POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND; PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT; CITY OF TACOMA; PORT OF SEATTLE; SNOHOMISH COUNTY; CLARK COUNTY; PACIFICORP; and PUGET SOUND ENERGY, Appellants, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, and, CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Intervenors.	ORDER ON DISPOSITIVE MOTIONS: CONDITION S.4 PCHB NOS. 07-021, 07-026, 07-027 07-028, 07-029, 0-030, 07-037 (Phase I) and PCHB NOS. 07-022, 07-023 (Phase II)
PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND; AND COALITION OF GOVERNMENTAL ENTITIES, Appellants,	

vs.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

and

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Intevenor.

On January 16, 2008, the following parties filed motions for summary judgment on the Special Condition S.4 (S.4) Issues raised in the appeal of the Phase I and Phase II Municipal Stormwater General Permit: Pierce County, King County, Snohomish County, Clark County, Washington State Department of Transportation (WSDOT), City of Tacoma, Port of Seattle and Port of Tacoma (collectively, the "Phase I Permittees"), Department of Ecology (Ecology), Pacificorp and Puget Sound Energy (Utilities), Puget Soundkeeper Alliance and People for Puget Sound (PSA), City of Seattle, and the Phase II Coalition of Governmental Entities (Coalition). On February 4, 2008, the Phase I Permittees, King County, the Utilities, Ecology, PSA, City of Seattle, and the Coalition filed responses. On February 14, 2008, the Phase I Permittees, Ecology, PSA, the Utilities, King County, the City of Seattle, and the Coalition, filed replies.

The Board considering these motions was comprised of Kathleen D. Mix, Chair, William H. Lynch, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown presided for the Board.

The following documents were received and considered in ruling on this motion:

1. Intervenor WSDOT's Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Larry E. Schaffner in Support of WSDOT's Motion for Partial Summary Judgment Re: Special Condition S.4;

2. Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4;

3. King County's Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Curt W. Crawford in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachments 1 & 2, Declaration of Joseph B. Rochelle in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachment 1;

4. Motion for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Kathy Hipple in Support of Motion for Summary Judgment on Permit Condition S.4 with Attachments A-F;

5. Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4, Exhibits in Support of Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Exhibits A-AG), Declaration of Jan Hasselman in Support of Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 and Exhibits 1-36;

6. Intervenor City of Seattle's Motion for Partial Summary Judgment Re Special Condition S.4, Declaration of Theresa R. Wagner in Support of Seattle's Motion for Partial Summary Judgment Re: Special Condition S.4 with Exhibit A-C, Declaration of Patricia D. Rhay in Support of Seattle's Partial Summary Judgment Re: Special Condition S.4 with Exhibits A-E;

7. City of Tacoma's Response in Support of Intervenor City of Seattle's Motion for Partial Summary Judgment Re: Special Condition S.4;

8. Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Heather Kibbey in Support of Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Karen R. Kerwin in Support of the Phase I Permittees' Partial Motion for Summary Judgment in Special Condition S.4 with Exhibits A-F, Declaration of Charles S. Wisdom, Ph.D., in Support of Phase I Permittees' Motion for Partial Summary Judgment on Special Condition S.4 with Curriculum Vitae, Declaration of Paul S. Fendt, P.E. in Support of Phase I Permittees' Motion for Partial Summary Judgment on Special Condition S.4 with Curriculum Vitae, Declaration of Lorna Mauren with Attachments A & B, Declaration of Doug Mosich in Support of Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Curt W. Crawford in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachments 1 & 2;

9. Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4, Declaration of Lori A. Terry in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Exhibits A-Z, Declaration of Regan W. Sidie, P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibits A-D, Declaration of David A. Tucker P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibits A-C, Declaration of Peter Rogalsky P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibit A, Declaration of John Ecklund, P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4, Declaration of Charles S. Wisdom, Ph.D., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibit A and Curriculum Vitae, Declaration of Paul S. Fendt, P.E., in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Exhibit A and Curriculum Vitae, Declaration of Barbara Rothwell in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Civil Name Search Results;

10. Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Kathy Hipple in Support of Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy with Exhibits A-Z;

11. Respondent Department of Ecology's Response in Opposition to Permittees' Motions for Summary Judgment on Condition S.4., Declaration of Bill Moore in Support of Ecology's Responses to Motions for Summary Judgment Re: Condition S.4 with attachments;

12. Department of Ecology's Response to Puget Soundkeeper Alliance's and Puget Sound Energy's Motions for Summary Judgment on Consolidated Condition S.4, Declaration of

Thomas J. Young in Support of Ecology's Response to Puget Soundkeeper Alliance's and Puget Sound Energy's Motions for Summary Judgment on Consolidated Condition S.4 with Exhibits 1-3;

13. Phase II Coalition of Governmental Entities' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4;

14. King County's Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4, Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Puget Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12) (Phase I) and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Conditions S.4 with attachments, Declaration of Joseph B. Rochelle in Support of King County's Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4, Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Puget Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12) (Phase I) and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Conditions S.4;

15. Puget Soundkeeper Alliance's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Declaration of Richard Horner, PH.D. in Support of PSA's Opposition to Motions for Summary Judgment (Phase I and II) with Exhibit A, Declaration of Jan Hasselman in Support of PSA's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 and Exhibits 37-39 (Phase I and II), Exhibits in Support of PSA's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 (Exhibits AH-AI)(Phases I and II);

16. Phase I Permittees' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4 with Exhibits A-J, Declaration of Doug Mosich in Support of Phase 1 Permittees' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4;

17. The Phase I Permittees' and the Phase II Coalition of Governmental Entities' Memorandum of Law in Opposition to Puget Soundkeeper Alliance's Partial Motion for Summary Judgment on Special Condition S.4 and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4, Declaration of Catherine A. Drews in Support of Phase I Permittees' Memorandum of Law in Opposition to Puget Soundkeeper Alliance's Partial Motion for Summary Judgment on Special Condition S.4 and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4 with Exhibits A-AC;

18. Intervenor City of Seattle's Combined Response to Summary Judgment Motions By Puget Soundkeeper Alliance, Pacificorp, Puget Sound Energy and Ecology on Consolidated Condition S.4 (Phase I and II), Second Declaration of Theresa R. Wagner Re: Summary Judgment (Phase I and Phase II) with Exhibits AA-DD, Second Declaration of Patricia D. Rhay Re: Summary Judgment (Phase I and Phase II).

19. Phase II Coalition of Governmental Entities' Reply to Pacificorp and Puget Sound Energy's Response to Motions for Summary Judgment on Permit Condition S.4.

20. Phase II Coalition of Governmental Entities' Reply in Support of Motion for Summary Judgment on Special Condition S.4, Declaration of Lori A. Terry in Support of Coalition's Reply in Support of Motion for Summary Judgment on S.4.

