



POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE;
PEOPLE FOR PUGET SOUND;
COALITION OF GOVERNMENTAL
ENTITIES

Appellants,

PCHB NOS. 07-022, 07-023

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Respondent,

(PHASE II MUNICIPAL
STORMWATER PERMIT)

STATE OF WASHINGTON,
DEPARTMENT OF
TRANSPORTATION,

Intervenor.

These consolidated appeals involve the regulation of stormwater discharges from municipal storm sewer systems under a National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit. In these appeals multiple parties challenge the validity of the Department of Ecology's (Ecology) 2007 Phase II Municipal Stormwater General Permit (Phase II Permit),¹ which was issued pursuant to the Federal Water Pollution Control Act, commonly known as the "Clean Water Act," 33 U.S.C. § 1251 *et seq.* and the state Water Pollution Control Act, Chapter 90.48 RCW.

¹ The Phase I Permit was appealed in a separate, consolidated case, PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 07-030, and 07-037.

**PHASE II MUNICIPAL STORMWATER
GENERAL PERMIT
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

1 The Pollution Control Hearings Board (Board) held a multiple day hearing between
2 October 23, 2008, and October 31, 2008, addressing issues pertaining to the Western
3 Washington Phase II Permit. Attorneys John R. Nelson and Lori Terry Gregory represented the
4 Coalition of Governmental Entities (Coalition).² Attorneys Jan Hasselman and Janette K.
5 Brimmer represented Puget Soundkeeper Alliance and People for Puget Sound (PSA). Ronald
6 L. Lavigne, Senior Counsel, and Thomas J. Young, Assistant Attorney General, represented
7 Ecology. Stephen R. Klasinski, Assistant Attorney General, represented Intervenor Washington
8 State Department of Transportation (WSDOT).

9 Board members William H. Lynch, presiding,³ Kathleen D. Mix, Chair, and Andrea
10 McNamara Doyle, comprised the Board. Randi Hamilton and Kim L. Otis of Gene Barker and
11 Associates of Olympia, Washington provided court reporting services.

12 PROCEDURAL BACKGROUND

13 On January 17, 2007, Ecology issued three NPDES and State Waste Discharge General
14 Permits. The first permit regulates discharges from Large and Medium Municipal Separate
15 Storm Sewer Systems (Phase I Permit). The second permit regulates discharges from Small
16 Municipal Separate Storm Sewer Systems in Western Washington (Western Phase II Permit).
17 The third permit regulates discharges from Small Municipal Separate Storm Sewer Systems in
18 Eastern Washington (Eastern Phase II Permit). Puget Soundkeeper Alliance and People for

19 ² The Coalition includes the following cities: Anacortes, Auburn, Bellevue, Bothell, Bremerton, Buckley, Burien,
20 Burlington, Camas, Des Moines, Ellensburg, Everett, Federal Way, Fircrest, Kennewick, Kent, Longview,
Marysville, Mount Vernon, Normandy Park, Port Angeles, Pullman, Puyallup, Renton, Richland, Sammamish,
SeaTac, Sumner, University Place, and Vancouver. The Coalition also includes Kitsap County.

21 ³ Administrative Appeals Judge Kay M. Brown presided over the Condition S4 hearing, and the Phase I appeal.
Board Member William H. Lynch presided over the remaining issues in the Phase II appeal.

1 Puget Sound (PSA) filed an appeal of the Western Phase II Permit, but not the Eastern Phase II
2 Permit. The Phase II Coalition of Governmental Entities (Coalition) filed appeals of both the
3 Eastern and Western Phase II Permits. All appeals on the Eastern and Western Phase II Permits
4 were consolidated into one case, for purposes of hearing only.⁴

5 The Board previously conducted a hearing on Special Condition S4, which is an identical
6 condition in the Phase I Permit and both the Eastern and Western Phase II Permits. The Board
7 issued its Order on Dispositive Motions: Condition S4 on April 2, 2008. *PSA v. Ecology*, PCHB
8 Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 07-030, 07-037, 07-022, 07-023 (Order on
9 Dispositive Motions: Condition S.4, April 2, 2008) [hereinafter *Order on Dispositive Motions:*
10 *Condition S4*]. It issued its Findings of Fact, Conclusions of Law, and Order, Condition S4 on
11 August 7, 2008. *PSA v. Ecology*, PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 07-030,
12 07-037, 07-022, 07-023 (2008) [hereinafter *Condition S4 Merits Decision*]. These decisions
13 resolved the issues related to Special Condition S4 for both the Phase I and Phase II Permits.

