Pollution Control Hearings Board
Shorelines Hearings Board
Forest Practices Appeals Board
Hydraulic Appeals Board
Environmental and Land Use Hearings Board

Telephone: (360) 459-6327
FAX: (360) 438-7699
Email: eho@eho.wa.gov
Website: www.eho.wa.gov

RECEIVED
AUG 0 9 2007
ATTORNEY GENERAL'S OFFICE
Ecology Division

STATE OF WASHINGTON

ENVIRONMENTAL HEARINGS OFFICE

Mailing Address: PO Box 40903, Olympia, WA 98504-0903
Physical Address: 4224 - 6th Ave. SE, Bldg. 2, RoweSix, Lacey, WA 98504-0903

August 8, 2007

Jan Hasselman
Todd True
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle WA 98104
and
Richard A. Smith
SMITH & LOWNEY, PLLC
2317 East John Street
Seattle WA 98112
(PCHB 07-021)

Doug Mosich
Assistant City Attorney
City of Tacoma
717 Market Street Rm. 1120
Tacoma WA 98402-3767
PCHB 07-027)

Catherine Drews & Elizabeth Anderson
Deputy Prosecuting Attorneys
Snohomish County
3000 Rockefeller Avenue M/S 504
Everett WA 98201-4046
(PCHB 07-029)

Steven C. Guyer
MidAmerican Energy Holdings Co.
4299 N W Urbandale Drive
Urbandale IA 50322
and
Loren R. Dunn
RIDDELL WILLIAM
1001 Fourth Avenue Suite 4500
Seattle WA 98154
(PCHB 07-037)

Carolyn Lake
Goodstein Law Firm
1001 Pacific Ave #400
Tacoma WA 98402-4440

Ronald L. Lavigne & Thomas J.Young
Assistant Attorneys General
Department of Ecology
PO Box 40117
Olympia WA 98504-0117

Tad H. Shimazu & Timothy Jones
WILLIAMS KASTNER & GIBBS
601 Union Street, Suite 4100
Seattle WA 98101
(PCHB 07-026)

Susan Ridgley, Sr. Port Counsel
Port of Seattle
2711 Alaskan Way, Pier 69
PO Box 1209
Seattle WA 98111
and
Stephen J. Tan & Tanya Barnett
CASCADIA LAW GROUP
1201 Third Avenue, Suite 320
Seattle WA 98101
(PCHB 07-028)

E. Bronson Potter
Sr. Deputy Prosecuting Attorney
Clark County
1013 Franklin
PO Box 5000
Vancouver WA 98666-5000
(PCHB 07-030)

Stephen Klasinski
Assistant Attorney General
Department of Transportation
PO Box 40113
Olympia WA 98504-0113

RE: APPEALS OF PHASE I MUNICIPAL STORMWATER PERMIT

Dear Parties:

Enclosed please find the Pre-Hearing Order from the conference held on March 16, 2007. Please review the order carefully in order to understand the details of what the process requires.

For ease of reference, the key deadlines are as follows:

1. **Motions**: File motions on any issue that would be dispositive on or before **October 14, 2007.** Opposing parties shall file a response 14 days from the date received. The Reply must be made within 10 days from receipt of the response.
2. **Discovery**: Discovery should be complete by **December 14, 2007**.
3. **Joint Status Report** shall be filed by **January 11, 2008**.
4. **Witness and Exhibit Lists**: Final witness lists by **January 4**, and Final exhibit lists by **January 22, 2008.**
5. **Briefs**: Pre-Hearing Briefs shall be filed by **February 4, 2008.**
6. **Hearing**: The hearing dates are set for **February 11-29, 2008.**

Also enclosed is an Order of Consolidation and Order on Intervention.

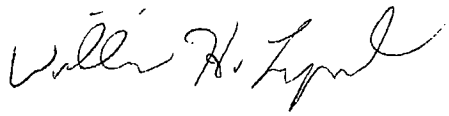
The presiding officer has not made any determination regarding the division of time between the parties or whether to use direct written testimony by experts. The parties should communicate their thoughts about the use of prefiled testimony by experts after they have had a chance to do further discovery.