21. Respondent Department of Ecology's Reply in Support of Motion for Partial Summary Judgment Regarding Condition S.4 (Phase I and II).

22. Intervenor King County's Reply to Responses of Pacificorp and Puget Sound Energy, The Department of Ecology and Puget Soundkeeper Alliance and People for Puget Sound Regarding Permittees' Motions on Condition S.4;

23. Intervenor City of Seattle's Reply to Summary Judgment Motions Re: Condition S.4.

24. Puget Soundkeeper Alliance's Reply in Support of Motion for Summary Judgment on Consolidated Condition S.4 (Phases I and II)[1], Exhibit in Support of Puget Soundkeeper Alliance's Reply in Support of Motion for Summary Judgment on Consolidated Condition S.4 (Exhibit AJ)(Phases I and II);

25. Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Matthew Dalton in Support of Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy; Declaration of Kathy Hipple in Support of Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy with Exhibits A-D;

26. Phase I Permittees' Reply to Pacificorp and Puget Sound Energy's Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 with Exhibits A-E, Declaration of Doug Mosich in Support of Phase I Permittees' Reply to Pacificorp and

[1] The Presiding Officer finds good cause to grant PSA's motion for leave to file this over-length brief because PSA is replying to five separate response briefs. No parties oppose this motion. Therefore, PSA's motion is granted.

Puget Sound Energy's Consolidated Response to Motions for Summary Judgment on Permit Condition S.4;

27. Phase I Permittees' Reply to PSA, Ecology and PSE Re Permittees' Motion for Partial Summary Judgment Re Special Condition S.4;

28. City of Seattle Supplemental Designation of Evidence Re: S.4 Summary Judgment Motions, Third Declaration of Theresa R. Wagner Re: Supplemental Evidence for S.4 Summary Judgment with Attached Exhibits A through F;

29. City of Tacoma's Response in Support of Intervenor City of Seattle's Supplemental Designation of Evidence Re: S.4 Summary Judgment Motions; and,

30. Puget Soundkeeper Alliance's Response to Supplemental Designation of Evidence Re: S.4 (Phases I and II).

Based on the record and evidence before the Board on the motions for partial summary judgment, the Board enters the following decision.

I.

PROCEDURAL BACKGROUND AND DECISION SUMMARY

On January 17, 2007, the Department of Ecology (Ecology) issued National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit (State Waste Permit) for discharges from Large and Medium Municipal Separate Storm Sewer Systems (Phase I Permit). The effective date of the Phase I permit is February 16, 2007.

Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PSA) (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-026), City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County (PCHB No. 07-029), Clark County (PCHB No. 07-030), and PacifiCorp and Puget Sound Energy (PCHB No. 07-037), challenging various provisions of the permit. The Board granted

leave to intervene to King County, the City of Seattle, and the Port of Tacoma, PacifiCorp and Puget Sound Energy, and The Washington State Department of Transportation (WSDOT), and consolidated all of the Phase I Appeals for hearing purposes.

On the same date as the issuance of the Phase I Permit, Ecology also issued NPDES and State Waste Permit for discharges from Small Municipal Separate Storm Sewer Systems in Western Washington (WW Phase II Permit) and NPDES and State Waste Permit for discharges from Small Municipal Separate Storm Sewer Systems in Eastern Washington (EW Phase II Permit). The effective date of both of the Phase II Permits, like the Phase I Permit, is February 16, 2007.

PSA and the Coalition of Governmental Entities filed appeals of the WW Phase II Permit (PCHB No. 07-022 and PCHB 07-023, respectively).[2] The Coalition of Governmental Entities filed an appeal of the EW Phase II Permit.[3] The Board consolidated the appeals of the WW Phase II and EW Phase II Permits for purposes of hearing only, and granted the WSDOT leave to intervene in both of the consolidated cases.

The Board conducted Pre-hearing conferences, and entered separate pre-hearing orders setting forth 36 issues for the Phase I Appeals, and 31 issues for the Phase II Appeals. The parties raise seven overlapping issues related to the permits' Special Condition S.4, which is an

[2] Additional appeals were filed by City of Pacific (PCHB No. 07-031), Whatcom County (PCHB No. 07-032), and Sammamish Plateau Water & Sewer District (PCHB No. 07-024), but they are not part of this consolidated action.
[3] Washington State University filed two appeals of the EW Phase II Permit (PCHB No. 07-025, PCHB No. 07-058) which are not part of these consolidated appeals.

identical condition in all three permits. The S.4 issues identified by the parties, which are the subject of this order, include the following:

1. Did Ecology act unreasonably, unjustly, or unlawfully in imposing Special Condition S.4 in the Permits to the extent it imposes requirements beyond Maximum Extent Practicable (MEP) and/or requires permittees to comply with standards that are not legally required, or are otherwise unreasonable unjust, or invalid?
2. Whether Special Condition S.4.F. and conditions that refer to it, are unlawful, unreasonable, unjust, or invalid in a municipal stormwater discharge permit, (a) by characterizing a violation of water quality standards as permit noncompliance and as a permit violation, and (b) by failing to clarify that the management process stated in S.4.F.2 is a means to comply with the permit rather than action taken in response to a permit violation, and, (c) by imposing timeframes that do not allow sufficient time within which to accomplish required actions?
3. Whether Special Condition S.4 is unlawful, unreasonable, unjust, or invalid because it fails to state specifically that compliance with the terms and conditions of this permit constitutes compliance with all applicable legal standards?
4. Does the permit unlawfully exempt permittees that comply with the process established in Permit Condition S.4.F from the requirement to ensure that discharges do not cause or contribute to violations of water quality standards?
5. Does the process established in Permit Condition S.4.F unlawfully fail to include standards and/or timelines necessary to ensure that discharges will comply with water quality standards?
6. Does the prohibition on violations of water quality standards contained in Permit Condition S.4 unlawfully or unreasonably conflict with the other provisions of the permit?
7. Does Permit Condition S.4 unlawfully fail to prohibit violations of water quality standards?

In this order, the Board concludes that only Issue 1 is amenable to summary judgment. Before deciding Issues 2 through 5 and Issue 7 of the S.4 issues, the Board requires more factual context as to the scope, interpretation, and expected application of Special Condition S.4.F. Therefore, the Board denies summary judgment to all parties on these issues. The Board concludes that Issue 6 involves and requires a factual review of other permit provisions

contained in both the Phase I and Phase II permits, and should therefore be addressed in the Phase I and Phase II specific cases.

II.