14 The Board issued an Order on Summary Judgment regarding the Phase II Permit on
15 September 29, 2008, resolving a number of the parties' issues, and the parties also withdrew
16 several issues. *PSA v. Ecology*, PCHB Nos. 07-022, 07-023 (Order on Summary Judgment,
17 Sept. 29, 2008) [hereinafter *Phase II Summary Judgment Order*]. This Phase II Permit decision
18 pertains only to the Western Phase II Permit and includes the following legal issues:

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21 ⁴The Board previously issued an Order on Clarification of Issues on January 4, 2008, because PSA had only
appealed the Western Phase II Permit and was not taking a position on the Eastern Phase II Permit. *PSA v. Ecology*,
PCHB Nos. 07-022, 07-023 (Order on Clarification of Issues, Jan. 4, 2008).

1 1. Low Impact Development (Issue 12):

- 2 a. Does the permit fail to require maximum onsite dispersion and infiltration of
3 stormwater, through the use of “low impact development” techniques, basin
4 planning, and other appropriate technologies, and if so, does that failure
5 unlawfully cause or contribute to violations of water quality standards?
6 b. Does the permit fail to require maximum onsite dispersion and infiltration of
7 stormwater, through the use of “low impact development” techniques, basin
8 planning, and other appropriate technologies, and if so, does that failure
9 unlawfully allow permittees to discharge pollutants that have not been treated
10 with all known available and reasonable methods of treatment (“AKART”),
11 and/or fail to reduce the discharge of pollutants to the maximum extent
12 practicable (“MEP”)?

13 2. One Acre Threshold (Issue 13):

- 14 a. Does the exemption from the requirement to regulate stormwater runoff from
15 development and redevelopment that disturbs less than one acre unlawfully
16 cause or contribute to violations of water quality standards?
17 b. Does the exemption from the requirement to regulate discharges from
18 development and redevelopment that disturbs less than one acre allow
19 permittees unlawfully to discharge pollutants that have not been treated,
20 reduced or prevented with AKART, and/or fail to reduce the discharge of
21 pollutants to the MEP?

22 3. Existing Development (Issue 14):

- 23 a. Does the lack of controls for reducing stormwater discharges from existing
24 development unlawfully cause or contribute to violations of water quality
25 standards?
26 b. Does the lack of controls for reducing stormwater discharges from existing
27 development unlawfully allow permittees to discharge pollutants that have not
28 been treated with AKART, and/or fail to reduce the discharge of pollutants to
29 MEP?

30 4. Monitoring (Issue 15): Does the permit unlawfully or unreasonably fail to require
31 monitoring of stormwater discharges, effectiveness of control techniques, and/or
32 receiving water quality?

33 5. Coverage Area (Issue 19): Is the coverage area of the permit, which is restricted to
34 cities above a specific size and the urban areas of counties, unlawfully or
35 unreasonably limited?

36 6. Compliance With Water Quality Standards (Issue 16a): Does the Phase II permit fail
37 to ensure that discharges will not cause or contribute to violations of water quality
38 standards?

1 Based on its review of the record and foregoing pleadings, and being fully advised, the
2 Board enters the following ruling.

3 SUMMARY OF THE DECISION

4 In this order, the Board concludes that there are sufficient distinctions between Phase I
5 and Phase II permittees in terms of available resources and experience in administering a
6 municipal stormwater management program to justify different requirements and different
7 schedules for various requirements between the two Permits. The Board concludes Ecology
8 properly defined a one-acre threshold for triggering regulation of development activity under the
9 Permit, in part because municipalities who regulate to lower thresholds must continue to regulate
10 at that level. The Board also concludes that the Permit adequately addresses stormwater
11 discharges from existing development, and that the monitoring required under the Permit is
12 sufficient. The Board concludes that Ecology correctly defined the coverage area of the Permit.
13 With respect to the use of Low Impact Development, the Board concludes that the current
14 language of the Phase II permit, which requires adoption of ordinances or other enforceable
15 mechanisms to allow for LID, is permissible, but requires Ecology to define in the Permit further
16 steps to advance LID by the Phase II jurisdictions. The Board concludes that Ecology must
17 modify the permit to require permittees to identify barriers to implementation of LID and
18 identify actions taken to remove those barriers, to establish goals regarding the future use of LID,
19 and to require other specific actions on reasonable and flexible time frames, both during this
20 permit cycle and in anticipation of future permits.