The presiding officer made some small changes to the proposed legal issues. In particular, broad catch-all language was deleted with the understanding that the parties can amend the legal issues upon good cause.

If there are concerns with the timelines proposed in these orders, please contact the presiding officer to discuss possible revisions to the schedule.

If you have questions, please do not hesitate to call.

Sincerely yours,



William H. Lynch, Presiding

WHL/jg/Phase I
Cc: Bill Moore, Ecology
Kathleen Emmett, Ecology

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 8, 2007 at Lacey, WA.

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

RECEIVED
AUG 0 9 2007
ATTORNEY GENERAL'S OFFICE
Ecology Division

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, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Intervenors.	PCHB NOS. 07-021, 07-026, 07-027 07-028, 07-029, 0-030, 07-037 ORDER ON CONSOLIDATION (PHASE I MUNICIPAL STORMWATER PERMIT)

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

Separate appeals were filed challenging various provisions of the permit. Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-021), City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County (PCHB No. 07-029), Clark County (PCHB No. 0-030), and PacifiCorp and Puget Sound Energy (PCHB No. 07-037) (collectively Phase I appeals). The Board granted Petitions to Intervene by King County, the City of Seattle, the Port of Tacoma, PacifiCorp and Puget Sound Energy, and the Washington State Department of Transportation.

It appears that the issues and the subject matter of these appeals are related, and it further appears that a consolidation of these appeals will expedite their disposition, avoid duplication of testimony and not prejudice the rights of the parties.

It also appears that Permit Special Condition S4, which is contained in both the Permit that is the subject of this appeal and in the Permits that are the subject of the Phase II appeals, should be consolidated between these two proceedings in order to avoid duplication of testimony and prevent potential prejudice to the rights of all parties to both proceedings. NOW THEREFORE

IT IS ORDERED that the above listed appeals are consolidated for hearing, and Permit Special Condition S4 is consolidated for hearing between the Phase I and Phase II appeals.

DATED this 8th day of August, 2007.

POLLUTION CONTROL HEARINGS BOARD

WILLIAM H. LYNCH, Presiding

RECEIVED
AUG 0 9 2007
ATTORNEY GENERAL'S OFFICE
Ecology Division

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, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Intervenors.	PCHB NOS. 07-021, 07-026, 07-027 07-028, 07-029, 0-030, 07-037 ORDER GRANTING MOTIONS TO INTERVENE (PHASE I MUNICIPAL STORMWATER PERMIT)

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

Separate appeals were filed challenging various provisions of the permit. Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-021), City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County (PCHB No. 07-029), Clark County (PCHB No. 0-030), and PacifiCorp and Puget Sound Energy (PCHB No. 07-037) (collectively Phase I appeals).

Petitions to Intervene were filed by King County, the City of Seattle, the Port of Tacoma, and PacifiCorp and Puget Sound Energy. These Petitions to Intervene were stipulated to by the other parties to the Phase I appeals. The Washington State Department of Transportation (DOT) filed a Petition to Intervene on the Phase I appeals, which was objected to by Puget Soundkeeper Alliance and People for Puget Sound (PSA).

PSA asserts that DOT's intervention is not appropriate in these appeals because DOT is not a regulated entity under this permit. PSA believes that DOT only has an indirect interest in this permit and if intervention is granted to DOT, other potential permit holders could also seek to intervene in these appeals.

DOT acknowledges it is not directly named as a permittee under this permit, but the development of this permit will substantially and directly shape the terms of its own permit that Ecology will issue to DOT. DOT contends that its interest in this permit are therefore substantial.

WAC 371-08-420 authorizes the presiding officer to "grant a petition for intervention by any person at any time, upon determining that the petitioner qualifies as an intervenor pursuant to

civil rule 24, that the intervention will serve the interests of justice and that the prompt and orderly conduct of the appeal will not be impaired."

