions. *See* 2008 Phase I
12 Decision. The Board discussed the shortcomings of conventional methods like the flow control
13 standard, which primarily focus on large storm events and provide only residual flow control
14 most of the time, do not address the loss of storage volume to provide for groundwater recharge,
15 and do not remove sufficient pollutants to replicate pre-development water quality. *Id.* at FF 38-
16 39, pp. 28-29. Accordingly, the Board noted such methods were “becoming more recognized as
17 insufficient. . . .” *Id.* at FF 38, pp. 28-29. In addition, the Board pointed out that the 2007 Phase
18 I Permit granted basins like Seattle and Tacoma, which had forty percent or more total
19 impervious area since 1985, a significant exception to achieving the required pre-developed
20 discharge rates. *Id.* at FF 40, pp. 29-30.

1 The Board then addressed LID. As the Board stated, “[w]hile specific definitions of LID
2 may vary, the concept of LID is well-established, and the basic BMPs that constitute LID are
3 well-defined.” *Id.* at FF 42, p. 31. (“BMP” refers to Best Management Practice.) The Board
4 generally summed up LID as follows:

5 LID techniques emphasize protection of the natural vegetated state, relying on
6 the natural properties of soil and vegetation to remove pollutants. LID
7 techniques seek to mimic natural hydraulic conditions, reducing pollutants that
go into stormwater in the first instance, by reducing the amount of stormwater
that reaches surface waters.

8 *Id.* (internal citation to record omitted). The Board listed a number of LID techniques that can be
9 applied at the site level, for example the maintenance of natural vegetation onsite, and noted that
10 watershed or landscape scale LID strategies can include efforts like basin planning. *Id.* at FF 43,
11 p. 31.

12 The Board determined “that LID methods are at this time a known and available method
13 to address stormwater runoff at the site, parcel, and subdivision level.” *Id.* at FF 66, p. 46. The
14 Board further found “that LID methods are technologically and economically feasible and
15 capable of application at the site, parcel, and subdivision level at this time.” *Id.* The Board then
16 held that the 2007 Phase I Permit’s reliance on a flow control standard as the primary method to
17 control stormwater runoff failed to meet both the federal MEP and the state AKART standards.
18 *Id.* at COL 16, pp. 57-58. According to the Board, it was not acceptable to “simply require
19 ‘removal of obstacles’ and actions to ‘allow’ use of LID.” *Id.* “[T]he permit must require
20 greater application of LID techniques, where feasible” at the parcel and subdivision level, in
21 order to meet the federal MEP and state AKART standards. *Id.*

1 The Board “stopped short” of concluding LID must also be required at the basin and
2 watershed level because “little evidence was presented as to the elements and cost of basin or
3 watershed planning that would be necessary to implement LID at this level.” *Id.* at COL 17, pp.
4 58-60. The Board decided, nonetheless, that some steps should be taken to help ready Ecology
5 for its eventual inclusion in subsequent permits, and concluded “that city and county permittees
6 should identify such areas where potential basin planning would assist in reducing the harmful
7 impacts of stormwater discharges upon aquatic resources.” *Id.* at FF 66, p. 46; COL 17, p. 59.

8 Summary judgment was also sought on the same LID issues in the 2007 Phase II appeal.
9 The Board again declined to rule on summary judgment, with the LID issues proceeding to
10 hearing. The parties presented evidence on the factual question of whether Phase II permittees
11 could incorporate and utilize LID techniques within their programs as readily as Phase I
12 permittees, and thus whether LID methods needed to be employed by Phase II jurisdictions to the
13 same extent to meet the AKART and MEP standards. *See Puget Soundkeeper Alliance v. Wash.*
14 *Dep’t of Ecology*, PCHB Nos. 07-022 and 07-023 (Order on Summary Judgment, Sept. 29, 2008)
15 at 26-29.

16 In its final decision on the Phase II Permit appeal, the Board declined to extend its full
17 Phase I holding regarding LID to jurisdictions covered under the 2007 Phase II Permit. *See* 2009
18 Phase II Decision at FF 28-30, pp. 23-25; COL 4-6, pp. 46-48. The Board found, as it did in the
19 Phase I Permit, that LID methods are a “known and available method to address stormwater
20 runoff at the site, parcel, and subdivision level.” *Id.* at FF 29, p. 23. However, the Board
21 determined these methods were technologically and economically feasible “to a more limited

1 extent” in Phase II jurisdictions, as these jurisdictions were less financially capable of managing
2 the associated costs. *Id.* at FF 29, p. 23; COL 4, p. 46. The Board found that the Phase II Permit
3 had not gone far enough in requiring specific steps and goals for the implementation of LID over
4 a reasonable time frame. *Id.* at FF 30, p. 24; COL 5, pp. 46-47. Based on those findings, the
5 Board directed “[s]pecifically” that Phase II permittees must “identify barriers to the use of LID
6 and how those will be addressed, to identify potential non-structural actions or LID techniques to
7 prevent continuing stormwater impacts, and to establish goals and metrics for promoting and
8 measuring LID use, with the intent that LID and other non-structural actions will be widely
9 implemented in Phase II jurisdictions on an appropriate time-line and in future permits.” *Id.* at
10 FF 30, pp. 24-25; COL 5, p. 47 Unlike its decision regarding the Phase I jurisdictions, the Board
11 did not require that LID be implemented for Phase II jurisdictions at the parcel and subdivision
12 level, where feasible, during the effective period of the 2007 Phase II Permit. *Id.* at FF 29, pp.
13 23-24; COL 4-6, pp. 46-48.

14 No party to the 2007 Phase I or Phase II Permit cases appealed the Board’s final
15 decisions further. Thus the decisions became final and binding on Ecology. Although the Board
16 had ordered changes to the 2007 Phase I and II Permits, Ecology undertook further efforts to
17 develop the LID requirements by ultimately placing those in the 2013 permits.

