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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COALITION OF GOVERNMENTAL ENTITIES: CITY OF AUBURN, CITY OF BAINBRIDGE ISLAND, CITY OF BELLEVUE, CITY OF BURLINGTON, CITY OF EVERETT, CITY OF KENT, CITY OF ISSAQUAH, CITY OF MOUNT VERNON, CITY OF RENTON, CITY OF SEATAC, CITY OF SNOQUALMIE, CITY OF SUMNER, all of which are municipal corporations of the State of Washington, and COWLITZ COUNTY, a political subdivision of the State of Washington,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

NO.

NOTICE OF APPEAL

I. INTRODUCTION

1.1 Appellant, Coalition of Washington Governmental Entities ("the Coalition"), hereby appeals the Western Washington Phase II Municipal Stormwater Permit issued by the Washington State Department of Ecology ("Ecology") on August 1, 2012; Effective Date: August 1, 2013; Expiration Date: July 31, 2018 ("the Permit").

III. ADDITIONAL PARTY

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

IV. ORDER OR DECISION APPEALED FROM

4.1 The Coalition appeals the Western Washington Phase II Municipal Stormwater Permit ("the Permit") issued by Ecology on August 1, 2012; Effective Date: August 1, 2013; Expiration Date: July 31, 2018. A copy of the Permit, along with the Public Notice for the issuance of said Permit is attached as Exhibit "B."

V. FACTS AND BASIS FOR APPEAL

5.1 Municipal stormwater is unique in many respects, including the fact that municipalities do not generate, and simply cannot completely control all of the pollutants that find their way into municipal separate storm sewer systems. Municipal storm sewer systems are complex collection systems that often encompass hundreds or thousands of miles and have dozens or hundreds of outfalls. Unlike traditional NPDES permits that regulate a source of pollutants, municipal storm sewer systems collect urban runoff with pollutants that are generated by all of us.

5.2 Because of the unique differences between municipal stormwater and other sources of water regulated under traditional NPDES permits, municipal stormwater permits are intended to be flexible, programmatic permits. The need for this flexibility is recognized in Washington State's All Known and Reasonable Methods of Treatment ("AKART") standard, and in the federal Clean Water Act's Maximum Extent Practicable ("MEP") standard.

1 5.3 In multiple respects, however, the Permit issued by Ecology replaces that
2 necessary flexibility with highly prescriptive requirements. In many cases, Ecology imposed
3 these requirements without considering their cost, feasibility, or practicability, and without
4 considering their impact on or reconcilability with other local governmental programs.
5 Additionally, many provisions of the Permit place unreasonable restrictions on growth and
6 economic development, which affects local government and the economic health of the
7 communities that Coalition members are charged to protect. These failures are critical and their
8 collective impact is extreme: each of the Coalition members is experiencing severe financial
9 challenges and many Coalition members are struggling to fund even basic public safety services.
10

11 5.4 In many instances, the Permit's prescriptive requirements were not legally
12 required, but instead were imposed by Ecology without reasonably considering alternative, more
13 flexible approaches that would take into account the unique nature of municipal stormwater. The
14 Coalition members and other local governments expressed some of these concerns and others
15 during the public comment period, so Ecology was aware of them, but chose to make nominal
16 revisions to the draft Permit.
17

18 5.5 Finally, this is a Permit that regulates over 85 municipalities – all of which are
19 unique in many respects, including population, experience, geography, and fiscal resources. In
20 short, the Permit is simply not appropriate to a "one size fits all" solution.
21

22 5.6 For the foregoing reasons and others that will be proved at the hearing of this
23 matter, Ecology acted unreasonably, unjustly, or unlawfully in imposing the following conditions
24 and/or provisions in the Permit:
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26

1 A. Provisions in the Permit, including but not limited to Condition S5.C.4,
2 Condition S5.C.5, Appendix 1, and referenced provisions of Ecology's Stormwater
3 Management Manual for Western Washington, that interfere with and/or conflict with land use
4 planning, the Growth Management Act, vesting, and other local governmental functions, impose
5 burdensome and unreasonable new requirements, adversely affect the economic health of
6 Coalition members and their communities, and impose economic burdens on Coalition members
7 and their communities.

9 B. Low Impact Development ("LID") provisions in the Permit, Appendix 1,
10 and referenced provisions of Ecology's Stormwater Management Manual for Western
11 Washington, that interfere with and/or conflict with land use planning, the Growth Management
12 Act, vesting, and other local governmental functions, impose burdensome and unreasonable new
13 requirements, rely on unproven technologies with potentially unintended consequences, and
14 adversely affect the economic health of Coalition members and their communities, and impose
15 economic burdens on Coalition members and their communities.

17 C. The LID Performance standard referenced in the Permit, Appendix 1
18 and/or Ecology's Stormwater Management Manual for Western Washington, which adds control
19 of flow durations between 8% of the 2-year and 50% of the 2-year storm to the existing flow
20 control standard (control between 50% of the 2-year to the 50-year flow) on the basis that this
21 requirement for managing stormwater is unreasonable, impracticable, and economically
22 burdensome.