CR 24 allows intervention, either as a matter of right, or on a discretionary basis. CR 24 sets forth the requirements as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
> (b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

This Board has previously noted Washington appellate courts have held that a trial court should disallow intervention only when it will unduly delay or prejudice the rights of the original parties. *City of West Richland v. Ecology*, PCHB No. 01-033 (Order Granting Motion to Intervene)(June 12, 2003)(citing *Wilson Sporting Goods v. Pedersen*, 76 Wn. App. 300, 303, (1994); and *Vashon Island Committee for Self Government v. Washington State Boundary Review Board for King County*, 127 Wn.2d 759, 765 (1995)).

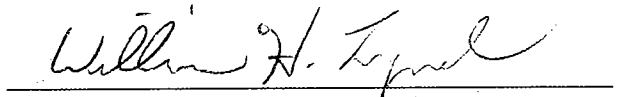
The Board believes that DOT, like the other parties petitioning for intervention, has a substantial interest in the terms of this permit. In order that the appeals may proceed in an

orderly fashion, Intervenors may not raise new legal issues distinct from those raised by Appellants, and evidence introduced must relate to matters directly at issue.

The request to intervene by King County, the City of Seattle, the Port of Tacoma, PacifiCorp and Puget Sound Energy, and the Washington State Department of Transportation is hereby GRANTED pursuant to WAC 361-08-420 and CR 24(b).

DONE this 8th day of August, 2007.

POLLUTION CONTROL HEARINGS BOARD



WILLIAM H. LYNCH, Presiding

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

RECEIVED
AUG 0 9 2007
ATTORNEY GENERAL'S OFFICE
Ecology Division

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, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Intervenors.	PCHB NOS. 07-021, 07-026, 07-027 07-028, 07-029, 0-030, 07-037 PRE-HEARING ORDER (PHASE I MUNICIPAL STORMWATER PERMIT)

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

Separate appeals were filed challenging various provisions of the permit. Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-021), City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County (PCHB No. 07-029), Clark County (PCHB No. 0-030), and PacifiCorp and Puget Sound Energy (PCHB No. 07-037) (collectively Phase I appeals). Petitions to Intervene were filed by King County, the City of Seattle, and the Port of Tacoma, whose interventions were stipulated to by the other parties to the Phase I appeals. The parties to the Phase I appeals also stipulated to a Petition to Intervene by PacifiCorp and Puget Sound Energy. The Washington State Department of Transportation (DOT) filed a Petition to Intervene on the Phase I appeals, which was objected to by Puget Soundkeeper Alliance and People for Puget Sound.

A pre-hearing conference on the Phase I appeals was held in person at the offices of the Pollution Control Hearings Board (Board) in Lacey, Washington, on March 16, 2007. Bill Lynch presided for the Board and orally granted the Petitions to Intervene on the Phase I appeals by King County, City of Seattle, Port of Tacoma, and PacifiCorp and Puget Sound Energy at the pre-hearing conference. The presiding officer reserved ruling on DOT's Petition to Intervene until after the pre-hearing conference in order to review the submitted material relevant to the petition. The presiding officer subsequently granted DOT's Petition to Intervene and this was communicated to the parties by telephone. The written order granting intervention to all the petitioners is attached to this Pre-Hearing Order. The presiding officer has consolidated all

Phase I appeals for hearing purposes, and the Order of Consolidation is also attached to this Pre-Hearing Order.