18 **D. The 2013 Permits**

19 As with the prior Phase I and Phase II Permits, the newly issued 2013 Phase I and Phase
20 II Permits require each permittee to implement and enforce a program to prevent and control the
21 impacts of runoff from new development, redevelopment, and construction. 2013 Phase I

1 Permit, Special Condition S5.C.5; 2013 Phase II Permit, Special Condition S5.C.4.⁴ The local
2 development codes, ordinances or other enforceable documents developed by the permittees
3 under the terms of the permits must incorporate and require LID Principles and LID BMPs.
4 2013 Phase I Permit, Special Condition S5.C.5.b; 2013 Phase II Permit, Special Condition
5 S5.C.4.f. The intent of the revisions is “to make LID the preferred and commonly-used approach
6 to site development.” *Id.*

7 The 2013 Phase I Permit specifies an overall approach to requiring LID that includes
8 “project thresholds, standards and lists to infiltrate, disperse, and retain stormwater runoff on-site
9 to the extent feasible without causing flooding or erosion impacts.” 2013 Phase I Permit, Special
10 Condition S5.C.5.b and Appendix 1, Section 4.5; 2013 Phase II Permit, Special Condition
11 S5.C.4.f and Appendix 1, Section 4.5. Depending on project type and location, requirements
12 include a list of specified LID techniques selected and prioritized by Ecology for
13 implementation, criteria to determine when implementation would be infeasible, and an LID
14 performance standard.⁵ 2013 Phase I Permit, Special Condition S5.C.5.b and Appendix 1,
15 Section 4.5. The 2013 Phase II Permit incorporates this same basic approach to requiring LID,
16 but gives the Phase II Permittees additional time to comply. Phase II Permit, Special Condition
17 S5.C.4.f and Appendix 1, Section 4.5.

20 ⁴ See Exhibit A to Declaration of Janette K. Brimmer in Support of PSA’s Response to Snohomish County’s Motion
for Partial Summary Judgment (providing relevant excerpts of the 2013 Phase I and II Permits and Appendices 1).

21 ⁵ The LID performance standard requires that “[s]tormwater discharges shall match developed discharge durations
to pre-developed durations for the range of pre-developed discharge rates from 8% of the 2-year peak flow to 50%
of the 2-year peak flow. 2013 Phase I Permit, Special Condition S5.C.5 and Appendix 1, Section 4.5.

1 The 2013 Phase I Permit also incorporates watershed-scale stormwater planning
2 requirements, which direct County permittees to either select a watershed identified in the Permit
3 or propose an alternate watershed that meets certain specified criteria. 2013 Phase I Permit,
4 Special Condition S5.C.5.c. County permittees are then required to lead a planning process for
5 that watershed that entails a scope of work and schedule consistent with specified criteria, and
6 culminates in a final watershed-scale stormwater plan they submit to Ecology. *Id.* The 2013
7 Phase II Permit requires that Phase II jurisdictions, with all or part of their coverage area in a
8 watershed selected by a Phase I county, must participate in the watershed planning process led
9 by that Phase I county. Phase II Permit, Special Condition S5.C.4.g.

10 III. ANALYSIS

11 A. Standard

12 The party moving for summary judgment must show there are no genuine issues of
13 material fact and they are entitled to judgment as a matter of law. *Magula v. Benton Franklin*
14 *Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is one that will affect
15 the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207
16 (1992). A party moving for summary judgment may meet the initial burden by pointing out the
17 absence of evidence to support the nonmoving party's case. *See Young v. Key Pharm., Inc.*, 112
18 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,
19 (1986)). On response, the nonmoving party cannot rely on the allegations made in its pleadings,
20 but, “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that
21 there is a genuine issue for trial.” *Young*, 112 Wash. 2d at 225-26. All facts and reasonable

1 inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146
2 Wn.2d 291, 300, 45 P.3d 1068 (2002). Dismissal for failure to state a claim is warranted only
3 upon the conclusion, beyond a reasonable doubt, that the claimant cannot prove any set of facts
4 that would justify recovery. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206, 209 (2007).

5 A party asserting res judicata or collateral estoppel bears the burden of proving that the
6 determinative issue was litigated in former proceedings. *Luisi Truck Lines, Inc. v. WUTC*, 72
7 Wn.2d 887, 894, 435 P.2d 654 (1967).

8 **B. Preclusion Based on Res Judicata, Collateral Estoppel and/or Stare Decisis**

9 PSA argues that a number of the LID issues presented by the Appellants raise arguments
10 about LID that were litigated and resolved in the appeal of the 2007 Permits, and that they are
11 barred by res judicata, collateral estoppel, and/or stare decisis. *See* Appendix A (list of
12 challenged issues). In response, the Appellants assert they are not challenging the Board's prior
13 decisions requiring LID. Rather, the Appellants assert that they are challenging the specific
14 means and methods by which LID has been implemented by Ecology in the 2013 Permits. The
15 Board agrees that the doctrines of collateral estoppel and res judicata do not preclude a challenge
16 to the means and methods by which Ecology now requires implementation of LID. The Board
17 also concludes that stare decisis is inapplicable in this instance.

18 Res judicata, or "claim preclusion," prevents the relitigation of claims that either were, or
19 should have been, litigated in a former action. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d
20 855, 859, 726 P.2d 1 (1986). It requires the claims in question be identical, including, among
21 other factors, identity of both subject matter and cause of action. *Id.* Collateral estoppel, or

1 “issue preclusion,” prevents the relitigation of issues decided in prior litigation between the same
2 parties, and requires, among other things, that the issues in question be identical. *City of*
3 *Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d
4 1077 (2008). Stare decisis means the same “precedent” or rule of law should apply to similar
5 cases, and requires among other things, the same or substantially similar facts. *Kittitas County v.*
6 *Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 173, 256 P.3d 1193 (2011).