FACTS

A. The Stormwater Problem

Stormwater is runoff that occurs during and following precipitation events and snowmelt events, including surface runoff, drainage, and interflow. Municipal separate storm sewers are the conveyances, or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains, owned or operated by municipalities, that are designed or used for collecting or conveying stormwater. Municipal separate storm sewers cannot, by definition, include sewers that collect and convey sewage as well as stormwater. *Potter Decl., Ex. 9, at 63, 64, Terry Decl., Ex. D (WW at 46-49, EW at 51-54).*

The Phase I and Phase II permits regulate discharges of municipal stormwater into waters of the state from municipal separate storm sewer systems, referred to as MS4s. The permits do not regulate stormwater that discharges directly to a water body without passing through a regulated MS4. *Potter Decl., Ex. 9, at 61, Ex. 10, at 4, Terry Decl., Ex. C (EW at 1, WW at 3).*

Stormwater in general is difficult to manage because discharges are intermittent and weather-dependent (i.e. from rainfall and snowmelt). Municipal stormwater is even more difficult to manage than other types of stormwater because it is discharged from such a large number of outfalls. Most existing MS4s were not built with water quality protection in mind, but

instead were built for the purpose of draining water as efficiently as possible, managing peak flows, and protecting the public from flooding and disease. *Wisdom Decl., Fendt Decl., Potter Decl., Ex. 10 at 13, 14, Terry Decl., Ex. C (EW at 9, 10, WW at 14-15).*

MS4s are large and complex, even those belonging to the "small" municipalities. An example of a large municipality MS4 is that of Pierce County. Pierce County's MS4 includes 540 linear miles of enclosed public pipes/culverts, 1,229 linear miles of open channels, 3,260 stormwater outfalls, and 1,553 lineal miles of roads with 18,828 associated stormwater catch basins. *Kibbey Decl*. An example of a "small" municipality MS4 is that of the City of University Place. Its MS4 covers approximately 8.4 square miles and receives runoff from 13 different drainage basins, drains 216 lane miles of road and includes more than 10 miles of open ditch, 70 miles of pipes, approximately 3800 catch basins and 14 outfalls. *Ecklund Decl*.

Municipalities differ from other regulated stormwater managers in two key aspects. First, they have limited control over the sources of pollutants that find their way into their MS4s, and they cannot stop the discharges coming out of their systems. Second, they are not the primary generators of the pollutants that are being discharged. Instead, the source of the pollutants is more often citizens and businesses, engaged in legal activity and the activities of daily life that also generate pollutants. *Fendt Decl., Wisdom Decl*.

Stormwater is the leading contributor to water quality pollution in urban waterways. Common pollutants in stormwater include lead, zinc, cadmium, copper, chromium, arsenic, bacterial/viral agents, oil & grease, organic toxins, sediments, nutrients, heat, and oxygen-demanding organics. Municipal stormwater also causes hydrologic impacts, because the

quantity and peak flows of runoff are increased by the large impervious surfaces in urban areas. Stormwater discharges degrade water bodies and, consequently, impact human health, salmon habitat, drinking water, and the shellfish industry. *Potter Decl., Ex. 10 at 8-13, Terry Decl., Ex. C (EW at 5-9, WW at 8-14).*

B. The Phase I and Phase II Permits

The Phase I and Phase II Permits are both NPDES permits, as required by the Federal Water Pollution Control Act, also known as the Clean Water Act (FCWA), 33 U.S.C. §§1251 et.seq. and State Waste Discharge Permits issued pursuant to the Washington State Water Pollution Control Act (WPCA), Chapter 90.48 RCW. The Permits are "general permits," which provide an alternative to individual NPDES discharge permits. General permits allow regulators to efficiently administer a permit process covering multiple discharges of a point source category within a designated geographical area. *Potter Decl., Exs. 9 at 61, Ex. 10 at 17, Terry Decl., Exs. C (EW at 13, WW at 18) & Ex. D (EW at 49, WW at 45), WAC Ch. 173-226.*

The purpose of the Phase I Permit is to authorize the discharge of stormwater into waters of the State of Washington from large and medium sized municipal separate storm sewers. *Potter Decl., Ex. 10 at 4*. The purpose of the two Phase II Permits is the same, but the permits apply to small municipal separate storm sewers, and are divided geographical into eastern and western Washington permits. *Coalition's Motion, Terry Decl., Ex. C (EW at 1, 15-17, WW at 3, 21-23).* The permittees under all three permits are the municipalities that own and operate the storm sewers.

Special Condition S.4 is entitled "Compliance with standards," and is identical in the Phase I Permit and both of the Phase II Permits. Parts A through E of S.4 establish the legal standards applicable to the management of stormwater. Part F establishes the required response to violations of water quality standards pursuant to parts A and B. Parts A, B, and F are the provisions challenged in these motions.

S.4.A states:

> In accordance with RCW 90.48.520, the discharge of toxicants to waters of the State of Washington which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited. The required response to such violations is defined in section S.4.F., below.

S.4.B states:

> This permit does not authorize a violation of Washington State surface water quality standards (Chapter 173-201A WAC), ground water quality standards (Chapter 173-200 WAC), sediment management standards (Chapter 173-204 WAC), or human health-based criteria in the national Toxics Rule (Federal Register, Vol. 57, NO. 246, Dec. 22, 1992, pages 60848-60923). The required response to such violations is defined in section S.4.F, below.

S.4.F states:

> Required response to violations of Water Quality Standards pursuant to S.4.A. and/or S.4.B:
>
> 1. Pursuant to G20 *Non-Compliance Notification*, the Permittee shall notify Ecology in writing within 30 days of becoming aware that a discharge from the municipal separate storm sewer is causing or contributing to a violation of Water Quality Standards. For ongoing or continuing violations, a single written notification to Ecology will fulfill this requirement.
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> 2. In the event that Ecology determines that a discharge from a municipal separate storm sewer is causing or contributing to a violation of Water Quality Standards in a receiving water, and the violation is not already being addressed by a Total Maximum Daily Load or other water quality cleanup plan, Ecology will notify the Permittee in writing that:

a. Within 60 days of receiving the notification, or by an alternative date established by Ecology, the Permittee shall review their Stormwater Management Program and submit a report to Ecology. . . . The report shall include:

i. A description of the operational and/or structural BMPs that are currently being implemented to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards, including a qualitative assessment of the effectiveness of each BMP.

ii. A description of additional operational and/or structural BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards.

iii. A schedule for implementing the additional BMPs including, as appropriate: funding, training, purchasing, construction, monitoring, and other assessment and evaluation components of implementation.

b. Ecology will, in writing, either approve the additional BMPs and implementation schedule or require the Permittee to modify the report. If modifications are required, the Permittee shall submit a revised report to Ecology.

c. The Permittee shall implement the additional BMPs, pursuant to the schedule approved by Ecology, beginning immediately upon receipt of written notification of approval.

d. The Permittee shall include with each subsequent annual report a summary of the status of implementation, and any information from assessment and evaluation procedures collected during the reporting period.

e. Provided the Permittee is implementing the approved BMPs, pursuant to the approved schedule, the Permittee is not required to further modify the BMPs or implementation schedule unless directed to do so by Ecology.