Appearances for the parties were as follows:

Appellants: Jan Hasselman, Todd True, and Richard A. Smith for Puget Soundkeeper Alliance and People for Puget Sound;
Tad H. Shimazu and Timothy Jones for Pierce County;
Douglas F. Mosich for City of Tacoma;
Susan M. Ridgley, Tanya Barnett, and Stephen J. Tan for Port of Seattle;
Catherine A. Drews and Elizabeth Anderson for Snohomish County;
E. Bronson Potter for Clark County;
Loren R. Dunn for Puget Sound Energy; and
Steven C. Guyer for PacifiCorp

Respondent: Thomas J. Young and Ronald L. Lavigne, Assistant Attorneys General for Ecology

Intervenors: Joseph B. Rochelle III for King County;
Theresa R. Wagner for City of Seattle;
Carolyn A. Lake for Port of Tacoma;
Loren R. Dunn for Puget Sound Energy;
Steven C. Guyer for PacifiCorp; and
Stephen Klasinski, Assistant Attorney General for DOT

Based on the conference, the following pre-hearing order is entered:

I. HEARING

The hearing has been tentatively set for **February 11 -29, 2008, commencing at 9:00 a.m.,** at the Board's offices in Lacey, Washington. If the parties believe that these dates are not prudent given the time needed for discovery, or if it appears that additional hearing days are needed because the issues were not previously formalized at the pre-hearing conference, the presiding officer will work with the parties to identify suitable dates for the hearing.

Please note that the presiding officer believes it is appropriate to consolidate the hearing of Phase I and Phase II as to the merits of Special Condition S4. It seems appropriate to schedule argument on this portion of the permits prior to the start of the Phase I hearing. It is not clear whether this can be done through the dispositive motion process or whether testimony is needed. The parties should make their recommendations to the presiding officer on this matter at their earliest possible convenience.

II. MEDIATION AND SETTLEMENT

Parties are encouraged to engage in mediation or settlement discussions with each other at any time without the presence of the presiding officer of the Board or with his or her presence if all parties and the presiding officer agree. If the parties wish to engage the services of an administrative appeals judge for mediation, they shall contact the presiding officer in writing at the Board's office.

The parties, through respondent's attorney, shall file with the Board a joint status report, setting forth settlement possibilities in the case, by **January 11, 2008.**

III. LEGAL ISSUES

The parties developed a list of proposed issues for the hearing, but there was some objection concerning the wording of some issues, as well as the inclusion of some issues. The presiding officer has reviewed the materials provided by the parties and has modified the proposed list of issues slightly to address some of the expressed concerns. This is discussed in

greater detail in the cover letter to the Pre-Hearing Order. The legal issues for the Phase I appeals as are follows:

A. Special Condition S4 (Compliance)

1. Whether Special Condition S4 is unlawful, unreasonable, unjust, and/or invalid because it requires permittees to comply with standards that are not legally required and/or are not otherwise reasonable, justifiable or supported by substantial evidence?
2. Whether Special Condition S4.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 S4.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 S4 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?

B. Special Condition S5 (SWMP)

1. Whether Special Conditions S5.C.1, S5.C.5, S5.C.7, S5.C8, and S5.C.9 unlawfully delegate to municipal permittees the authority specifically granted to Ecology by the federal Clean Water Act and the State Water Pollution Control Act to (a) inspect, surveil, and/or enforce the provisions of the Clean Water Act and the State Water Pollution Control Act against unpermitted stormwater dischargers; and/or (b) inspect, surveil, and/or enforce the provisions of the Clean Water Act and the State Water Pollution Control Act against stormwater dischargers that have been permitted by the Department of Ecology?
2. Whether Special Conditions S5.C.5, S5.C.7, and S5.C.8 unlawfully dictate that municipal permittees must adopt ordinances, establish legal authority to conduct specific functions, and/or perform specific regulatory functions for which Ecology is legally responsible, by requiring permittees to inspect privately owned stormwater facilities, prohibit illegal discharges and/or take enforcement actions at sites that are covered by stormwater permits issued by Ecology?

C. Special Condition S7 (TMDLs)

1. Whether Special Condition S7 and Appendix 2 are lawful, practicable, and reasonable because the provisions contain indefinite provisions and require Phase I permittees to implement TMDL requirements outside the jurisdiction of the Permit?
2. Whether Special Condition S7 and Appendix 2 unlawfully or unreasonably require all permittees to comply with applicable TMDLs?