7 The Board’s direction to Ecology in its 2008 Phase I Decision to implement broader LID
8 requirements in Phase I Permits addressed the specific question of whether the permits must
9 require LID as a stormwater management tool in order to meet water quality standards. The
10 Board was not presented with testimony or evidence on an overall approach for requiring LID, a
11 list of prioritized LID techniques, criteria for judging the feasibility (or infeasibility) for
12 implementation of LID techniques, or any particular LID performance standard. Both the 2007
13 Phase I and II Permits lacked such requirements and the Board’s decisions on those permits
14 focused on the absence of such requirements.

15 With respect to the Phase I Permit, the Board required greater application of LID at the
16 parcel and subdivision level, where feasible, to meet AKART and MEP. *Id.* at COL 16, pp. 57-
17 58. The Board did not specify the approach necessary to accomplish this—*i.e.* the methods,
18 criteria and/or standards by which Ecology must “more extensively” require LID, or even what
19 “feasibility” meant. The Board instead recognized that, “like all stormwater management tools,
20 [LID] too is subject to limitations in its practical application by site or other constraints,” and left
21 the specific implementation of LID requirements up to Ecology. *Id.* at COL 16, p. 58. At the

1 basin or watershed level, the Board directed that certain prescribed steps be required in the Phase
2 I Permit to assist with implementation of basin-level planning in future permitting. *Id.* at COL
3 17, pp. 58-60. The Board remanded the 2007 Phase I Permit to Ecology with direction to
4 “require the permittees to develop methods for use of low impact development at parcel and
5 subdivision levels in their jurisdictions.” *Id.* at 6; COL 16, p. 58.

6 The Board also remanded the 2007 Phase II Permit to Ecology, ordering that the revised
7 permit require Phase II permittees to similarly take prescribed steps to facilitate an eventual
8 broader application of LID. 2009 Phase II Decision at FF 28-30, pp. 23-25; COL 4-6, pp. 46-48.
9 Unlike the Phase I Permit, the Board did not order that the Phase II Permit require that LID be
10 applied where feasible. *Id.* Indeed, the Board recognized that “Ecology’s development of
11 technical guidance and eventual adoption of a performance standard is a critical step necessary
12 for the fullest and most successful implementation of LID practices in both Phase I and Phase II
13 jurisdictions” *Id.* at COL 6, p. 47.

14 Ecology subsequently developed a new, overarching approach to require LID at the
15 parcel and subdivision level for both the 2013 Phase I and Phase II Permits. Ecology first
16 specified how requirements applied based on project type and location. The agency then
17 developed a list of LID techniques prioritized for implementation, criteria to determine when
18 implementation would be infeasible, and a new LID performance standard. *See* 2013 Phase I
19 Permit, Special Condition S5.C.5 and Appendix 1, Section 4.5; Phase II Permit, Special
20 Condition S5.C.4 and Appendix 1, Section 4.5. Ecology also took the next step of requiring that
21 watershed-scale stormwater planning actually occur in Phase I jurisdictions, consistent with the

1 Board's decision in 2008 that Ecology should be ready to address basin planning in the next
2 round (2012/2013) of permits, when such a requirement may be necessary to meet the state
3 AKART and federal MEP standards. *See* 2013 Phase I Permit, Special Condition S5.C.5.c.;
4 2008 Decision at COL 17, pp. 58-59. Finally, in the 2013 Phase II Permit, Ecology required
5 permittees to participate in this newly required watershed-scale planning efforts, if
6 jurisdictionally applicable. Phase II Permit, Special Condition S5.C.4.g.

7 The Board concludes that the present appeals challenging the LID provisions of the 2013
8 Permits are not barred by res judicata or collateral estoppel. The new conditions, including the
9 list of LID techniques, infeasibility criteria, LID standard, and watershed planning requirements,
10 constitute new permit terms in the 2013 Phase I and II Permits. The validity or legality of these
11 permit conditions presents new issues not previously raised or ruled upon in the 2007 Phase I and
12 Phase II Permit appeals. Because the elements of res judicata, collateral estoppel and stare
13 decisis are not present, those doctrines do not apply to preclude litigation of the LID issues now
14 raised by the permittees.⁶

15 The second underlying basis of many of PSA's and Ecology's arguments is that certain
16 legal issues are broadly stated, leading to confusion about the scope and focus of the Appellants'
17 LID-related challenges, with little clarification allegedly obtained through discovery. PSA,
18 admitting on reply that the Appellants' response briefing shows that some issues do address the
19 specifics of LID implementation, agrees these issues are not barred. *See* PSA Reply at 9-12

20 ⁶ Stare decisis, in particular, would not bar the issues from litigation. While legal precedent may be controlling or
21 persuasive in a substantive decision on summary judgment, or a final decision after hearing, it would not justify the
outright dismissal of issues, which is what PSA seeks here. *See, e.g., Kittitas County*, 172 Wn.2d at 173-4 (stare
decisis did not prevent court from considering how past precedent applied to a new challenge).

1 (citing Phase I Issue No. 5, and Phase II Issues No. 2(b) and (c) and 3(b)-(e)). PSA then argues
2 that the Appellants should be limited to litigation of this narrower set of issues. *Id.* at 11-12.
3 Ecology, also in reply, now asks for all seventeen Phase I and Phase II LID issues to be reduced
4 to four. Ecology Reply at 3.