Potter Decl., Ex, 9 at 45, Terry Decl. Ex. D (EW at 7-9, WW at 7-9).

III.

ANALYSIS

A. Summary Judgment

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party as they have been in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Here, the Phase I Permittees and the Coalition challenge S.4.A and B., contending that they exceed the mandatory requirements imposed by federal and state law, and that Ecology lacks the authority to impose these requirements under those laws. Alternatively, they argue that

even if Ecology has the discretionary authority to impose these requirements, it has acted arbitrarily or unreasonably in choosing to exercise its discretion in the manner reflected in Special Condition S.4.

PSA and the Utilities, on the other hand, argue that S.4.A and B are invalid because, when taken together with S.4.F, these permit conditions fail to achieve compliance with state water quality standards.

A fundamental legal question that lies at the heart of all of the parties' arguments is whether federal or state law requires, or may require, discharges from MS4s to comply with state water quality standards. The Board concludes that federal law does not, but that state law does require such compliance.

B. Federal regulation of municipal stormwater discharges

The Federal Clean Water Act (FCWA) was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under the FCWA it is unlawful to discharge any pollutant to navigable waters of the United States unless the discharge is in compliance with an NPDES permit. 33 U.S.C. §§ 1311 and 1342.

The FCWA established the NPDES permit program which authorizes EPA, or approved states, to issue permits which allow discharges, subject to permit conditions. 33 U.S.C. §1342(a). First, the permit conditions must require the application of the best practicable control technology currently available to achieve effluent limitations. 33 U.S.C. §1311(b)(1)(A).

Second, the conditions must require the permit-holder to meet effluent limitations that will ensure compliance with state water quality standards. 33 U.S.C. §1311 (b)(1)(C).

Prior to 1987, there was much controversy over whether municipalities were subject to NPDES permitting requirements under federal law. See e.g., *Natural Resources Defense Council v. Costle*, 568 F. 2d 1369, 1374-1377 (D.C. Cir. 1977)(invalidating EPA regulation exempting MS4 discharges from NPDES). This controversy was resolved in 1987 when Congress enacted the Water Quality Act amendments to the FCWA. Pub. L. No. 100-4, 101 Stat. 7 (1987)(codified throughout 33 U.S.C.). At the core of the 1987 amendments was 33 U.S.C. §1342 (p)(3), which resolved the question of whether municipal storm sewer systems required NPDES permits and established the federal standards for municipal stormwater discharges. That section provides as follows:

> Permits for discharges from municipal storm sewers . . .shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.
>
> 33 U.S.C. §1342(p)(3)(B)(iii).

This provision required a NPDES permit for municipal storm sewer discharges and directed that municipal stormwater dischargers must reduce the discharge of pollutants "to the maximum extent practicable," which was a lesser standard than had previously been in federal law for all other industrial or other stormwater dischargers. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1166 (9th Cir. 1999) *amended by 197 F.3d 1035 (9th Cir. 1999).* However, with this new standard, the law also created a second controversy: whether such discharges must

comply with state water quality standards. The Ninth Circuit directly addressed this issue in the *Browner* decision. The court first determined that "the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C) [state effluent limitations, including those necessary to meet water quality standards]. *Browner*, 191 F.3d at 1164. The Browner court, nevertheless, held that 33 U.S.C.§1342 (p)(3)(B)(iii) authorizes the EPA [or a state with delegated NPDES permitting authority] to require municipal stormsewer discharges to comply strictly with water quality standards even though it does not require that it do so. The *Browner* court concluded that while EPA had the authority to determine that strict compliance with water quality standards was necessary to control pollutants, it also had the authority to require less than strict compliance, and had done so through an interim regulatory approach in the first round of municipal stormwater permitting. That interim approach was one of using "best management practices" (BMPs) to provide for the attainment of water quality standards. *Browner* at 1166.

PSA and PSE argue that EPA, through its policy and rulemaking process, has exercised its discretion under 33 U.S.C. §1342 (p)(3)(B)(iii) to require all discharges from municipal stormwater systems to now comply with state water quality standards.[4] PSA and PSE fail to cite any federal Phase I or Phase II rule, however, that explicitly requires compliance with state water

[4] The National Association of Clean Water Agencies and the National Association of Flood and Stormwater Management Agencies (the Amici) argue in their amicus brief that the discretion provided in the last clause of 33 U.S.C.§1342 (p)(3)(B)(iii) is limited by the "maximum extent practicable" (MEP) standard in the first clause of that same provision. Since the Board concludes that the EPA has not in fact exercised its discretion to require compliance with state water quality standards, and since Washington state has the authority under other provisions of the FCWA to authorize requirements related to water quality that are more stringent than federal law, the Board does not need to decide whether EPA's discretion is limited by the "MEP" standard to decide the issues before it in this motion. *See* 33 U.S.C. § 1370.

quality standards. Instead, they focus on a 1991 Opinion from EPA's Office of General Counsel, an interim permitting policy document that expressly applies only to EPA, and guidance to that same policy document. They also argue that strict compliance is required because the rules themselves do not carve out an exception to EPA's general requirements that all NPDES permits must ensure compliance with water quality standards. *See Hasselman Decl., Ex. 13* (EPA General Counsel, Jan. 9, 1991); U.S.EPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (Aug. 26, 1996); *Hasselman Decl., Ex. Q* ,U.S. EPA, *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water permits*, 61 Fed. Reg. 57425, 57426 (Nov. 6, 1996); 40 C.F.R. § 122.44(d) (prohibiting issuance of a NPDES permit "when imposition of conditions cannot ensure compliance with the applicable water quality requirements of affected states.")

In light of the language of 33 U.S.C. §1342(p)(3)(B)(iii) and its interpretation by the Ninth Circuit Court of Appeals in *Browner*, the Board concludes that the EPA has not clearly expressed an intent to require MS4s to comply with state water quality standards. In any event, we conclude the question of whether compliance with Washington's state water quality standards is required is answered by reference to state law.

C. <u>State regulation of MS4s</u>

1. State WPCA

Washington State's Water Pollution Control Act, Ch. 90.48 RCW (WPCA), originally promulgated in 1945, expresses a strong intent by Washington State to protect the quality of its

waters. Laws 1945, ch. 216. In RCW 90.48.010, the Legislature makes the following statement of policy:

> It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.

The WPCA has been the vehicle through which Washington has implemented the requirements of the FCWA. RCW 90.48.260, RCW 90.48.262(1). Under FCWA, the federal regulatory structure creates the minimum level of requirements for regulation of water quality; however states may authorize requirements related to water quality that are more stringent than federal law. 33 U.S.C. § 1370. Since the Board has concluded that the FCWA requires municipalities to "reduce the discharge of pollutants to the maximum extent practicable," and authorizes, but does not require, either the EPA or the states to require compliance with state water quality standards, the question presented by these motions becomes whether the state has, through its laws, demonstrated an intent to go beyond the minimum requirements of federal law and require compliance with state water quality standards. The Board concludes that it has.