1 FINDINGS OF FACT

2 Overview of the Western Phase II Permit⁵

3 [1]

4 Stormwater is recognized as the leading contributor to water quality pollution in urban
5 waterways. *Ex. MUNI-0127, Fact Sheet, p. 8.* In December 1999, the federal Environmental
6 Protection Agency (EPA) issued new rules regarding the regulation of municipal stormwater.
7 *Ex. COA-0028, Moore Testimony.* EPA finalized the Phase II rules in 2000 (EPA Phase II
8 Rules), which applied the NPDES permit program to certain small municipal separate
9 stormwater sewer systems (called MS4s). *Ex. MUNI-0127, Fact Sheet, p. 3. Emmett Testimony.*

10 [2]

11 The EPA Phase II Rules provide that the permits must require regulated MS4s to
12 “develop, implement, and enforce a stormwater management program (SWMP) designed to
13 reduce the discharge of pollutants ... to the maximum extent practicable (MEP), to protect water
14 quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.” 40
15 C.F.R. §122.34(a). The rules also require that permittee’s SWMPs include the following six
16 minimum control measures:

- 17 1) Public education and outreach
18 2) Public involvement and participation
19 3) Illicit discharge detection and elimination
20 4) Construction site stormwater runoff control
5) Post-construction stormwater management in new and redevelopment
6) Pollution prevention and good housekeeping practices for municipal operations.
40 C.F.R. §122.34(b).

21 ⁵ Unless the context indicates otherwise, all references to the Phase II Permit in this opinion refer to the Western Washington Phase II Permit.

1 In addition to these minimum control measures, permits must also include two additional
2 measures: any more stringent effluent limitations based on an approved total maximum daily
3 load (TMDL) or equivalent analysis; and evaluations of program compliance, the
4 appropriateness of identified BMPs, and progress toward identified measurable goals. 40 C.F.R.
5 §122.34(d)(1).

6 [3]

7 While Ecology was updating the 2001 Stormwater Management Manual, which had been
8 originally written for Puget Sound, it concluded that circumstances in Eastern Washington were
9 sufficiently different to warrant the preparation of a separate Eastern Washington Manual.
10 Ecology held numerous public workshops and public hearings, and substantial public comments
11 and legislative interest was generated during this timeframe. Ecology formed a Westside
12 Stormwater Group and an Eastern Washington Stormwater Management Steering Committee to
13 assist Ecology in developing a separate stormwater manual for Eastern and Western Washington.
14 In January 2004, Ecology completed a report to the Legislature regarding regulating municipal
15 stormwater through the NPDES permit program. *Ex. ECY-09, Moore Testimony.*

16 [4]

17 After the issuance of the report to the Legislature, Ecology's internal efforts at drafting
18 the permits became more coordinated, and Ecology tried to reach consensus on issues raised
19 during the comment period. *Moore Testimony.* Kathleen Emmett served as the Permit writer for
20 the Phase II Permit. She relied upon the technical expertise of others within the agency. *Emmett*
21

1 *Testimony.* Bill Moore was the management lead and project lead for all the Municipal
2 Stormwater Permits. *Moore Testimony.*

3 [5]

4 In 2005, Ecology issued the most recent edition of the Stormwater Management Manual
5 for Western Washington (2005 Stormwater Manual). The 2005 Stormwater Manual represents
6 the latest version of guidance by Ecology for measures to take to control the quantity and quality
7 of stormwater runoff from new development and redevelopment projects. *Ex. MUNI-0127, Fact*
8 *Sheet, p. 39.* Both the Phase I and Phase II Permits were issued on January 17, 2007, with an
9 expiration date of February 15, 2012, and both utilize a great deal of information from the 2005
10 Stormwater Manual. For example, Appendix 1 of both the Phase I and Phase II Permits
11 incorporate large portions of the 2005 Stormwater Manual for new development, redevelopment,
12 and construction sites. *Moore Testimony.*

13 [6]

14 The Phase II Permit is an area-wide permit that covers a large geographic area and a
15 multitude of discharge points. Like the Phase I Permit, it is a “programmatic permit” that
16 requires the permittees to implement area-wide stormwater management programs (SWMP)
17 rather than establishing benchmarks or numeric effluent limitations for specific outfalls or
18 discharges. The Phase II Permit regulates local governments, which in turn, regulate others.
19 Stormwater discharges that do not come into the municipal stormwater system are not regulated
20 by this permit. Ecology views these SWMP requirements, in the aggregate, to represent MEP
21

1 and to satisfy the state-law requirement to incorporate all known, available, and reasonable
2 methods of treatment (AKART). *Moore Testimony*.