5 The Appellants met their burden, however, when they responded with argument and
6 evidence demonstrating how their issues relate to the specific implementation of LID
7 requirements in the 2013 Permits, and not to the requirement for broader application of LID in
8 the first instance. The Board finds that the Appellants raise genuine issues of fact that preclude
9 summary judgment. *See, e.g.*, King County Response at 6-8 (focused on Ecology’s selected
10 approach of a “fixed hierarchical BMP list” for Phase I Issue No. 5 and Phase II Issue No. 3(c),
11 the specific watershed selections and extra-jurisdictional provisions for basin planning for Phase
12 I Issue No. 6 and Phase II Issue No. 9, and application of permeable pavement requirements to
13 new or replaced roadway surface for roadway projects subject to drainage review for Phase I
14 Issue No. 18 and Phase II Issue No. 5); Phase II Coalition of Governmental Entities’ Response at
15 7-9 (focused on permeable pavement requirements, infeasibility criteria, and certain BMPs like
16 bioretention facilities under Phase II Issue Nos. 5 and 17).

17 The Appellants’ responses have also better elucidated the scope and focus of the issues
18 for hearing. While the Board concludes that no specific issue will be stricken for being overly
19 broad and lacking specificity, the responses serve as a guide to the Board on what arguments and
20 evidence the Appellants intend to present. If the Appellants offer evidence at hearing that the
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1 Respondents contend expands the issues raised, the challenge to that evidence will be addressed
2 in the hearing.

3 The Board is intent on preserving its prior decisions on the Phase I and Phase II Permits
4 with regard to LID. As PSA points out, certain portions of evidence in the summary judgment
5 record seem to cross the line into questioning the application of LID in general at the parcel and
6 subdivision level. *See* PSA Reply at 5-6 (*citing, e.g.,* Wrye Decl. for “complain[ing] that
7 application of LID at the site and parcel level is ‘difficult if not impossible’ for the County”).

8 The Board reserves judgment on whether the subsequent presentation of argument or evidence
9 transforms LID issues into ones that conflict with the Board’s past decisions. However, the
10 Board cautions the Parties that it will not consider evidence or arguments in this matter that
11 challenge whether LID methods are known and available methods to address stormwater runoff
12 at the site, parcel, and subdivision level for Phase I and II jurisdictions. Nor will the Board allow
13 evidence or argument that serve to attack the requirement that the Phase I Permit require broader
14 application of LID at those levels, where feasible, as being reasonable and required for meeting
15 AKART and MEP. These issues were decided by the Board in the 2008 and 2009 decisions on
16 the Phase I and Phase II Permits. All arguments and evidence instead should squarely address
17 the more specific application and implementation of LID requirements in the 2013 Permits.

18 **C. Failure to Articulate and Support a Claim**

19 PSA also challenges numerous issues on the basis that Appellants have “failed to
20 articulate and support a claim.” *See* PSA Motion at 1, 11, 22-25 (*citing* Phase I Issue Nos. 2,
21 17(d) and (e), and Phase II Issue Nos. 5 and 17). PSA argues that the Appellants failed to state a

1 claim, that insufficient evidence supports their claims, and/or that their claims are vague. *Id.*
2 PSA's arguments are focused on not knowing the specific arguments and facts that support the
3 Appellants' issues, even after discovery. PSA did not show how these issues fail to state a valid
4 legal claim. PSA also did not address what legal burden the Appellants must meet or how the
5 evidence fails to meet it.

6 The Appellants legal claims for all these issues is, in broad strokes, that various LID-
7 related permit terms are unlawful, unjust, impracticable, or otherwise unreasonable, and
8 therefore do not meet the MEP and/or AKART standards. *See* Appendix A (list of challenged
9 issues). It is their burden to show, by a preponderance of the evidence, that the permit terms are
10 invalid and do not meet the MEP or AKART standards. In response to PSA's Motion, the
11 Appellants produced evidence to address how certain permit terms are allegedly invalid or
12 unreasonable. *See e.g.*, Pierce County Response at 11-15 and Declarations of Dan Wrye and
13 Toby Rickman (providing evidence under Phase I Issue Nos. 2, and 17(d) and (e), of concerns
14 related to basin planning, porous and permeable pavement, and infeasibility criteria); Coalition
15 Response at 7-9 and Declarations of Toby Rickman, Paul Bucich, Chris Vandal, Dan DeWald,
16 Patrick Harbison, and Heather Kibbey (providing evidence under Phase II Issue Nos. 5 and 17 of
17 concerns with permeable pavement requirements, infeasibility criteria, and the application of
18 certain BMPs like bioretention facilities and rain gardens). These responses specify that
19 Appellants will pursue claims related to, for example, the bioretention criteria, the permeable
20 pavement criteria, the related "infeasibility criteria" for those two approaches, and the LID

1 performance standard (including infiltration/implementation related to flow control) of the
2 Permits.

3 In reply, PSA and Ecology offer additional argument responsive to the clarifications of
4 the Appellants' responses. First, PSA concedes that certain justiciable concerns were raised on
5 some issues, but argues the issues as stated are overbroad and must be narrowed to the specific
6 arguments and evidence presented by Appellants in response. *See* PSA Reply at 4, 7-15.

7 Contrary to PSA's assertions, the Appellants were under no obligation to provide every argument
8 and piece of evidence in response, rather only that sufficient to meet their burden of showing a
9 genuine issue of fact. Construing the facts most favorably to the nonmoving party, the Board
10 concludes that the Appellants have stated a legal claim and provided evidence for that claim,
11 which presents material questions of fact for hearing and precludes summary judgment.⁷ The
12 Appellants met their burden.