The statutory provisions pertaining to the state waste disposal permit requirements are scattered throughout Ch. 90.48 RCW, including RCW 90.48.160 through .200, and 90.48.520. RCW 90.48.180 directs that Ecology shall issue a permit unless it finds:

> that the disposal of waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010.

RCW 90.48.520 states that:

> In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant's wastewater. . . . In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.

The Legislature has also given broad authority to Ecology to promulgate rules:

> relating to standards of quality for waters of the state and for substances discharged therein in order to maintain the highest possible standards of all water of the state in accordance with the public policy as declare in RCW 90.48.010.

RCW 90.48.035. Pursuant to this authority, Ecology has adopted the state water quality standards. See WAC Ch. 173-201A (Water quality standards for surface waters,). WAC 173-201A-510 (1) states:

> The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste discharge permits, as provided for in RCW 90.48.160, 90.48.162 and 90.48.260. Waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, must be conditioned so the discharges authorized will meet the water quality standards. No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria, except as provided for in this chapter.

The Waste Discharge General Permit Program mirrors these requirements, stating, "No pollutants shall be discharged to waters of the state from any point source, except as authorized by an individual permit…or as authorized through coverage under a general permit. WAC 173-226-020. General permits issued by Ecology are to ensure compliance with AKART, water

quality-based effluent limitations, and any more stringent limitations or requirements, including those necessary to meet water quality standards. WAC 173-226-070.

The Board has previously addressed the extent to which stormwater discharges must meet water quality standards in several general permit appeals. In 2007, the Board held that both the FCWA *and Ch. 90.48 RCW* required Ecology to impose more specific discharge conditions to achieve water quality standards when the permit's adaptive management approach (benchmarks and BMPs) failed to do so. *PSA v. NWMTA*, PCHB Nos. 05-150, 05-151, 06-034, 06-040, CL 27 (2007). Later that same year, the Board concluded that state waste discharge permitting laws require construction stormwater discharges to achieve compliance with state water quality laws. *Associated General Contractors of Washington v. Ecology*, PCHB No. 05-157, 05-158, 05-159, CL 4 (2007)(citing RCW 90.48.080). The 2002 version of the Industrial Stormwater General Permit required compliance with water quality standards. *PSA v. Ecology*, PCHB Nos. 02-162, 02-163, 02-164 P-II ((2003). In its review of that permit, the Board relied on both the CWA and the state WPCA to invalidate permit conditions that allowed noncompliance with the state's water quality standards for pollutants discharged at locations on the FCWA 303(d) list of impaired water bodies. Each of these cases involved industrial or construction discharges, not municipal discharges, leaving open the question of whether state law sets a different standard for municipal discharges, or in some manner limits the responsibility of municipalities to comply with water quality standards. The Board concludes that if the state waste discharge permitting standards apply to MS4s, compliance with state water quality standards is required of municipal dischargers. The issue currently before the Board, then, is whether the state has chosen to treat

discharges from MS4s differently than other waste discharges, or whether the state waste permitting scheme applies to these discharges.

2. Does WPCA apply to discharges from MS4s?

The parties point to RCW 90.48.160, .162 and .180 to establish that the state waste disposal permit requirements are intended (or not intended) to apply to municipal storm sewer systems. These provisions contain various terms and phrases called out by the parties on all sides as either support for, or opposition to, the proposition that the legislature intended that MS4s are subject to the state waste discharge permitting standards. See *e.g*. RCW 90.48.160 ("Any person who conducts a commercial or industrial operation . . . which results in the disposal of solid or liquid waste material. . ."); RCW 90.48.162 (Any county or any municipal . . .corporation operating . . . a sewerage system, including any system which collects only domestic sewerage, which results in the disposal of waste material . .); RCW 90.48.180 ("The department shall issue a permit unless it finds that the disposal of waste material . . . will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010.")

As pointed out by the permittees, all of these provisions predated the 1987 amendments to the FCWA which added 33 U.S.C. §1342 (p)(3), the provision expressly addressing discharges from MS4s, and some even predated the 1972 FCWA itself. *See* RCW 90.48.160, 180 (originally enacted in 1955, 1955 c 71, §§ 1, 3); RCW 90.48.162 (originally enacted in 1972, 1972 ex.s.c 140§ 1). The permittees argue, based on the timing of enactment that the Washington Legislature could not have intended these statutes to apply to discharges from MS4s because they pre-dated regulation of municipal stormwater discharges on the federal level.

Ecology responds that the Washington Legislature's lack of response to the amendment of the FCWA specifically addressing MS4s, which occurred more than 20 years ago, means that the Legislature did not think existing statutes that regulate the discharge of waste material into waters of the state needed to be amended to establish separate rules for discharges from MS4s. Instead, Ecology argues that the Washington Legislature's inaction indicates that the Legislature believes existing laws establish the appropriate legal standards for regulating all discharges of waste materials into waters of the state, including the waste materials discharged by MS4s. In interpreting a statute, the courts give great weight to the construction placed upon it by officials responsible for its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period of time. *In re Sehome Park Center v. Washington*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

The one statutory provision contained in the WPCA adopted closest in time to 33 U.S.C. §1342 (p)(3), is RCW 90.48.520. It is this provision Ecology references in the permit as specific support for Condition S.4.A.

RCW 90.48.520 states:

> **90.48.520. Review of operations before issuance or renewal of wastewater discharge permits--Incorporation of permit conditions**
> In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant's wastewater. . . . Such conditions shall be required regardless of the quality of receiving water and regardless of the minimum water quality standards. In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.

The permittees make much of the fact that the Legislature used the word "wastewater," and they argue that based on a dictionary definition of the term, wastewater is different than stormwater. Ecology responds by focusing on the last sentence of this provision, which refers to all discharges without limitation by the word wastewater; by arguing that wastewater includes stormwater; and by pointing out that the Legislature must have been using the term wastewater broadly, since as a technical matter there are no state or federal "wastewater" discharge permits.[5]

The parties then turn to a review of the Legislative history of the bill, which they provide for the Board if the Board concludes RCW 90.48.520 is ambiguous. There is an extensive amount of legislative history pertaining to RCW 90.48.520. *See Potter Decl, Exs. 1- 7*. This history reveals that RCW 90.48.520 arose out of an effort by the Legislature to address standards for industrial wastewater that is discharged into sewage treatment plants and to address the separation of sewage and stormwater transport systems. Washington Laws, 1985, Ch. 249, Sections 1 and 2. During this same time period (1985 through 1987), the Puget Sound Water Quality Authority[6] published their 1987 Puget Sound Water Quality Management Plan (Plan), which focused on the need to effectively control contaminants from multiple pollutant sources in order to protect Puget Sound. This Plan is referenced in the Senate Bill Report for ESHB 499,

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[5] Federal permits under FCWA regulate the discharge of "pollutants" and are referred to as "national pollutant discharge elimination system permits." 13 U.S.C. §1311, 1342. State permits regulate the discharge of "waste materials" and are referred to as "state waste discharge permits". RCW 90.48.160.

