POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND Appellants, v. DEPARTMENT OF ECOLOGY, Respondent.	))))))))))	No. NOTICE OF APPEAL

1. Identity of appealing parties and representative.

The appealing parties are:

People for Puget Sound
911 Western Avenue, Suite 580
Seattle 98104
(206) 382-7007
(206) 382-7006 (fax)

Puget Soundkeeper Alliance
5309 Shilshole Avenue N.W., #215
Seattle, 98107
(206) 297-7002
(206) 297-0409 (fax)

The representatives of the appealing parties are:

Jan Hasselman
Todd True
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 (fax)
jhasselman@earthjustice.org
ttrue@earthjustice.org

Richard A. Smith
Smith & Lowney, PLLC
2317 East John Street
Seattle, WA 98112
(206) 860-2883
(206) 860-4187 (fax)

2. Identification of other parties.

The respondent in this appeal is the Washington State Department of Ecology.

3. The decision under appeal.

This is an appeal of the Phase I Municipal Stormwater Permit, a National Pollutant Discharge Elimination System and State Waste Discharge General Permit, issued on January 17, 2007. A copy of this permit is attached.

4. Short and plain statement showing grounds for appeal.

The Phase I Municipal Stormwater Permit ("Phase I Permit") is contrary to law because it is inconsistent with the requirements and intent of the federal Clean Water Act and its governing regulations promulgated by the U.S. Environmental Protection Agency ("EPA"), and Washington State water pollution control law and its governing regulations promulgated by the Washington State Department of Ecology ("Ecology").

5. Statement of facts.

Stormwater is the runoff of precipitation from roads, roofs, parking lots, yards and other developed surfaces. Stormwater scours streams, carries heavy loads of contaminants such as dissolved metals, polycyclic aromatic hydrocarbons ("PAHs"), pesticides, fecal coliform, and nutrients, and destroys the physical, chemical and biological integrity of streams and rivers. Stormwater is among the most significant, if not the most significant, source of pollution threatening the ecological integrity of Western Washington's rivers, streams, estuaries, and bays, particularly Puget Sound. Stormwater also alters the natural hydrologic cycle of healthy

watersheds by increasing peak flows that can harm stream and aquatic ecology and undermine water quality standards. These increased peak flows have the result of diminishing base flows during other times of year, further undermining the physical and biological integrity of streams and rivers.

Stormwater also represents a significant threat to the survival and recovery of fish and wildlife, including federally protected endangered species like salmon and orcas. In some streams, scientists have observed concentrations of stormwater-related pollutants high enough to kill, injure and disable returning adult salmon within minutes of their entry into fresh water, preventing spawning. Additionally, stormwater and its impacts have a broad array of economic costs to the region, including property damage, habitat degradation, loss of fisheries and shellfish harvesting, and harm to drinking water; engineering controls on new and existing development and clean-up of polluted sites; and cultural and economic impacts to tribes, loss of tourism, recreation, and other business revenues.

Ecology issued the original Phase I permits in 1995 for a five-year term. Ecology, however, delayed issuance of the revised Phase I permits until January 17, 2007, several years later than required by applicable regulations. The Phase I permit regulates stormwater from some large and medium municipal separate storm sewer systems (MS4s) in Washington state, including Seattle, Tacoma, and unincorporated portions of King, Snohomish, Clark and Pierce counties. The permit is also designed to cover secondary permittees, upon application and according to the terms of the permit. The permit authorizes discharges of stormwater from MS4s in these jurisdictions consistent with the terms of the permit.

The permit requires covered jurisdictions to develop a stormwater management plan ("SWMP") that includes several components. These components include: a) legal authority; b)

mapping and documentation of MS4s; c) coordination among departments in each jurisdiction; public education and outreach; d) public involvement and participation; e) measures to control stormwater from new development, redevelopment and construction sites; f) structural stormwater controls; g) source control program for existing development; h) detection and elimination of illicit discharges; i) operation and maintenance of municipal operations; and j) education and outreach program. The Permit has a term of five years. However, Ecology typically is unable to renew its NPDES permits on the anticipated five-year schedule, and permits often are in effect for much longer than five years. The previous Phase I stormwater permit was in effect from 1995 to 2007.

Permittees are required to develop and implement a program addressing stormwater from new development, redevelopment and construction. That program must meet technical thresholds identified by Ecology in an Appendix to the Permit. These technical thresholds incorporate by reference specific portions of Ecology's 2005 Stormwater Manual for Western Washington ("Manual"). The Manual, in turn, offers a menu of different management practices, engineering techniques, and other mechanisms designed to reduce to some extent pollution in stormwater and control to some extent its flow-related impacts.