13 Second, for the first time on reply PSA and Ecology identify certain other LID issues in
14 the Phase I appeal and argue that they present no actual concern. Citing to other provisions of
15 the Phase I Permit, PSA and Ecology claim that those provisions can apply to the circumstances
16 presented in order to alleviate the Appellants' concerns. *See* PSA Reply at 8 (citing Issue No. 2

17 ⁷ Although the Board finds that in their respective responses the Appellants sufficiently defeated summary judgment
18 on the Respondents' claim that the issues advanced by the Appellants failed to state a claim for relief or were
19 otherwise overly broad and lacked necessary specificity, the Board requested the Appellants to provide the Board
20 and the parties any additional elements of the Permits that they would be challenging under the listed issues. Clark
21 County, Pierce County, and the Coalition responded that they were challenging the LID feasibility assessment
process, the LID performance standard, and the LID best management practice lists under Phase I Issue No. 5 and
Phase II Issue No. 17. Ecology objected to the Appellants' challenge to these elements of the Permits, asserting that
this information was not disclosed during discovery. The Respondents have not filed a motion to conduct additional
discovery. The Board otherwise reserves ruling on the admissibility of evidence on any of these elements of the
Permits for hearing.

1 re: requirements for site plans, surveys, etc., in regard to Snohomish County’s Response) and 12
2 (citing Issue Nos. 6 and 7 re: watershed planning process in regard to Pierce County’s
3 Response); Ecology Reply at 6 (also citing Issue No. 2 in regard to Snohomish County
4 Response) and 7 (likewise noting, for example, that Pierce County “has not even attempted to
5 explain why its concerns regarding Clover Creek could not be met” under an alternative
6 watershed process set out in the permit).

7 Whether alternate permit provisions really do address the Appellants’ concerns in any
8 given circumstance involves issues of fact. Additionally, no Appellant has had the chance to
9 respond to this argument or the evidence presented in support (*e.g.*, the O’Brien Decl.).⁸ The
10 Board rejects PSA’s and Ecology’s argument that the Appellants failed to articulate and support
11 a claim for Phase I Issue Nos. 2, 17(d) and (e), and Phase II Issue Nos. 5 and 17.

12 **ORDER**

13 In accordance with the analysis above, PSA’s and Ecology’s Motion for Partial Summary
14 Judgment is DENIED on Phase I Issue Nos. 2, 4, 5, 6, 7, 17(d) and (e), and 18, and Phase II
15 Issue Nos. 2(b) and (c), 3(b)-(e), 5, 9, and 17.

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⁸ The Board here notes Snohomish County has since moved to voluntarily withdraw Phase I Issue No. 2.

1 SO ORDERED this 26th day of September, 2013.

2 **POLLUTION CONTROL HEARINGS BOARD**

3
4 TOM MCDONALD, Presiding

5
6 KATHLEEN D. MIX, Member

7
8 JOAN M. MARCHIORO, Member

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3 **APPENDIX A**

4 **Phase I Issues:**

5 Issue No. 2. Whether provisions of Special Condition S5.C.5, Appendix 1 and/or the 2012
6 Stormwater Management Manual for Western Washington (the “Manual”) that
7 specify the types of surveys, studies, site plans and/or other scientific or
8 engineering reports the Permittee must require applicants for land development
9 projects to submit are unlawful, unjust, unreasonable, impracticable, vague
10 and/or ambiguous.

11 Issue No. 4. Whether provisions of Special Condition S5.C.5.a.i of the Permit are unlawful,
12 unreasonable, impracticable, vague and/or ambiguous because they purport to
13 provide permittees with regulatory options and alternatives that are illusory,
14 unattainable and/or nonexistent;

15 Issue No. 5. Whether Special Condition S5.C.5.b and Minimum Requirement (MR) 5 set
16 forth in Appendix 1 of the Permit are unlawful, unjust, unreasonable,
17 impracticable, vague, ambiguous, economically infeasible and/or set forth
18 mandates of unknown effectiveness in ameliorating, treating and/or controlling
19 municipal stormwater;

20 Issue No. 6. Whether Special Condition S5.C.5.c. of the Permit contains requirements that are
21 unlawful, unjust, unreasonable and/or inequitable because they require Phase I
counties to take on all the responsibility for watershed-scale stormwater planning
for a basin, including areas that are (a) within the jurisdiction of Phase II
permittees when such Phase II permittees are not required by their NPDES
permits to actively and fully participate in, and share the costs of, such basin
planning on an equitable pro-rata basis, (b) federally owned and thus regulated
by EPA when such federal land owners are not required to actively and fully
participate in, and share the costs of, such basin planning on an equitable pro-rata
basis, and/or (c) within Indian Reservations and thus regulated by EPA when the
Indian Tribes are not required to actively and fully participate in , and share the
costs of, such basin planning on an equitable pro-rata basis;

Issue No. 7. Whether Special Condition S5.C.5.c of the Permit contains requirements that are
unlawful, unjust, unreasonable, impracticable, beyond the authority of Ecology
to impose, contrary to the Washington State constitution, contrary to the United
States constitution and/or contrary to other terms of the Permit because they

1 require Phase I counties to perform activities and/or plan stormwater strategies in
2 areas where their MS4s do not exist, and/or that are outside of their
jurisdictional boundaries, and/or in locations over which they have no control or
authority to access.

3 Issue No. 17. Whether certain Low Impact Development (“LID”) provisions contained in the
4 Permit, Appendix 1, the Manual, and/or documents that are referenced by or
5 incorporated into the Permit, Appendix 1 and/or the Manual, are unlawful,
unjust, unreasonable, impracticable, vague and/or ambiguous for the following
reasons:

6 d. Permittees are required to adopt LID development standards that are at
7 least as stringent as those found in the Manual, including infeasibility
criteria, which are not included in the Permit; and/or

8 e. The Permit does not include criteria to determine LID feasibility, but
9 instead relies on “infeasibility” criteria included in the Manual;

10 Issue No. 18. Whether the provisions in the Permit, Appendix 1, and corresponding references
11 to the Manual are unreasonable, unjust, unlawful, burdensome, expensive, cost
prohibitive, impracticable, insufficiently tested and/or not legally required with
12 regard to provisions that apply to roadway projects, porous pavement, and full
dispersion.