24 D. LID provisions in the Permit, Appendix 1, and corresponding referenced
25 provisions of Ecology's Stormwater Management Manual for Western Washington, on the basis
26

1 that Ecology acted unreasonably, unjustly or unlawfully by failing to conduct a sufficient
2 economic evaluation, cost-benefit analysis, or by otherwise failing to adequately evaluate and
3 consider the economic and/or environmental impacts and costs of these requirements on
4 Coalition members, their citizens, and businesses.

5 E. Condition S5.C.3.c.i, which requires permittees to field screen 40% of
6 their municipal separate storm sewer system by December 31, 2017 and 12% of their municipal
7 separate storm sewer system each year thereafter on the basis that field screening is largely
8 ineffective to locate illicit discharges because of their intermittent nature. This provision of the
9 Permit is expensive in terms of staffing and testing, with little or no benefit to water quality.

10 F. Elimination of the one-acre threshold in Condition S5.C.4 for the reasons
11 set forth above and because eliminating the one-acre threshold for all permittees, without
12 considering the unique circumstances of the many local jurisdictions regulated by this Permit, is
13 unreasonable, impracticable, and economically burdensome.

14 G. Provisions in Condition S5.C.4.g, which require participation in
15 watershed-scale stormwater planning led by a Phase I County under the Phase I Municipal
16 Stormwater General Permit on the basis that the provisions go beyond state and federal
17 regulatory requirements and are unreasonable and infeasible in the context of this Permit.

18 H. Provisions in S5.C.5 that require catch basin inspections every two years
19 on the basis that it is overly prescriptive, unreasonable, impracticable, and expensive without a
20 corresponding environmental benefit.

21 I. Provisions in the Permit and Appendix 1 that reference or are based upon
22 Ecology's Stormwater Management Manual for Western Washington on the basis that there was
23

1 no opportunity for meaningful review and comment afforded Coalition members because the
2 draft Permit and draft Manual were issued at the same time and, in certain instances, referenced
3 future guidance that was not drafted or available for review.

4 J. Provisions in the Permit that require use of Ecology documents and a
5 stormwater manual, which Ecology characterizes as "guidance," when in reality those documents
6 and manual are used in this Permit as regulatory requirements with no feasible, practicable, or
7 reasonable alternatives available to permittees, the community, or businesses that are also
8 regulated or affected by the Permit's requirements.

10 K. Provisions in Condition S8A that require reporting of any stormwater
11 monitoring or stormwater-related studies conducted by the Permittee or on behalf of the
12 Permittee and stormwater-related investigations conducted by other entities reported to the
13 Permittee on the basis that these permit requirements are not legally required or reasonable.

15 L. Provisions in Condition S8 pertaining to payment into a collective fund to
16 the extent that the Permit does not state where monitoring or studies will occur, how the
17 collective funds will be spent by Ecology, and how the data and information collected by
18 Ecology will be used.

19 M. The definitions of "outfall," and "receiving waters," "municipal separate
20 storm sewer system," and "MS4" are appealed on the basis that they are confusing,
21 unreasonable, and exceed the scope of applicable law and/or regulatory requirements.

23 N. The inclusion of "interflow" in the definition of "stormwater" is appealed
24 on the basis that it is factually inaccurate, confusing, unreasonable, and exceeds the scope of
25 applicable law and/or regulatory requirements.

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NOTICE OF APPEAL - 7

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1 O. Appendix I requirements that pertain to the use of porous pavement for
 2 roads absent certain exceptions on the basis that these requirements are unreasonable and exceed
 3 the scope of regulatory requirements.

4 P. Ecology acted unreasonably, unjustly or unlawfully by failing to conduct a
 5 sufficient economic analysis or cost-benefit analysis, or by otherwise failing to adequately
 6 evaluate and consider the economic or environmental impacts and/or costs of the Permit on the
 7 regulated community, including Coalition members, their citizens, and businesses that are
 8 impacted and affected by the Permit.
 9

10 **VI. RELIEF REQUESTED**

11 6.1 Appellants respectfully request that the Board issue an Order remanding the
 12 Permits to Ecology with direction to address the Permit deficiencies as set forth above.

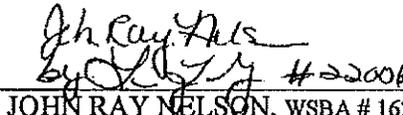
13 6.2 Appellants request such other and further relief as the Board deems appropriate.

14 DATED this 30th day of August, 2012.

15 FOSTER PEPPER PLLC

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17 

17  #22006

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 30, 2012, I caused to be served upon the parties in this action a true and correct copy of the Notice of Appeal via facsimile (without exhibits) and via mail (with exhibits).

1. Department of Ecology
Attn: Appeals Processing Desk
300 Desmond Drive, SE
Lacey, WA 98503
Fax: (360) 407-6989
2. Department of Ecology
Attn: Appeals Processing Desk
P.O. Box 47608
Olympia, WA 98504-7608
3. Ted Sturdevant, Director
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NOTICE OF APPEAL - 9

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

DATED this 30th day of August 2012, at Seattle, Washington.

FOSTER PEPPER, P.L.L.C.

By Sherry Toves
Sherry Toves