D. Special Condition 8 (Monitoring)

1. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to achieve the goals of the statutory municipal stormwater permit program?
2. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to be consistent with generally accepted scientific, engineering and/or regulatory practices?
3. Whether the monitoring requirements imposed in Special Condition S8 are overly broad, overly prescriptive, and cost-ineffective so that requiring implementation of such requirements as written is unlawful, impracticable, and/or unreasonable?
4. Is Special Condition S8 invalid, unreasonable, or not reasonably practicable for municipal stormwater discharges as to:
    a. The criteria requirements for storm events, basin selection, sampling, and wet/dry season allocation, and related provisions of S8.D;
    b. Toxicity requirements of S8.D.2;
    c. The calendar year reporting requirements and related provisions of S8.D, E, F, and H?
5. Whether the toxicity testing requirement of Special Condition S8.D should be clarified or modified to indicate that it does not trigger an effluent limit or compliance monitoring and triggers only investigation as may be specified in the permit?
6. Whether Ecology's inclusion of Special Condition S8.D.2.d in the final Phase I Municipal Stormwater Permit violated the Administrative Procedures Act, chapter 34.05 RCW?

E. Economic Impact Analysis

1. Whether the permit was unlawfully issued because Ecology did not conduct an economic impact analysis of the permit's requirements and/or because the permit does not include a reasonable means of prioritizing and sequencing the numerous tasks required of municipalities with limited resources?

F. Issues Specific to the Ports of Seattle and Tacoma

1. Whether Special Conditions S3.A., S6.E.4, S6.E.5, S6.E6, and S6.E.7 are unlawful, unreasonable, unjust, or invalid to the extent that they impose on Ports requirements not imposed on other Secondary Permittees?
2. Whether Special Condition S6.C is unlawful, unreasonable, unjust, or invalid because it imposes requirements that unreasonably conflict with Secondary Permittees' other legal obligations, and/or fails to recognize limitations on the legal authority of Secondary Permittees?
3. Whether the minimum performance measures in Special Condition S6.E.3 that require that Ports "ensure" compliance with illicit discharge policies and that non-

stormwater discharges comply with requirements of a SWPPP reviewed by the Port, are unlawful, unreasonable, unjust, or invalid?

4. Whether the minimum performance measures in Special Condition S6.E.4 that require that within one year of the effective date of coverage Ports must comply with minimum technical requirements for new development and redevelopment contained in Appendix 1, are unlawful, unreasonable, unjust, or invalid?
5. Whether the requirement in Special Condition S6.E.7 to prepare and implement SWPPP(s) for "all Port-owned lands," regardless of their capacity to generate pollutants or other site-specific characteristics, is unlawful, unreasonable, unjust, or invalid?
6. Whether Special Condition S8 is unlawful, unreasonable, unjust, or invalid to the extent it imposes monitoring requirements on some but not all Phase I Permittees?
7. Whether Special Condition S9.D is unlawful, unreasonable, unjust, or invalid because it requires Permittees to make "all records related to this permit and the Permittee's SWMP", including those that may be privileged or otherwise exempt from disclosure, available for public inspection?

G. Joint Environmental Legal Issues

1. Low-Impact Development:
   a. Does the permit fail to require maximum onsite dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully cause or contribute to violations of water quality standards?
   b. Does the permit fail to require maximum onsite dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully allow permittees to discharge pollutants that have not been treated with all known available and reasonable methods of treatment ("AKART"), and/or fail to reduce the discharge of pollutants to the maximum extent practicable ("MEP")?

2. Existing Development:
   a. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully cause or contribute to violations of water quality standards?
   b. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully allow permittees to discharge pollutants that have not been treated with AKART, and/or fail to reduce the discharge of pollutants to MEP?

3. Monitoring: Is the monitoring required under Permit Condition S.8 unlawful because it is inadequate to determine whether: (i) the permittee is in compliance with water quality standards; (ii) discharges are causing or contributing to violations of water quality standards; or (iii) discharges are being treated with AKART and/or MEP?