13 **Phase II Issues:**

14 Issue No. 2. Whether Special Condition S5.C.4 of the 2013-18 Phase II NPDES Municipal
15 Stormwater Permit for Western Washington (the “Permit”), and references in
those conditions to Appendix 1 and the 2012 Stormwater Management Manual
16 for Western Washington (“the Manual”) contain requirements that are unlawful,
unjust, unreasonable, and/or impracticable for one or more of the following
reasons:

17 b. Said provisions impose burdensome and unreasonable new requirements;
and/or

18 c. Said provisions impose economic burdens on Coalition members
to an extent that renders the provisions impracticable and unreasonable.

19 Issue No. 3. Whether Low Impact Development (“LID”) provisions contained in Conditions
20 S5, S5.C.1, S5.C.2, S5.C.3, S5.C.4, and/or S5.C.5 of the Permit, Appendix 1, the
Manual, and/or documents referenced by or incorporated into the Permit,
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1 Appendix 1 and/or the Manual, are unlawful, unjust, unreasonable, and/or
2 impracticable for one or more of the following reasons:

- 3 b. Said provisions impose burdensome and unreasonable new requirements;
- 4 c. Said provisions rely on unproven technologies with potentially unintended
5 consequences;
- 6 d. Said provisions adversely affect the economic health of Coalition
7 members and their communities; and/or
- 8 e. Said provisions impose economic burdens on Coalition members to an
9 extent that renders the provisions impracticable and unreasonable.

10 Issue No. 5. Whether provisions in the Permit, Appendix 1, and corresponding references to
11 the Manual are unreasonable, unjust, unlawful, and/or impracticable with regard
12 to provisions that apply to the use of porous pavement for roadway projects.

13 Issue No. 9. Whether the provisions in Permit Condition S5.C.4.g, which require participation
14 in watershed-scale stormwater planning led by a Phase I County under the Phase I
15 Municipal Stormwater Permit, are unreasonable, unjust, unlawful, and/or
16 impracticable.

17 Issue No. 17. Whether provisions in the Permit that require the use of Ecology documents and a
18 Manual, which Ecology characterizes as guidance, are unreasonable, unjust,
19 unlawful, and/or impracticable when those documents and Manual are used in the
20 Permit as regulatory requirements with no reasonable, feasible, or practicable
21 alternatives available to permittees, the community, or businesses that are also
regulated or affected by the Permit's requirements.

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**APPENDIX B
WRITTEN RECORD**

The record before the Board for this Order is as follows:

1. Puget Soundkeeper Alliance’s Motion for Partial Summary Judgment (Phase I and Phase II consolidated issues) with Appendix A;
 - A. Declaration of Janette K. Brimmer in Support of Puget Soundkeeper Alliance’s Motion for Partial Summary Judgment;
 - i. Exhibit A: Selected portions of Phase I Appellants’ Response in Opposition to Puget Soundkeeper Alliance’s First Motion for Partial Summary Judgment in *Puget Soundkeeper Alliance v. Wash. Dept. of Ecology*, PCHB Nos. 07-021 through -30, and 07-039 (the “2007 Phase I Permit Appeal”);
 - ii. Exhibit B-1: Selected portions of Phase II Coalition of Governmental Entities’ Amicus Brief in Response to PSA’s First Motion for Summary Judgment in the 2007 Phase I Permit Appeal;
 - iii. Exhibit B-2: Selected portions of Hearing Brief of Coalition of Governmental Entities in *Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-022, 23, 25 and 31 (the “2007 Phase II Permit Appeal”);
 - iv. Exhibit C: Selected portions of Direct Testimony of Dr. Derek Booth in the 2007 Phase I Permit Appeal;
 - v. Exhibit D: Selected portions of Direct Testimony of Dr. Richard Horner in the 2007 Phase I Permit Appeal;
 - vi. Exhibit E: Parties’ responses to select interrogatories promulgated by Puget Soundkeeper Alliance in this litigation:
 1. E-1: Building Industry Association of Clark County’s responses to Phase I Interrogatory Nos. 6, 32, and 33;
 2. E-2: Clark County’s responses to Phase I Interrogatory Nos. 6, 32, and 33;
 3. E-3: King County’s response to Phase I Interrogatory No. 6;
 4. E-4: Pierce County’s responses to Phase I Interrogatory Nos. 6 and 33;
 5. E-5: City of Seattle’s responses to Phase I Interrogatory Nos. 6 and 32;
 6. E-6: Snohomish County’s responses to Phase I Interrogatory Nos. 6 and 32;
 7. E-7: City of Tacoma’s response to Phase I Interrogatory No. 6; and
 8. E-8: Coalition of Governmental Entities’ responses to Phase II Interrogatory Nos. 6, 12, 18, 20, and 21.

- 1 vii. Exhibit F: Parties' responses to select interrogatories promulgated by
2 Department of Ecology in this litigation:
3 1. F-1: Building Industry Association of Clark County's responses to
4 Phase I Interrogatory Nos. 2, 10, 34, 38, and 39;
5 2. F-2: Clark County's responses to Phase I Interrogatory Nos. 2, 10, 37,
6 and 38;
7 3. F-3: King County's responses to Phase I Interrogatory Nos. 2, 37, and
8 38;
9 4. F-4: Pierce County's responses to Phase I Interrogatory Nos. 2, 37,
10 and 38;
11 5. F-5: City of Seattle's responses to Phase I Interrogatory Nos. 2, 37,
12 and 38;
13 6. F-6: Snohomish County's responses to Phase I Interrogatory Nos. 2,
14 34, 37, and 38;
15 7. F-7: City of Tacoma's responses to Phase I Interrogatory Nos. 2, 10,
16 37, and 38;
17 8. F-8: State of Washington, Department of Transportation's responses
18 to Phase I Interrogatory No. 37;
19 9. F-9: Phase II Appellants' (Coalition of Governmental Entities)
20 responses to Phase II Interrogatory Nos. 6 and 8; and
21 10. F-10: King County's responses to Phase II Interrogatory Nos. 6, 10,
 and 12.
 viii. Exhibit G: Selected portions of Volume 5 of the August 2012 Stormwater
 Management Manual for Western Washington, pp. cover page, table of
 contents, and Chapter 5 – On-Site Stormwater Management.