The Manual frankly acknowledges that while the engineered conveyance, treatment and detention systems outlined in the Manual can reduce the impacts of stormwater, they will not protect water quality, beneficial uses or the natural hydrologic function of the watershed. This admission is consistent with other admissions by Ecology and years of peer-reviewed scientific research that shows that traditional engineering approaches to stormwater have not fully protected stream health from continuing degradation. For example, research has demonstrated that detention pond outlets—one of the chief means to mitigate stormwater impacts—cannot do

so fully regardless of size. Additionally, there is little research to support Ecology's conclusion that the various mitigation approaches outlined in the manual represent the most effective treatment and control techniques possible.

Other techniques exist to reduce the impacts of stormwater on water quality and aquatic health. Known generally as low impact development ("LID"), these techniques seek to maintain the ability of watersheds and individual sites to store, evapotranspirate, and infiltrate stormwater on site rather than allow it—and the pollutants it picks up—to run off to streams. LID calls for maintenance of a portion of a site and watershed in native vegetated condition, and the use of building materials and techniques—for example, pervious concretes—that allow water to infiltrate into soils or remain on site. Research has demonstrated that proper application of LID techniques in appropriate circumstances can dramatically reduce, or even eliminate, runoff of stormwater from developed sites. Several jurisdictions have taken steps to allow and encourage use of LID techniques, and several successful projects have been constructed using them. In some jurisdictions covered by the Phase I Permit, however, ordinances effectively prohibit or limit the use of LID techniques.

Another approach is the of use basin-level planning at the watershed level to identify watershed conditions, set priorities, monitor results, and ensure appropriate levels of forested cover and limits on total impervious surface. Basin planning allows jurisdictions to set goals that are necessary to manage the impacts of stormwater on a watershed scale, and is among the most effective management practices available for controlling the impacts of stormwater.

LID and basin planning techniques are practicable, available, and reasonable methods of controlling stormwater impacts on state waters. Other jurisdictions and NPDES permitting authorities have required the adoption of such approaches. Ecology and many other regulatory

bodies and experts have recommended widespread adoption of these approaches. Depending on site conditions and administrative processes, use of LID can be less expensive to implement than engineered storage, detention or treatment systems and can be more successful at protecting water quality and beneficial uses than the engineering methods emphasized in the Manual. By failing to require the use of LID techniques where they are appropriate, the Permit fails to protect water quality standards and beneficial uses, and fails to require the use of practicable, available and reasonable methods to control stormwater. Moreover, the approach taken in the permit actually discourages LID and basin planning by placing a much higher administrative burden on permittees who seek to use methods that are alternative to the Manual. Even Ecology has acknowledged that the collection and presentation of the information required under the permit to use alternative approaches will be cost-prohibitive in many situations.

Regular monitoring is a cornerstone of any stormwater prevention plan. Monitoring allows Ecology, permittees, and the public to understand and assess the extent to which management practices are or are not successful in reducing the impacts of stormwater, and to understand and assess the quality of receiving waters and whether they are meeting water quality standards. As such, monitoring is required to assess whether the permit is meeting applicable legal standards such as reducing pollution to the maximum extent practicable, using all known, available and reasonable methods of treatment, and whether discharges are violating water quality standards. However, the Phase I Permit requires only the most limited monitoring, requiring each jurisdiction to conduct monitoring on a limited number of occasions at only three stormwater outfalls, each representing a different kind of land use. The Permit also requires limited stormwater effectiveness monitoring. No monitoring is required until after two and a half years from the effective date of the permit, and results are not reported until the fourth year

of the permit. This limited approach to monitoring fails to protect water quality and beneficial uses and fails to require the use of practicable, available and reasonable methods to control stormwater.

Much if not most of the development already existing within the covered jurisdictions was built without any stormwater treatment or flow control facilities at all, and this existing development is a major source of continued degradation of Washington's waters. The Permit's regulation of such stormwater contains limited substantive standards, instead requiring permittees to "reduce" pollution by unspecified amounts or through unspecified means, or to "consider" particular approaches. Stormwater that is authorized to be discharged from existing development into municipal systems will degrade water quality and contribute to violations of water quality standards without requiring practicable, reasonable and known methods of treating or controlling that stormwater.

The permit contains boilerplate provisions prohibiting discharge of pollutants that would violate water quality standards, requiring the reduction of pollutants to the maximum extent practicable, and requiring application of all known, available and reasonable methods of prevention, control and treatment of water pollution. However, the substantive requirements that are to be included in each jurisdiction's SWMP are inconsistent with this mandate, as they do not protect water quality or require use of all known, available or practicable methods to control or treat stormwater. Additionally, the permit includes a provision that authorizes continued violation of water quality standards if approved by Ecology. Ecology has stated that it will not consider a WQS violation to be a violation of the permit if the process is followed.