[6] The Puget Sound Water Quality Authority (PSWQA) was a planning body originally established by the Legislature in 1983 to develop a comprehensive plan to identify actions to restore and protect the biological health and diversity of Puget Sound. RCW 90.71.005, *Potter Decl., Ex. 5A, p. 1-1*. It was charged with developing, adopting and overseeing the implementation of the Puget Sound Water Quality Management Plan. RCW 90.71.020(2)(a). PSWQA was eventually replaced with the Puget Sound Action Team, which in turn, has been replaced with the Puget Sound Partnership. See RCW 90.71.210.

the Bill that eventually became RCW 90.48.520. *See Potter Decl., Ex. 4*. The Plan addresses urban stormwater runoff in several places. A key reference from the Water Quality Plan, cited by Ecology in its brief, states:

> Although urban runoff has traditionally been considered a nonpoint source, as a result of a lawsuit brought by the National Resources Defense Council against EPA in 1976, urban runoff is now coming to be considered a pointsource. Pursuant to the results of the lawsuit, revised EPA regulations require dischargers of urban runoff to apply for an NPDES permit by December 31, 1987.

Potter Decl., Ex. 5A, at 4-11.

This reference reflects that RCW 90.48.520 was debated and adopted at a time when the status of discharges from MS4s under federal law had recently been clarified as point source discharges subject to NPDES permitting.

From all of the material presented to the Board regarding the scope of the WPCA, the Board finds most persuasive that the WPCA, unlike the FCWA, makes no distinction between municipal stormwater, other types of stormwater, and other types of polluted discharges. To reach the conclusion advocated for by the municipalities, that MS4 discharges are not covered under the WPCA, the Board must conclude that none of the general WPCA statutes apply to any stormwater discharges—industrial, construction, or municipal.[7] This interpretation is not consistent with the Board's past precedent, nor with the regulatory efforts of Ecology to place increasingly more stringent requirements on stormwater management in each of these sectors

[7]In 2004, the Legislature passed legislation aimed specifically at the requirements for construction and stormwater general permits. *See* Laws of 2004 c 225, codified in part at RCW 90.48.555, .560, and .565. However, the use of general permits to regulate discharges of both industrial and construction stormwater predated this 2004 enactment, and was based on both state waste discharge laws and the FCWA. See Laws of 2004 c 225 (4) ("The legislature finds the department of ecology has been using general permits to permit categories of similar dischargers, including stormwater associated with industrial and construction activities.")

through general permits, many of which have been reviewed by this Board. *See, for example, Puget Soundkeeper Alliance and Northwest Marine Trade Association v. Ecology*, PCHB Nos. 05-150, 05-151, 06-034, & 06-040 (2007) (Findings of Fact, Conclusions of Law, and Order) (discussing the regulatory history of boatyards.)

Ecology's longstanding interpretation, expressed through its water quality regulations, its past permitting decisions, and the position it has taken in the current permits is that <u>all</u> waste discharge permits, federal or otherwise, must be conditioned so the discharges authorized will meet water quality standards. WAC 173-201A-510(1); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 603, 90 P.3d 659 (2004). The first MS4 permits issued by Ecology in 1995 acknowledge the application of the state water quality standards to the permit, and the use of the compliance schedule exception to address the anticipated violations of those standards by MS4 discharges under the permit. *See Terry Decl., Ex. E.* (see generally, the Compliance with Standards Section of the submitted permits.). The current permits, Special Conditions S.4. A and B, state that discharges of toxicants to waters which would violate water quality standards are prohibited, and that the permit does not authorize violation of Washington State surface water quality standards. All of these actions reflect Ecology's interpretation that MS4 discharges are subject to the same requirements as any other stormwater discharge. This interpretation, coming from the agency charged with administering the WPCA and the state water quality standards, is entitled to great weight. *Port of Seattle, at 593-594.*

Ecology's actions are significant in two ways: First, stated above, they indicate Ecology's interpretation, which is entitled to weight. Second, in the face of these actions by Ecology to include

discharges from MS4s under the WPCA, the Legislature appears to have acquiesced in Ecology's interpretation of RCW 90.48.520, which is that this statute did not need to be amended to establish separate rules for discharges from MS4s. Although it is a rule of statutory construction that absent evidence of the Legislature's knowledge of an administrative interpretation, legislative inaction does not indicate acquiescence in the interpretation, *Department of Labor and Industries v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991), the Legislature's knowledge of Ecology's interpretation of this statute can be reasonably inferred. The Legislature adopted RCW 90.48.555 and other sections pertaining to stormwater discharges during the 2004 legislative session. The Legislature's adoption of this legislation in 2004 would necessarily make it aware of Ecology's general approach in regulating stormwater discharges. As stated earlier, to conclude that MS4 discharges are not covered under the WPCA, it is necessary to conclude that none of the general WPCA statutes apply to any stormwater discharges. The Legislature did not deem it necessary to amend RCW 90.48.520 or otherwise enact explicit statutory authority for Ecology to regulate stormwater discharges during the 2004 session. The Legislature's lack of action during that time, or since, can reasonably be construed as acquiescence in Ecology's interpretation. Therefore, the Board concludes that the WPCA does apply to discharges from MS4s, and prohibits discharges that violate water quality. RCW 90.48.160, .162, .180 and .520.

3. RCW 94.54.020(3)(b)

A final piece of the state statutory scheme cited by the parties is RCW 90.54.020(3)(b), the state's antidegradation policy. *Port of Seattle*, at 590. This statutory provision, which was

adopted as part of the state Water Resources Act of 1971, identifies water quality as a fundamental goal in utilizing and managing the state's waters. RCW 90.54.020(3)(b). It states:

> Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

Permittees argue[8] against application of this statute to discharges from MS4s, asserting that it is a general statement of policy, not a permitting statute, and that <u>all</u> it requires is treatment of discharges with all known and reasonable treatments (AKART). This argument ignores the second sentence of the provision which prohibits discharges that will reduce existing water quality even if they do comply with water quality standards. Thus, the antidegradation policy actually requires more than compliance with water quality: It requires no reduction of existing quality absent overriding considerations.