2. Declaration of Janette K. Brimmer in support of PSA's Response to Snohomish County's
Motion for Partial Summary Judgment, Exhibit A (cited in PSA's Motion for Partial
Summary Judgment at 9 n.7, for reference to relevant excerpts of the 2013 Phase I and II
Permits and Appendices 1).
3. Notice of Department of Ecology's Joinder in Puget Soundkeeper Alliance's Motion for
Partial Summary Judgment (Phase I and Phase II consolidated issues).
4. Snohomish County's Response to Puget Soundkeeper Alliance's and Ecology's Joint Motion
for Partial Summary Judgment on Phase I Issues Nos. 2, 4, 5, 6, 7, 17(d), 17(e) and 18;
A. Declaration of Randolph R. Sleight in Support of Snohomish County's Response to
Puget Soundkeeper Alliance's and Ecology's Joint Motion for Partial Summary
Judgment on Phase I Issues Nos. 2, 4, 5, 6, 7, 17(d), 17(e) and 18;

- 1 B. Declaration of Bree Urban in Support of Snohomish County's Response to Puget
2 Soundkeeper Alliance's and Ecology's Joint Motion for Partial Summary Judgment
3 on Phase I Issues Nos. 2, 4, 5, 6, 7, 17(d), 17(e) and 18;
4 i. Exhibit A: Snohomish County's Notice of Appeal;
5 ii. Exhibit B: 6-page settlement proposal;
6 iii. Exhibit C: Proposed meeting agenda for 4/12/13 settlement negotiation
7 conference;
8 iv. Exhibit D: Section 4.1 of Appendix 1 to the 2007 Phase I Permit;
9 v. Exhibit E: Chapter 3 of Volume I of the 2005 Stormwater Management
10 Manual for Western Washington;
11 vi. Exhibit F: Section 4.1 of Appendix 1 to the 2013-18 Phase I Permit.

- 12 C. Declaration of Tom Rowe in Support of Snohomish County's Response to Puget
13 Soundkeeper Alliance's and Ecology's Joint Motion for Partial Summary Judgment
14 on Phase I Issues Nos. 2, 4, 5, 6, 7, 17(d), 17(e) and 18;
15 i. Exhibit A: Copies of photographs printed from L-Seven website depicting
16 typical pole buildings of a type and design that would qualify as Smaller
17 Projects;
18 ii. Exhibit B: Copies of photographs printed from Northwest Pole Buildings
19 website depicting typical pole buildings of a type and design that would
20 qualify as Smaller Projects;
21 iii. Exhibit C: Copies of photographs printed from Permabilt website depicting
typical pole buildings of a type and design that would qualify as Smaller
Projects;
iv. Exhibit D: Copies of photographs printed from Spane website depicting
typical pole buildings of a type and design that would qualify as Smaller
Projects;

5. City of Tacoma's Opposition to Puget Soundkeeper's Motion for Partial Summary Judgment;
A. Exhibit A: Board's November 19, 2007, Second Prehearing Order in Phase I
Municipal Stormwater Appeal;

6. King County's Response in Opposition to Puget Soundkeeper Alliance's Motion for Partial
Summary Judgment and Department of Ecology's Joinder Therein, and King County's
Joinder in Portions of Pierce County's Memorandum in Opposition;
A. Declaration of Joseph B. Rochelle (Page I and Phase II Consolidated Issues);
i. Exhibit 1: letter from Marc Isaacson, Division Director of King County
Water and Land Resources Division, to Bill Moore, Washington Department
of Ecology, dated February 2, 2012;
ii. Exhibit 2: King County's response to PSA's interrogatory No. 10;
iii. Exhibit 3: King County's response to PSA's interrogatory No. 12;