4. Water Quality Standards Violations:
   a. Does the permit unlawfully exempt permittees that comply with the process established in Permit Condition S4.F from the requirement to ensure that discharges do not cause or contribute to violations of water quality standards?
   b. Does the process established in Permit Condition S4.F unlawfully fail to include standards and/or timelines necessary to ensure that discharges will comply with water quality standards?
   c. Does the prohibition on violations of water quality standards contained in Permit Condition S4 unlawfully or unreasonably conflict with the other provisions of the permit?
   d. Does the permit unlawfully authorize known, continued, and ongoing violations of water quality standards?

5. Compliance:
   a. Does the permit unlawfully provide for compliance with permit terms on a schedule that is indefinite and unenforceable, not as expeditious as possible, and/or in excess of statutory deadlines?
   b. Does the permit unlawfully allow a permittee to create and implement permit requirements without Ecology's oversight or involvement?

6. Permit Modifications: Does the permit unlawfully provide for modification of permit terms without adherence to permit modification procedures?

7. Urban and Large Rivers Exemption:
   a. Do the 2005 amendments to the 2001 Western Washington Stormwater Management Manual altering the flow control requirements for urban areas (Manual 2.5.7) and areas adjacent to larger rivers (App. I-E), which are incorporated into the permit's terms, result in discharges that unlawfully cause or contribute to violations of water quality standards?
   b. Do the 2005 amendments to the 2001 Western Washington Stormwater Management Manual altering the flow control requirements for urban areas (Manual 2.5.7) and areas adjacent to larger rivers (App. I-E), which are incorporated into the permit's terms, represent AKART and/or reduction of pollutants to the MEP?

8. TMDLs:
    a. Does permit condition S7 unlawfully or unreasonably fail to require compliance with TMDLs issued after the date of the permit's issuance?
    b. Does permit condition S77 unlawfully or unreasonably fail to include additional restrictions on stormwater discharges for applicable TMDL beyond the five listed in Appendix 2 to the permit?
9. Maintenance of Stormwater Facilities:
    a. Does the Permit unlawfully fail to require adequate long-term operation and maintenance of new and existing stormwater facilities and therefore result in discharges that unlawfully cause or contribute to violations of water quality standards?
    b. Does the Permit fail to require adequate long-term operation and maintenance of new and existing stormwater facilities and therefore unlawfully allow permittees to discharge pollutants that have not been treated, reduced or prevented with AKART, and/or fail to reduce the discharge of pollutants to the MEP?

10. Stormwater Pollution Management Programs ("SWMPs"): Does the permit unlawfully fail to incorporate the terms of the SWMPs as enforceable requirements under the permit?

11. Public Participation: Does the permit unlawfully fail to provide for required public participation, public review, and public oversight of the permit, the permit's terms, and the SWMPs?

IV. WITNESSES

The parties have provided preliminary lists of witnesses. Final witness lists shall be served on the parties and filed with the Board by **January 4, 2008.** Telefax is allowed, provided that the original is mailed the same day. Any witness listed herein or in final lists may be called by any party. The party calling a witness has the responsibility to ensure his or her attendance at the hearing.

A witness' expertise shall be established by résumé offered as an exhibit.

V. EXHIBITS

The parties provided preliminary lists of exhibits prior to the pre-hearing conference. Final exhibit lists shall be served on the parties by **January 22, 2008.** The parties shall exchange copies of exhibits and file the final exhibit lists with the Board by **January 28, 2008.** The parties are directed to meet either in person or by phone prior to filing the final exhibit list with the Board for the purpose of attempting to stipulate in advance of hearing to exhibits' authenticity and admissibility and to remove any duplicative exhibits. Parties are encouraged to offer only those exhibits, or portions they intend to rely upon in their case. Telefax is allowed, provided that the original is mailed the same day. Even though the parties may stipulate to the admissibility of exhibits, the exhibits generally should be offered through a witness at the hearing.