Permittees' second argument is that even if a discharge from an MS4 impairs water quality, it does not violate the statute because MS4 permits meet the public interest exception allowed by RCW 90.54.020(3)(b). Ecology responds, stating that WAC 173-201A-320(4) sets out the actual process for meeting the "overriding public interest" exception, and that process has not been followed here. Ecology contends that this provision calls for the applicant to make a request for a determination of public interest and submit information to Ecology as required by

[8] Permittees also make the same type of timing argument in relation to this statutory provision that they did in relation to the WPCA provisions. Permittees' response brief to PSA and Ecology at 22. For the same reasons stated with regard to the WPCA provisions timing argument, the Board rejects the argument here.

the rule, and then Ecology will make a determination. Ecology states that there has never been a request from the permittees to start this process. The Board agrees with Ecology that, absent an initial determination by Ecology, this argument is not ripe for review.

A comprehensive reading of WCPA, along with the state's antidegradation statute, and a review of Ecology's rulemaking in response to this legislative direction, leads the Board to the conclusion that state law does not treat municipal stormwater any differently than any other stormwater discharges to state waters. Other permitted discharges must comply with state water quality standards, and so must permitted discharges from MS4s.

Even if we were to read state law in a more limited fashion, we would still conclude, alternatively, that Ecology has more than ample discretion to require compliance with water quality standards. As the concurrence so well states, this discretion is well-based in the provisions of the FCWA that allow states to enforce more stringent standards for the discharge of pollutants, as well as those specific provisions of state law that provide Ecology broad authority to administer the permit program intended to eliminate pollution from state waters. *33 U.S.C. §. 1370; RCW 90.48.260.* Ecology has imposed such standards through both the regulations cited above, and the terms of this general permit.

That the Board reads these provisions of state law to require municipalities to comply with water quality standards, does not mean that Ecology lacks discretion to define the manner, method and timing for requiring compliance with these standards. To the contrary, Ecology has considerable leeway in defining permit terms that will effect compliance over the short and long-term, discretion to fashion enforcement methods, ability to define the manner in which

compliance schedules should be utilized, and powers to define, through permit terms, the ongoing iterative process necessary to achieve ultimate compliance with water quality standards. In *Waste Action Project v. Ecology*, PCHB No. 97-69 (1997) (Order Granting Summary Judgment), the Board upheld Ecology's issuance of a new NPDES permit to Foss Maritime Company for its stormwater discharges. Ecology determined that previous effluent standards were unattainable with the requisite BMPs, so it suspended the effluent limits for certain metals and allowed a compliance schedule to determine and implement AKART. The Board found that this did not violate the anti-backsliding provisions governing NPDES permits or the state's antidegradation policy. In a challenge to the NPDES permit issued to the Port of Seattle for stormwater discharges associated with SeaTac Airport, the Board upheld the permit over the allegation that the permit impermissibly failed to require more stringent limitations necessary to assure stormwater discharges met water quality standards. *Port of Seattle v. Ecology*, PCHB Nos. 03-140, 03-141, 03-142 (2004) (Findings of Fact, Conclusions of Law, and Order). The Board noted the meaningful efforts underway to obtain information regarding the sources of copper and zinc runoff, Ecology's requirement in the permit for a receiving water study, and the permit's requirement for the Port to use enhanced BMPs as needed once the necessary information became available. Division I of the Court of Appeals recognized the discretion of Ecology to administer the NPDES discharge permit program, and stated that "the statutory scheme envisions that effluent limitations will decrease as technology advances." *Puget Soundkeeper Alliance v. State*, 102 Wn. App. 783, 790-791, 9 P.3d 892 (2000). While Ecology must not allow an impermissible self-regulatory system, *Environmental Defense Center v.*

United States Environmental Protection Agency, 344 F. 3d 832, 854 - 856 (9th Cir. 2003), it can use the general permit regulatory process to define what will be considered adequate permit compliance, and what is adequate progress toward compliance with water quality standards. Whether the terms of this permit, and particularly Special Condition S4.F are an adequate or legally correct exercise of Ecology's discretion, is discussed below.

In light of this analysis, the Board concludes that both Condition S4.A and B are appropriate statements of state law, and therefore, appropriate permit standards and conditions. The second sentence of both of these provisions is the "link" to Condition S.4.F., the permit condition that sets out the required response to violations of the statements of state law set forth in S.4.A and B. All parties take issue with the operation of S.4.F, and to the manner in which it works in relation to expected violations. We next address this issue.

D. S.4.F

S.4.F sets out a notification and response process for what the permit labels "violations of water quality standards pursuant to S.4.A and/or S.4.B" Ecology refers to this notification and response process as "the compliance pathway." The parties raise two challenges to this process. The first challenge involves the proper characterization of an S.4.A or S.4.B event that triggers the S.4.F notification and response process. Are these events properly characterized as permit violations, or does a permit violation occur only if the permittee fails to follow the process outlined in S.4.F? Stated another way, is every discharge that is prohibited by S.4.A or not authorized by S.4.B a violation of the permit, even if the permittee responds as required by those provisions and fully complies with the S.4.F "compliance pathway?"

Concern about this question appears to be the driver behind much of this case. Municipalities are fearful that, under one reading of the permit language, they will be subject to citizen lawsuits for FCWA violations whenever a discharge that causes or contributes to a violation of water quality standards is reported. PSA and the utilities, on the other hand, are concerned that under a different reading of the same permit language, municipalities will be allowed to continually and indefinitely violate state water quality standards—but still be in compliance with their permits—so long as they notify Ecology and follow the "compliance pathway."

The permit on its face presents somewhat contradictory language on this point. *See* S.4.A and B ("The required response to *such violations* is defined in section S.4.F. below." Emphasis added); S.4.F.2.e. ("Provided the Permittee is implementing the approved BMPs, pursuant to the approved schedule, the Permittee is not required to further modify the BMPs or implementation schedule unless directed to do so by Ecology.")

The second challenge raised by the parties involves both procedural and substantive requirements of S.4.F. Disputes exist regarding the reasonableness of the timeframes, the sufficiency of the standards to ensure ultimate compliance with water quality standards, and the legal implications for permittees that fully comply with the S.4.F process but continue to have discharges that cause or contribute to violations of state water quality standards. *See* S.4.F.2.e.

The Board declines to address the issues surrounding the validity of Special Condition S.4.F on summary judgment. While in the end some of these issues may be questions of law, the Board hesitates to address them without a more complete understanding of the intended meaning

and operation of S.4.F. Answering the many questions involving interpretation of S.4.F clearly requires factual testimony.

E. S.4 Issue 6

S.4 Issue 6 questions whether the prohibition on violations of water quality standards contained in Special Condition S.4 unlawfully or unreasonably conflict with the other provisions of the permit. This issue is based on a misstatement of the relationship between S.4 and the other conditions of the permits.

Condition S.4 establishes the legal standards that permittees must meet and establishes a process for permittees to use to come into compliance with those standards. The purpose of the Board's review of S.4.A and B is to first determine whether the legal standards they express are correct (we conclude that they are), and whether S.4.F establishes an appropriate compliance mechanism (the Board has deferred this issue to factual hearing). If other provisions of the permit conflict with the legal standards established in Condition S.4 (and affirmed by the Board), it is these provisions that must be modified, not Condition S.4. Thus Issue 6 is really a challenge to other unnamed provisions of the Phase I permit, and not to Condition S.4. For that reason, Issue 6 is more appropriately left to the Phase I and Phase II hearings.