- 1 iv. Exhibit 4: King County’s response to the Washington State Department of
Ecology’s interrogatories nos. 11, 12, 17, and 18.
- 2 v. Exhibit 5: King County’s response to PSA’s interrogatory No. 33;
- 3 vi. Exhibit 6: Memorandum from Lydia Reynolds-Jones of King County’s Road
Services Division to Doug Navetski, Water and Land Resources Division,
dated June 13, 2011;
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- 5 7. Intervenor City of Seattle’s Response in Opposition to Puget Soundkeeper Alliance’s Motion
for Partial Summary Judgment (Phase I and Phase II consolidated issues);
- 6 8. Appellant Intervenor Washington State Department of Transportation’s Opposition to Puget
Soundkeeper Alliance’s Motion for Partial Summary Judgment;
- 7 A. Declaration of Mark Maurer in Opposition to Puget Soundkeeper Alliance’s Motion
for Partial Summary Judgment;
- 8 B. Declaration of Jeff Uhlmeier in Opposition to Puget Soundkeeper Alliance’s Motion
for Partial Summary Judgment;
- 9 C. Declaration of Stephen Klasinski in Opposition to Puget Soundkeeper Alliance’s
Motion for Partial Summary Judgment (Phase I and Consolidated Phase II);
- 10 i. Exhibit A: Excerpts from 2007 Phase I Municipal Stormwater Permit cover
page, and S.5.C.5, pp. 9-12;
- 11 ii. Exhibit B: Excerpts from 2007 Phase II Municipal Stormwater Permit cover
page, and S.5.C.4, pp. 17-20;
- 12 iii. Exhibit C: Excerpts from 2007 Phase I Municipal Stormwater Permit,
Appendix 1 – Minimum Technical Requirements for New Development and
Redevelopment, pp. 1 and 19;
- 13 iv. Exhibit D: Excerpts from 2007 Phase I Municipal Stormwater Permit,
Appendix I, pp. 1 and 20;
- 14 v. Exhibit E: Excerpts from 2007 Phase I Municipal Stormwater Permit,
Appendix 1 – Minimum Technical Requirements for New Development and
Redevelopment, pp. 23-26;
- 15 vi. Exhibit F: Excerpts from 2007 Phase II Municipal Stormwater Permit,
Appendix 1, pp. 25-27
- 16 vii. Exhibit G: Excerpts from Phase I Third Pre-Hearing Order, PCHB Nos. 07-
021, 07-026, 07-027, 07-028, 07-029, 07-030, 07-037, dated December 11,
2007, Issue F.1.
- 17 viii. Exhibit H: Excerpts from Phase II Fourth Pre-Hearing Order, PCHB Nos. 07-
022 & 07-023, dated May 1, 2008, Issue 12;
- 18 ix. Exhibit I: Excerpts from the 2013 Phase I Municipal Stormwater Permit,
Appendix 1, Section 4.5, Minimum Requirement 5, pp. 1 and 20-23;
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- x. Exhibit J: Excerpts from the Department of Ecology's August 2012 Stormwater Management Manual for Western Washington (SWMMWW), pp. 2-29, 5-16 through 5-19, and 7-7 through 7-9;
- xi. Exhibit K: Flow Chart for Determining LID MR#5 Requirements, dated March 11, 2013;
- xii. Exhibit L: Excerpts of WSDOT's Responses to Ecology's First Set of Interrogatories and Requests for Production, PCHB No. 12-097c (Phase II),
- xiii. Exhibit M: Excerpts of WSDOT's Responses to Ecology's First Set of Interrogatories and Requests for Production, PCHB No. 12-097c, dated June 17, 2013;

- 9. Pierce County's Memorandum in Opposition to Puget Soundkeeper Alliance's Motion for Partial Summary Judgment;
 - i. Appendix A: Ecology's Redline website posting of changes to Phase I Permit Provisions;
 - ii. Appendix B: Issues stated in the Board's Pre-Hearing Order;
 - A. Declaration of Dan D. Wrye in Support of Pierce County's Opposition to Puget Soundkeeper Alliance, et al.'s Motion for Summary Judgment;
 - i. Exhibit A: CV for Dan D. Wrye;
 - ii. Exhibit B: Copies of County's discovery responses;
 - iii. Exhibit C: Copies of County's discovery responses;
 - iv. Exhibit D: Excerpts from Juanita Creek Basin report;
 - B. Declaration of Toby D. Rickman, P.E. in Support of Pierce County's Opposition to Puget Soundkeeper Alliance, et al.'s Motion for Summary Judgment;
 - i. Exhibit A: CV for Toby D. Rickman, P.E.;
- 10. Phase II Coalition of Governmental Entities' Memorandum in Opposition to Puget Soundkeeper Alliance's Motion for Partial Summary Judgment;
 - i. Appendix A: Ecology's Redline website posting of changes to Phase I Permit Provisions;
 - ii. Appendix B: Issues stated in the Board's Pre-Hearing Order;
 - iii. Appendix C: Portions of the Coalition's Responses to PSA's and Ecology's Interrogatories;
 - iv. Appendix D: Portions of the Coalition's Responses to PSA's and Ecology's Interrogatories;
 - A. Declaration of Paul A. Bucich, P.E., in Support of Coalition of Governmental Entities' Opposition to Puget Soundkeeper Alliance, et al.'s Motion for Summary Judgment;
 - i. Exhibit A: CV of Paul A. Bucich, P.E.
 - ii. Exhibit B: Photographs

- 1 iii. Exhibit C: Excerpts of *Stormwater Watershed Retrofit Analysis and*
2 *Recommendations for the Juanita Creek Basin in the Lake Washington*
3 *Watershed (August 2012).*
- 4 B. Declaration of Chris Vandall in Support of Coalition of Governmental Entities’
5 Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary Judgment;
6 i. Exhibits A-1, A-3, A-3, A-4: photographs;
- 7 C. Declaration of Dan Dewald in Support of Coalition of Governmental Entities’
8 Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary Judgment;
- 9 D. Declaration of Patrick Harbison, P.E., in Support of Coalition of Governmental
10 Entities’ Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary
11 Judgment;
- 12 E. Declaration of Eric LaFrance, P.E., in Support of Coalition of Governmental Entities’
13 Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary Judgment;
- 14 F. Declaration of Heather Kibbey in Support of Coalition of Governmental Entities’
15 Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary Judgment;
16 i. Exhibit A: Excerpts from the Herrera/Redmond Report;
17 ii. Exhibit B: Paper presented at a 2007 Low Impact Development
18 Conference;
19 iii. Exhibit C: Ecology March 2013 publication, *Focus on Bioretention*
20 *Monitoring*;
21 iv. Exhibit D: Excerpt from TAPE overview document located at
 www.ecy.wa.gove/programs/wq/stormwater/newtech;
11. Puget Soundkeeper Alliance, et al. Reply in Support of Motion for Partial Summary
Judgment – LID and Basin Planning Issues (Phase I and Phase II Consolidated Issues)
12. State of Washington, Department of Ecology’s Reply in Support of Puget Soundkeeper
Alliance’s Motion for Partial Summary Judgment (Phase I and Phase II Consolidated);
Declaration of Ed O’Brien in Support of State of Washington, Department of Ecology’s
Reply in Support of Puget Soundkeeper Alliance’s Motion for Partial Summary Judgment
(Phase I and Phase II Consolidated);