When meeting with the presiding officer on the first hearing day, each party shall have available for the Board an original and three (3) copies of its exhibits and exhibit lists which shall identify those admissible by stipulation of the parties. An original or one copy of any exhibit that cannot be conveniently copied due to size, bulk, reproduction difficulty, etc., must be available for the Board at the hearing.

Each exhibit shall be pre-marked and organized by tab for identification (A-1, A-2, etc., for appellant and R-1, R-2, etc., for respondent, respectively) and so identified on the exhibit lists. The number given to an exhibit does not limit the order of its introduction at hearing.

Any exhibit listed by one party may be introduced by another party.

VI. DISCOVERY

The discovery cutoff is **December 14, 2007.** If formal discovery is pursued, parties should pay particular attention to the time requirements imposed by the superior court civil rules with regard to interrogatories, depositions, etc. Discovery requests shall be served sufficiently ahead of the discovery deadline so that the opposing party has the response time allowed by these rules. (For example, responses to interrogatories are typically due thirty (30) days after service. See CR 33).

The parties shall attempt to coordinate depositions of witnesses that are common to both the Phase I and Phase II appeals to the greatest extent possible, and shall consider using lead attorneys to handle specific issues at the depositions.

The parties shall endeavor to resolve any discovery disputes. If a dispute persists, any party may file a discovery motion provided such motion is accompanied by an affidavit reciting efforts to resolve the discovery dispute.

An original and one (1) copy of any discovery motion and supporting documents must be filed with the Board.

Depositions, interrogatories, requests for production or inspection, requests for admission and the responses shall not be filed. It is the initiating party's responsibility to maintain the original together with answers to interrogatories and to make them available for proceedings.

VII. MOTIONS

Any motion, which would be dispositive of the case or any legal issue shall be filed and served by **October 14, 2007.** An original and three (3) copies of motion pleadings shall be filed

with the Board and served on opposing parties. Opposing parties shall have 14 calendar days from the date of receipt of the motion, to file and serve a response. Reply is due 10 days after receipt of the response.

Any dispositive motions regarding Special Condition S4 must be served on all Phase I and Phase II parties. All Phase I and Phase II parties will have an opportunity to file responsive briefs on motions pertaining to this permit provision.

Responses to any non-dispositive motion shall be filed and served five days from receipt of the motion by the non-moving party. The moving party shall have three days from receipt of the response to file and serve a reply.

Motions will be decided based on the written record, unless oral argument is requested by a party and granted by the Board pursuant to WAC 371-08-450. At the parties' request, argument may be held by telephone with the parties arranging the connections

Note: Service and filing of motion, answer, and reply (if 15 pages or less) may be by telefax, provided that the original and required numbers of copies are mailed the same day.

VIII. BRIEFS

Pre-hearing briefs are optional. If submitted, they shall be filed and served no later than, **February 4, 2008** with an original and three (3) copies for the Board. Telefax of 15 pages or less is allowed, provided that the original is mailed the same day.

Briefs are limited to 15 pages in length, absent an order granting a motion to lengthen. If a citation is made to a case other than Wn. App. or Wn.2d, a complete copy of the referenced citation must be filed and served.

IX. COMMUNICATION

All correspondence and filings with the Board shall be sent to the attention of the presiding officer with copies sent at the same time to all other parties.

Telefax may be used to communicate with the Board and the parties, limited to 15 pages in length.

The parties have agreed to allow e-mail for communication between each other, and that this may be used for purposes of pleadings and service. The parties also have agreed that the 3-day rule applies for purposes of communication. Communications with the Board, however, will still be by facsimile or mail.

X. MISCELLANEOUS

"Filed and "served" means the date received by the Board.

ORDER

This order shall govern the proceedings, unless subsequently modified by order of the Board for good cause upon a party's motion or the Board's volition.

SO ORDERED this 8th day of August, 2007.

POLLUTION CONTROL HEARINGS BOARD

William H. Lynch

WILLIAM H. LYNCH, Presiding