The issues statements for both the Phase I and Phase II permit appeals already contain issues that capture PSA's contention that the permit provisions will not achieve compliance with water quality standards. *See Phase I Third Pre-hearing Order, issue F.4 and Phase II Third Pre-hearing Order, issue 16a*. Therefore, the Board defers consideration of S.4 Issue 6 until we consider Phase I, Issue F.4 and Phase II, Issue 16a.

Based on the foregoing analysis, the Board enters the following:

ORDER

Summary Judgment on S.4 Issue 1 is granted in favor of Ecology to the extent we conclude Ecology has the legal authority to include requirements beyond MEP in Special Condition S.4 of the Permit.

The Board does not grant summary judgment to any party on S.4 Issues 2 through 5, and 7, and instead directs that these issues proceed to hearing. The Board requests factual testimony on the process and operation of S.4.F.

Ruling on S.4 Issue 6 is deferred to the permit specific Phase I and Phase II hearings. *See* Phase I Issue F.4 and Phase II, Issue 16a.

SO ORDERED this 2nd day of April 2008.

POLLUTION CONTROL HEARINGS BOARD

Kathleen D. Mix, Chair

William H. Lynch, Member

Andrea McNamara Doyle, Member

Kay M. Brown, Presiding
Administrative Appeals Judge

CONCURRING OPINION

I write separately because I am not persuaded that Ecology had a "non-discretionary obligation" to include RCW 90.48.520 as a condition of these permits (as Ecology states in the permit fact sheets), or that discharges from MS4s are necessarily "subject to the same requirements as any other stormwater discharge" (as my colleagues conclude in the majority). That being said, I concur in the result reached by the majority because I find Ecology has the discretionary authority to include Special Conditions S.4.A and S.4.B as permit requirements, subject to our review of the reasonableness of the exercise of that discretion.

In administering the NPDES program, Washington State has the authority under the FCWA to adopt and enforce more stringent requirements related to water quality than the federal law provides. *33 U.S.C. § 1370.* This section provides:

> *Except as expressly provided in this chapter*, nothing in this chapter shall (1) preclude or deny the right of any State … to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance is in effect under this chapter, such State … may not adopt or enforce any …[limitation, prohibition, or standard] which is less stringent… 33 U.S.C §1370 (emphasis added).

The State, acting through both the Legislature and Ecology, has done so on many occasions through enactment of numerous statutory and regulatory provisions, including several of the provisions discussed at length by the majority.[9] Ecology has explicitly incorporated some of

[9] The Legislature has designated Ecology the state's water pollution control agency for all purposes of the FCWA, and has granted it "complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program…" RCW 90.48.260.

these requirements into the municipal stormwater permits at issue here, most notably the prohibition in RCW 90.48.520, and the parties have identified nothing in federal or state law that *expressly* precludes it from doing so.

The National Association of Clean Water Agencies and the National Association of Flood and Stormwater Management Agencies (the Amici) urge us to find that the discretion to apply "such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants" provided in the CWA § 402 (p)(3)(B)(iii) is necessarily limited to those other provisions that are "practicable" within the MEP standard contained in the preceding clause of that subsection. *Amici brief at 9*. This argument fails to address the FCWA's overarching approach to water quality regulation that allows states to regulate water quality more stringently than the federal minimums established by the Act. Under this framework, § 402 (p)(3)(B)(iii) does not amount to an express proscription or denial of the state's right to adopt or enforce more stringent standards or prohibitions than Congress enacted for municipal storm sewer systems in 1987.

An equally plausible reading of this subsection, and one that is more consistent with the broad reservation of authority in 33 U.S.C. §1370, is as an expression of Congressional intent to preserve EPA's and the States' discretion to require more than the what is spelled out in § 402 (p)(3)(B) when they determine it is "appropriate" for the control of pollution. In evaluating the appropriateness of additional requirements, practicability is an obviously relevant consideration

given the context in which this provision appears, but there is no indication that Congress intended to make that the only consideration.

In the end, this analysis leads in the same direction and reaches nearly the same conclusion as was reached by the majority: Ecology has the legal authority to include Special Conditions S.4.A and S.4.B, provided its decision to do so was an appropriate exercise of discretion in this case.

Under either approach, key to the Board's decision about the validity of Special Condition S.4 is the relationship between S.4.A and .B to the process outlined in S.4.F, by which permittees and Ecology will respond to discharges that are otherwise prohibited by RCW 90.48.520 or that amount to unauthorized violations of state surface and groundwater quality standards, sediment management standards, or national Toxics Rule human-health based criteria. Whether every MS4 discharge that is prohibited by S.4.A or not authorized by S.4.B is intended to be a *per se* permit violation, or whether it is the *response* to such discharges that is intended to be determinative of a permit compliance will influence the ultimate judgment about the condition's validity.

I agree with my colleagues that the permits themselves are unclear on this point, but would find the former reading unreasonable in light of the fact that most if not all permittees <u>will</u> have intermittent or ongoing discharges that are prohibited or not authorized by S.4.A and B

during this life of these permits. *Decl. of Fendt, at ¶ 18*[10], *Decl. of Wisdom, at ¶ 14,*[11] *Potter Decl., Ex. 8; Moore Dep., pp. 79:19 - 80:5.*[12] Reading Conditions S.4.A and S.4.B as triggering *per se* permit violations also contradicts the direction Ecology reported to the Legislature that it intended to take in these permits. *Municipal Stormwater NPDES Permit Program Report to the Legislature, January 2004, at 9* ("Direction – Compliance and Compliance Measures: Ecology has made the following decisions: Permit compliance will be based on actions, not outcomes…") *(Terry Decl., Ex. Z).*

While I would find Condition S.4 unreasonable as a matter of law if it triggers *per se* permit violations, I also agree with my colleagues that this issue is not suitable to summary judgment since the facts and circumstances surrounding the intent and operation of the Permits' "compliance pathway" require further development, which should be done at hearing.

Andrea McNamara Doyle, Member

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[10] "In my opinion, requiring municipalities to meet water quality standards at all time[s], for all storms, at all places imposes an unreasonable and impracticable permit condition because permittees are unlikely to be able to predict how to comply or to demonstrate consistent compliance with water quality standards."

[11] "[I]t is my professional opinion that discharges from municipal separate storm water sewer systems cannot consistently meet water quality standards and will not be able to do so for decades."

[12] "Q: Do you think it is possible for permittees to comply with water quality standards? A: In the short term, I don't think it's possible. Certainly in this five year permit cycle for which we are writing these permits, no."