The permit also sets standards that are intended to reduce the impacts of stormwater pollution associated with municipal operations, including roads, parks, and treatment and flow

conveyance facilities. The permit calls for permittees to develop a plan to reduce stormwater impacts from roads and other municipally owned properties, but provides no substantive standards. It does not require reduction to the maximum extent practicable or require the use of known and reasonable methods to control stormwater impacts.

The permit sets various deadlines for implementation of its requirements. Some of these deadlines are excessive and contrary to governing legal standards. In some cases, the permit grants excessive time to comply with requirements that had previously been included in the 1995 Phase I Permits that still have not been completed. For example, the Permit grants jurisdictions up to four years from the effective date of the permit to satisfy parts of the requirement to develop a municipal storm sewer system map. Field screenings of outfalls to detect illicit discharges need not occur for four years. Permittees have four years to develop an inspection schedule for stormwater treatment and control facilities. Excessive timelines fail to protect water quality standards or otherwise comply with the applicable regulations.

In many places, compliance with the Permit requires compliance with the Manual. In 2005, Ecology adopted several highly controversial changes to the Manual. In one, Ecology exempted more urbanized watersheds from the requirement to control flow volume increases. It also exempted some roads from the requirement to provide enhanced levels of treatment to remove pollutants. It also exempted some areas from flow control requirements where discharges were to larger rivers. These exemptions embodied in the 2005 manual —which reduce the treatment of stormwater for activities that discharge to waters of the state relative to earlier versions of the manual—fail to reduce stormwater's impacts to the maximum extent practicable, fail to protect water quality standards, and fail to apply known, available, and reasonable methods of treatment.

While the Phase I Permit in large measure incorporates the Manual, it also allows permittees to develop plans that are consistent with other manuals that are approved by Ecology. Those manuals are not identified and do not yet exist. No public process is required for Ecology to approve such future manuals, nor do any substantive standards need to be satisfied. This amounts to a provision that would effectively allow modification of permit conditions without adherence to permit modification procedures. This provision violates state and federal water laws, state administrative procedural requirements, and is arbitrary and unfair.

The Permit relies in large measure on the creation, implementation, and enforcement of SWMPs. However, Ecology does not review or approve any SWMP. Permittees are authorized to discharge stormwater without assurances that they are meeting required standards, and without accountability.

The Permit authorizes discharges that kill, injure, harm or harass federally listed species, including Puget Sound chinook salmon and Hood Canal summer-run chum salmon, and orcas.

The Permit provides for additional requirements where a Total Maximum Daily Load ("TMDL") has been approved for stormwater discharges. While the list of impaired waterbodies in Western Washington is enormous, there are only a handful of TMDLs that have been finalized for these waterbodies, as Ecology has fallen far behind schedule. Additionally, the list of impaired water bodies is itself incomplete, in part due to insufficient monitoring of water quality and in part because existing water quality standards do not fully protect beneficial uses like salmon spawning and rearing. Under the terms of the Permit, the additional requirements for TMDLs do not apply to TMDLs approved after the date of issuance of the permit. Moreover, for some TMDLs where stormwater has contributed to impairment of water quality, the permit requires to additional measures at all. This approach to stormwater regulation in waters subject

to, or that may in the future become subject to, a TMDL is inconsistent with the standards and requirements of the applicable regulations.

The Permit authorizes the discharge of stormwater that harms water quality in numerous respects, and violates water quality standards. It does not require control of stormwater discharges to the maximum extent practicable, or require use of known, available and reasonable methods of reducing stormwater and its impacts. It will authorize actions that further contribute to the ecological decline of Puget Sound and other Western Washington water bodies, and the further decline of fish and wildlife species like orcas and salmon. Alternative methods of controlling, treating and reducing stormwater are already in use in several jurisdictions, are effective and reasonable, and will meet state and federal water pollution goals and standards.

7. Relief requested.

Appellants request that the Board order the Department of Ecology to modify the Phase I Permit to comply with applicable legal requirements and to correct any defects. The permit should otherwise remain in force and in effect during this remand period.

8. Copies of this notice were served upon the respondent on February 15, 2007.

Dated this 14th day of February, 2007.

JAN HASSELMAN
TODD TRUE
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340
(206) 343-1526 *[fax]*
jhasselman@earthjustice.org
ttrue@earthjustice.org

RICHARD A. SMITH
Smith & Lowney, PLLC
2317 East John Street
Seattle, WA 98112
(206) 860-2883
(206) 860-4187 *[fax]*

Attorneys for Appellants
Puget Soundkeeper Alliance;
People for Puget Sound