3 [7]

4 The Phase II permittees are a group of 85 municipalities that present a range of financial
5 capabilities and experience in stormwater management. This diversity among the Phase II
6 permittees, as well as the number of jurisdictions involved, distinguishes them from the Phase I
7 jurisdictions, which include only six large cities or counties and several “secondary” permittees.
8 For example, a smaller Phase II city such as Aberdeen has limited resources to address
9 stormwater management, while Bellevue and Vancouver have much greater resources. The
10 numbers and diversity of the Phase II permittees also made it difficult for Ecology to define a
11 single and appropriate level of effort and for these cities, yet the agency ultimately chose to
12 regulate the Phase II permittees as a group, and to the same standards.

13 [8]

14 In order to begin effectively regulating the Phase II jurisdictions, Ecology set up the
15 Phase II Permit to “lag behind” the Phase I Permit, so that the Phase II permittees could take
16 advantage of the efforts of the Phase I jurisdictions, which would be breaking ground in aspects
17 of stormwater management, establishing ordinances, and modeling how to manage the municipal
18 stormwater problem. The Phase II Permit itself will also allow the level of effort among the
19 Phase II permittees to vary, but at the same time will require every jurisdiction to take action to
20 advance stormwater management and control within their jurisdiction (*e.g.*, the least
21

1 sophisticated jurisdictions will need to develop funding mechanisms, while more advanced
2 jurisdictions will be expected to improve stormwater programs more directly). *Moore Testimony.*

3 [9]

4 In developing the Phase II Permit requirements, Ecology considered a variety of
5 comments, as well as their own technical knowledge of the status of stormwater management
6 programs among the smaller cities. Despite dispute among interested parties as to whether Phase
7 II jurisdictions should be expected to comply with only the six minimum measures of the federal
8 rules or something greater, Ecology drafted the Phase II Permit in a way that selectively went
9 beyond the federal requirements. Ecology recognized that although some jurisdictions had
10 adopted the 2005 Stormwater Manual, they may not have adopted the acreage thresholds as a
11 basis for regulating development. Ecology also recognized that municipal storm sewer systems
12 are complicated and require time to map, and that some Phase II jurisdictions would need to
13 develop a funding mechanism for their stormwater program. Grants provided by the Legislature
14 (through Ecology or the Puget Sound Action Team) have allowed some Phase II jurisdictions to
15 develop codes that set up a utility to fund stormwater programs and take other actions necessary
16 to lay the groundwork for effective stormwater management, but not all jurisdictions received
17 such grants. *Moore Testimony, Emmett Testimony.*

18 Current Efforts of Selected Phase II Permittees

19 [10]

20 The Coalition asserts that the Phase II Permit is one of the most stringent municipal
21 stormwater permits in the country, and that Phase II permittees are working hard to comply with

1 the permit requirements within their limited resources. The Coalition notes that in these difficult
2 economic times, and with declining revenues, Phase II permittees do not have the extra resources
3 needed to comply with the additional Permit requirements advocated by PSA. The Coalition
4 provided testimony from the cities of Camas, Port Angeles, and Port Orchard, as well as Kitsap
5 County in support of their position.

6 [11]

7 Some smaller Phase II jurisdictions are just beginning to map outfalls (Camas), or create
8 stormwater management plans in the first instance (Port Orchard). Phase II cities are also in
9 various stages of having a stormwater utility to raise money for stormwater overflow problems or
10 permit compliance, or both. Port Angeles created such a utility 5 years ago, while Port Orchard
11 has only recently adopted such an ordinance. The numbers and experience of staff dedicated to
12 stormwater-related issues varies widely among these Phase II cities. A small city such as Camas
13 has 2.9 full-time equivalent employees working in the area of stormwater, while Kitsap County
14 has had as many as 26.5 employees addressing stormwater. However, Kitsap County expects
15 continued lay-offs within its workforce, and has trouble attracting people with necessary skills.
16 Given the diversity of size and other factors within these Phase II cities, monies allocated to
17 stormwater management also varies widely. Port Angeles spends approximately \$600,000 a year
18 to comply with the Phase II Permit out of a \$720,000 stormwater budget. In Kitsap County the
19 stormwater fee raised about \$6.2 million in 2007. At the other end of the spectrum, Port Orchard
20 will have no budget until 2009 and has received a \$75,000 grant which was used to hire a
21 consultant to map the stormwater system. In addition to budget reductions, some jurisdictions

